

<b>Matter of Torres v Kelly</b>
2011 NY Slip Op 30580(U)
March 11, 2011
Sup Ct, New York County
Docket Number: 108451/10
Judge: Manuel J. Mendez
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: MANUEL J. MENDEZ  
*Justice*

PART 13

DIANA TORRES,

INDEX NO. 108451/10

- v -

MOTION DATE 01-12-2011

RAYMOND KELLY, ET AL.,

MOTION SEQ. NO. 001

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

The following papers, numbered 1 to 2 were read on this motion to/for Article 78

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_ 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).

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion to review and annul the determination of the Board of Trustees of the New York City Police Pension Fund which denied Petitioner's Accident Disability Retirement (ADR) application, declaring said action to be arbitrary, capricious, unreasonable and unlawful (2) directing and ordering Respondents to retire petitioner with ADR benefits retroactive to the date of Petitioner's retirement plus interest or (3) directing a hearing on the factual or medical issues or (4) directing the Board of Trustees to allow petitioner and/or their representatives to present testimony and/or evidence as necessary at a hearing before the Board and (5) for an order pursuant to CPLR 7804(e) and 2307 (a) directing respondents to serve and file reports, etc., is granted in accordance with the memorandum decision filed herewith.

Accordingly, it is ADJUDGED that respondents Raymond Kelly, as police Commissioner of the City of New York and as Chairman of the Board of Trustees, the Board of Trustees and the City's determination to deny petitioner Diana Torre's application for accidental disability retirement (ADR) benefits was arbitrary, capricious and an abuse of discretion; and it is further

ORDERED that the application by petitioner seeking to vacate and annul respondents determination to deny petitioner's ADR benefits is granted, and it is further

ORDERED that respondents retire petitioner with ADR allowance retroactive to the date of petitioner's retirement, plus interest.

ENTER:

Dated: March 11, 2011

Manuel J. Mendez  
J.S.C. **MANUEL J. MENDEZ**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 13**

-----X  
In the Matter of the Application of

DIANA TORRES,

Index No.: 108451/2010

Petitioner,

-against-

RAYMOND 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 based 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 of the Civil Practice Law and Rule.

-----X  
**Mendez, J.:**

This is an Article 78 proceeding instituted by petitioner Diana Torres, a police officer with the New York City Police Department (NYPD), seeking (1) an order to review and annul the determination of the Board of Trustees of the New York City Police Pension Fund, Article II (the Board of Trustees), which denied her accident disability retirement (ADR) application, pursuant to section 13-252 of the Administrative Code of the City of New York (the Administrative Code), and to declare said action to be arbitrary, capricious, unreasonable and unlawful; 2) to direct and order respondents Raymond Kelly (Kelly), as Police Commissioner of the City of New York (the City) and as Chairman of the Board of Trustees, the Board of Trustees and the City (together, respondents) to retire petitioner with ADR benefits retroactive to the date of petitioner's retirement plus interest; or, in the alternative, 3) to direct a hearing on the factual

and/or medical issues raised herein; or, in the alternative 4) to direct that the Board of Trustees allow petitioner and/or their respective representatives to present such testimony and/or evidence as is necessary at a hearing held before the Board of Trustees, in order to prove petitioner's entitlement to ADR benefits, pursuant to Administrative Code § 13-352; and 5) for an order, pursuant to CPLR 7804 (e) and 2307 (a), directing respondents to serve and file all reports, recommendations, certificates and other documents submitted to the Board of Trustees in connection with petitioner's retirement, as well as all copies of any and all records, reports or notes relating to petitioner which are on file with the Police Department Article II Pension Fund (the Pension Fund) and/or the NYPD.

**BACKGROUND**

Petitioner served continuously and satisfactorily as a uniformed police officer with the NYPD from the time of her appointment on July 5, 1989, until the time of her Service Retirement in March of 2010. Pursuant to Administrative Code § 13-214, petitioner was at all material times a member of the Pension Fund, and, as such, she made all necessary contributions to it as required by law.

On February 23, 2003, as she was on her way to work, petitioner slipped on some ice which was located on the ground outside the garage entrance to the 26<sup>th</sup> NYPD Precinct, injuring her right knee, legs, right shoulder, lower back and hands (the February 23, 2003 incident). Petitioner was taken to the Columbia Presbyterian Medical Center emergency room, and X-rays were taken of her hip and right knee. After being diagnosed with right knee contusion and abrasion, as well as back strain, she was prescribed Motrin and discharged from the hospital. As a result of her injuries, petitioner was placed on restricted duty from February 23, 2003 to July

10, 2003. Although her knees still caused her pain, petitioner was later able to return to work in a Full Duty Capacity, the designation given to a police officer who is deemed capable, by medical staff, of performing or conducting full police duty, in the Manhattan Special Victims Unit. At this time, she was able to climb up and down stairs. Following petitioner's February 23, 2003 injury, petitioner received steady and continuous medical care.

On October 10, 2003, while at the New York County District Attorney's Office for a court appearance, petitioner tripped over some plastic flood mats that were piled on the floor and fell on both knees onto a cement floor (the October 10, 2003 incident). Petitioner was immediately taken to the emergency room at Downtown Beekman Hospital for an evaluation, where she was diagnosed with a 2cm laceration to her right hand and contusion/swelling in both knees. Petitioner was then prescribed Motrin and discharged. Petitioner returned to work after a weekend of rest. Thereafter, plaintiff continued to work, despite the fact that the pain and swelling in her knees steadily increased to the extent that she eventually had to undergo surgeries to both knees, followed by extensive physical therapy.

To that effect, following the October 10, 2003 incident, on October 30, 2003, petitioner was seen by orthopedic surgeon Dr. William O. Thompson (Dr. Thompson) for complaints of pain in her knees, as well as numbness and swelling in her toes. Dr. Thompson's physical examination of petitioner revealed a left knee effusion, tenderness in her patellofemoral joint and 0-110 degrees of flexion. Petitioner's right knee revealed no effusion and flexion of 0-120 degrees with a positive patellofemoral grind.

It was noted in Dr. Thompson's October 30, 2003 report that:

Diana was back for full duty 10/10/03. She fell again when she tripped over a mat

on the floor, landing on both knees. She has pain on the right, and in the hypothenar eminence as well. She gets swelling towards the end of the day and she complains of numbness in both toes at the end of the day .... At this point, I recommend surgery

(Torres Notice of Petition, Exhibit D, Dr. Thompson's October 20, 2003 Report). Dr. Thompson then requested authorization for "bilateral, lateral retinacular release, debridement of patella, femoral chondrosis," beginning with the left knee (*id.*).

On March 24, 2004, at Saint Francis Hospital, Dr. Thompson performed surgery on petitioner's left knee for what he referred to in his preoperative report as a "post work related injury" (Torres's Notice of Petition, Exhibit E, Dr. Thompson's March 24, 2004 Preoperative History and Physical Report). Following this left knee surgery, despite receiving steady and continuous treatment, physical therapy and diagnostic testing, petitioner's condition did not improve.

On June 23, 2004, at Saint Francis Hospital, Dr. Thompson performed surgery on petitioner's right knee. Dr. Thompson's preoperative diagnosis was, among other things, excess lateral patella compression syndrome of the right knee. Following this surgery, petitioner received steady and continuous treatment, but her condition did not improve.

On February 29, 2008, at Vassar Brothers Medical Center, Dr. Thompson again performed surgery on petitioner's left knee. The preoperative diagnosis was left knee pain, status post recurrent knee injury. Following this surgery, petitioner received steady and continuous treatment, physical therapy and diagnostic testing, but her condition did not improve.

On February 18, 2009, petitioner filed an application for ADR benefits, wherein she stated that, due to the accidents of February 23, 2003 and October 10, 2003:

\* 6]  
I complain of constant pain of my right and left knees and lower back. I have difficulty going up steps and standing for an extended period of time. As a result, I am unable to perform full police duty. I request Accidental Disability Retirement

(Torres's Notice of Petition, Exhibit K, Application for ADR). In addition, on the advice of the police commissioner, an "NYPD Commissioner's Application for Ordinary Disability Retirement (ODR)" was filed by the NYPD (Torres's Notice of Petition, Exhibit K, Application for ODR).

On March 12, 2009, petitioner sought a second opinion regarding her injuries from orthopedic surgeon Dr. Andrew S. Rokito (Dr. Rokito). In his report, Dr. Rokito noted that petitioner injured her knees in February of 2003, when she slipped on ice, and in October of 2003, when she tripped over plastic mats. Dr. Rokito stated that, as a result of these injuries, petitioner "continues to experience bilateral knee pain ... swelling, pain with stair climbing, pain after prolonged sitting ... is unable to run. She notes a sense of giving way or buckling in both of her knees" (Torres's Notice of Petition, Exhibit M, Dr. Rokito's Report of March 12, 2009). Dr. Rokito anticipated that petitioner would not be able to return to regular duty as a police officer.

On May 5, 2009, in regard to her application for ADR benefits, petitioner was examined by the NYPD Medical Board for the Pension Fund (the Medical Board). After reviewing her medical history, the Medical Board concluded that petitioner was "disabled from performing the full duties of a New York City Police Officer," and then recommended approval of petitioner's ADR application and disapproval of her ODR application (Torres's Notice of Petition, Exhibit N, May 5, 2009 Medical Board Report). On July 8, 2009, the Board of Trustees reviewed petitioner's ADR application for the first time. During this meeting, Karen Pakstis (Pakstis), a

representative from petitioner's union, indicated that she would search for information as to whether petitioner was on or off duty at the time of the February 23, 2003 incident.

On August 12, 2009, the Board of Trustees met to review petitioner's ADR application for a second time. At this meeting, Pakstis failed to introduce any evidence regarding whether or not petitioner was on duty at the time of the February 23, 2003 incident. The Board of Trustees then remanded petitioner's case to the Medical Board, requesting that the Medical Board evaluate whether or not petitioner's October 10, 2003 injury was the disabling event, or "the competent causal date," because, shortly after said injury, she had to have the first surgery on one of her knees (Petitioner's Notice of Petition, Exhibit O, August 12, 2009 Board of Trustees Meeting Minutes). In addition, the Board of Trustees requested that the Medical Board address "the Tobin versus Steisel standard ... whereas an accident that aggravates a preexisting condition is an accident and in this case it would be the line-of-duty date of October 10, '03" (*id.*).

On September 8, 2009, petitioner was reexamined by the Medical Board in regard to her ADR application. For the second time, the Medical Board concluded unanimously that petitioner was disabled and unanimously recommended approval of her ADR application. In the minutes of that meeting, the Medical Board stated that "[t]he final diagnosis is Internal Derangement of Both Knees Status - Post Bilateral Arthroscopy with Residuals. The competent causal factor is the line of duty injury of February 23, 2003" (Torres's Notice of Petition, Exhibit P, September 8, 2009 Medical Board Report).

On November 4, 2009, Dr. Joel Mandel (Dr. Mandel), an orthopedic surgeon, prepared an extensive summary of petitioner's medical history, along with his evaluation of petitioner's medical state. Dr. Mandel stated that, although petitioner continued to have pain in both knees,



she was able to resume full-time, full-duty work in September of 2003. About three weeks after the October 10, 2003 fall, petitioner returned to Dr. Thompson, who then recommended surgery.

After examining petitioner, Dr. Mandel gave a 50% apportionment of the left and right knee disabilities to the February 23, 2003 incident and a 50% apportionment of said disabilities to the October 10, 2003 incident. He also noted that petitioner continues to experience almost constant pain, swelling and locking in her right knee, especially after prolonged standing, and he recommended petitioner for total work-related disability retirement.

On December 9, 2009, the Board of Trustees again considered petitioner's application of ADR, and again, the Board of Trustees remanded petitioner's case to the Medical Board for reconsideration of the competent causal date. At this time, the Board of Trustees pointed out that, after the February 23, 2003 incident, petitioner returned to full duty, demonstrating that this injury was not the cause of her disability. In addition, the Board of Trustees again requested that the Medical Board consider whether the October 10, 2003 accident aggravated petitioner's preexisting condition of February 23, 2003.

On January 26, 2010, petitioner was reexamined by the Medical Board, and for the third time, the Medical Board concluded unanimously that petitioner was disabled and unanimously recommended approval of her ADR application. In the minutes of that meeting, the Medical Board noted that petitioner stated that she probably should have taken sick leave following the October 10, 2003 incident, but she did not, as she had just returned to work following the February 23, 2003 injury. Petitioner also advised the Medical Board that she made an arrest on October 8, 2003, just two days before her fall, though she was still undergoing treatment for her symptomatic knees from an orthopedist.

The Medical Board then stated that it “continues to attribute [petitioner’s disability] to the February 23, 2003 incident,” because she “never fully recovered from [that] incident,” and “was still under active treatment of an orthopedist at the time of her second fall and that she was still symptomatic as to her knees” (Torres’s Notice of Petition, Exhibit S, January 26, 2010 Medical Board Report). The Medical Board then recommended approval of petitioner’s ADR application and disapproval of her ODR application.

On March 10, 2010, at a meeting to review petitioner’s ADR application, the Board of Trustees voted to deny petitioner’s ADR application, as set forth, in pertinent part:

Detective Sparks: We are going to 6/6 the accident, withdraw the ordinary, she is out on service.

\* \* \*

Mr. McTigue: On the record.  
For the record, the basis for the City side not agreeing that the competent causal factor of [the] accident was service related is because the record is replete with documentation that the officer was walking from the parking lot of the building, she slipped and she was not in service at the time she slipped. That’s the basis for the City side not agreeing that this is an accident for purposes of accident disability.

Ms. DeBellis: That’s a 6/6 ordinary

(Torres’s Notice of Petitioner, Exhibit T, March 10, 2010 Board of Trustees Meeting Minutes).<sup>1</sup>

The Board of Trustees then passed a resolution retiring petitioner for ordinary disability under the provisions of *Matter of City of New York v Schoeck* (294 NY 559 [1945]).

On March 16, 2010, Anthony J. Garvey, Executive Director of the Pension Fund drafted a letter to the petitioner informing her that her ADR application was denied. Said March 10, 2010

---

<sup>1</sup>Under the principles of *New York v Schoeck* (294 NY 559 [1945]), a 6/6 tie vote automatically results in the Board of Trustees’ disapproval of petitioner’s ADR application and approval of the Police Commissioner’s application for ODR submitted on petitioner’s behalf.

action of the Board of Trustees denying petitioner's ADR application resulted in petitioner receiving substantially less retirement allowance. Petitioner then filed the instant Verified Petition.

### DISCUSSION

It is well settled that judicial review of an administrative agency determination is limited to whether the determination was arbitrary and capricious, that is, without a rational basis in the administrative record (*see* CPLR 7803 [3]; *Matter of Arrocha v Board of Educ. of City of N.Y.*, 93 NY2d 361, 363-364 [1999]; *Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757-758 [1991]; *Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231-232 [1974]; *Matter of Climent v Board of Educ. of Community School Dist. No. 22*, 288 AD2d 312, 313 [2d Dept 2001]). "[A] court may not substitute its judgment for that of the board or body it reviews *unless* the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion" (*Matter of Arrocha*, 93 NY2d at 363, quoting *Matter of Pell*, 34 NY2d at 232 (citation omitted); *Matter of Partnership 92 LP & Bldg. Mgt. Co. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 428-429 (1<sup>st</sup> Dept 2007), *affd* 11 NY3d 859 (2008). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell*, 34 NY2d at 231). "[O]nce it has been determined that an agency's conclusion has a 'sound basis in reason,' the judicial function is at an end ... " (*Paramount Communications v Gibraltar Cas. Co.*, 90 NY2d 507, 514 (1997), quoting *Matter of Pell*, 34 NY2d at 231). "It is well-settled that the determination of an administrative agency will be accepted by the courts if it has warrant in the record and a reasonable basis in law" (*Matter of*

*Procaccino v Stewart*, 32 AD2d 486, 489 [1<sup>st</sup> Dept], *aff'd* 25 NY2d 301 [1969], quoting *Matter of Willcox v Stern*, 18 NY2d 195, 203 [1966]).

WHETHER RESPONDENTS DENIAL OF PETITIONER'S ADR APPLICATION WAS ARBITRARY, CAPRICIOUS AND AN ABUSE OF DISCRETION

As explained in the case of *Matter of Borenstein v New York City Employees' Retirement Sys.*, (88 NY2d 756, 760 [1996]), the award of accidental disability retirement benefits to a New York City Employees' Retirement System (NYCERS) applicant is a two-step process. The first step consists of fact finding by the NYCERS medical board to determine the threshold matter of "whether the applicant is actually 'physically or mentally incapacitated for the performance of city-service'" (*id.*, quoting Administrative Code § 13-168 [a]). If the medical board determines that the applicant is disabled, "it must then make a recommendation to the Board of Trustees as to whether the disability was 'a natural and proximate result of an accidental injury received in such city-service'" (*Matter of Borenstein*, 88 NY2d at 760).

"[A] reviewing court may not set aside the denial of accidental disability retirement benefits 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" (*Matter of Nastasuk v Board of Trustees of N.Y. Fire Dept. Art. 1-B Pension Fund*, 289 AD2d 335, 335 [2d Dept 2001]). "In such a case, the court can annul a determination of the Board of Trustees as a matter of law if it determines that the Board's decision was not supported by credible evidence" (*id.*).

Initially, it should be noted that it is uncontested that petitioner is disabled for the performance of full police duty. However, in order to obtain ADR benefits, petitioner must also establish that she "suffered physical or mental incapacitation 'as a natural and proximate result of an accidental injury received in ... city-service'" (*Matter of McCambridge v McGuire*, 62 NY2d

563, 567 [1984]; Administrative Code § B18-43.0). “Not every line of duty injury will result in an award of accident disability. The injury must be the result of a ‘sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact [citation omitted]’” (*Matter of McCambridge*, 62 NY2d at 568; *Matter of Leary v New York City Employees’ Retirement Sys.*, 59 AD3d 547, 549 [2d Dept 2009]). “To be distinguished are injuries sustained while performing routine duties but not resulting from unexpected events, e.g., back strains sustained while putting a tire in the trunk of a city vehicle” (*id.*).

Here, petitioner’s actions resulting in both the February 23, 2003 and the October 10, 2003 incidents were not “undertaken in the performance of petitioner’s ordinary employment duties but rather a sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact” (*Matter of Leary v New York City Employees’ Retirement Sys.*, 59 AD3d at 549). However, as the February 23, 2003 incident occurred at a time when petitioner was on her way to work and not yet on duty, only the October 10, 2003 incident can be considered an in-line-of-duty injury necessary for ADR benefits. As such, in order for petitioner to qualify for ADR benefits, it must be determined as to whether there is a causal connection between the October 10, 2003 incident and petitioner’s disability.

As put forth by petitioner, “[a]n accident which precipitates the development of a latent condition or aggravates a preexisting condition is a cause of disability within the meaning of Administrative Code ... § B3 - 40.0” (*Matter of Tobin v Steisel*, 64 NY2d 254, 257, 259 [1985] [“evidence establishing that an accident exacerbated an underlying condition, thereby rendering the employee disabled, would be sufficient” as the cause of the injury]; *Matter of Petrella v Board of Trustees of Police Pension Fund*, 141 AD2d 361, 363 [1st Dept 1988] [to the extent

that the police officer's work-related trauma precipitated development of latent psychological disorder, such trauma was considered the cause of the disability for the purpose of obtaining accident disability pension]).

Here, as the Medical Board's final report of January 26, 2010 concluded that petitioner was disabled because of the injuries she sustained during the February 23, 2003 incident, without considering whether or not the October 10, 2003 incident caused or aggravated that preexisting condition, said report is deficient in credible evidence regarding the cause of petitioner's disability (*see Matter of Brown v Board of Trustees of Police Pension Fund of the Police Dept. of City of N.Y.*, 111 AD2d 75, 77 [1<sup>st</sup> Dept 1985] [where the medical board found that the chief cause of petitioner's disability was a pre-existing condition, and did not consider whether the line-of-duty injury aggravated said pre-existing condition "to the extent that it became disabling when it did," the Court found the record deficient in that regard and remanded the matter to the board of trustees for further proceedings]; *Matter of Kelly v Board of Trustees of Police Pension Fund, Art. II*, 47 AD2d 892, 892 [1<sup>st</sup> Dept 1975] [Court recommended that the pension board defer final determinations regarding the petitioner's ADR application until medical evidence regarding whether petitioner was unfit to perform police duty because of preexisting arthritis of his cervical spine or whether injuries resulting from a subsequent accident, as a cause or aggravation of his preexisting condition, was considered]).

Similarly, in the case of *Matter of Costello v Board of Trustees of Police Pension Fund, Art. II* (63 AD2d 894, 894 [1<sup>st</sup> Dept 1978]), the Court found the medical board's report conclusory in nature where "there was no indication in the medical board's report that it considered whether the 1968 and/or 1970 injuries, concededly sustained in the line of duty,

caused petitioner's disability or contributed to an aggravation of his 1966 [non-line-of-duty back] injury." Under those circumstances, the Court held that the medical board's report could not serve as a basis of the trustees' determination (*id.* at 894).

It appears, therefore, that the Medical Board applied an incorrect standard of causation in making its determination as to the competent causal date of petitioner's disability, which was then relied upon by the Board of Trustees when denying petitioner's ADR application. "In an article 78 proceeding challenging the disability determination, the Medical Board's finding will be sustained unless it lacks rational basis, or is arbitrary or capricious" (*Matter of Bornstein v New York City Employees' Retirement System*, 88 NY2d at 760; *Matter of Quill v Ward*, 138 AD2d 305, 306 [1<sup>st</sup> Dept 1988]; *Matter of Procaccino v Stewart*, 32 AD2d at 489). As such, the Medical Board's determination must be sustained as long as it is supported "by some credible evidence and is not irrational" (*Matter of Rodriguez v Board of Trustees of N.Y. City Fire Dept., Art. I-B Pension Fund*, 3 AD3d 501, 501 [2d Dept 2004]; *Matter of Bailey v Kelly*, 11 AD3d 208, 209 [1<sup>st</sup> Dept 2004]). "Some credible evidence' strikes a proper balance between deference to the Medical Board and accountability to NYCERS members" (*Matter of Bornstein v New York City Employees' Retirement Sys.*, 88 NY2d at 761).

In addition, a review of the minutes of the March 10, 2010 meeting of the Board of Trustees reveals that the Board of Trustees only considered the February 23, 2003 incident as the competent causal date for the purposes of making its determination, and, thus, also failed to consider that petitioner's disabilities were caused by the line-of-duty incident of October 10, 2003 (*Matter of Tobin v Steisel*, 64 NY2d at 259 [Court noted that "it has been assumed in a number of disability cases that evidence establishing that an accident exacerbated an underlying



condition, thereby rendering the employee disabled, would be sufficient, if accepted”]; *Matter of Drayson v Board of Trustees of the Police Pension Fund of City of N.Y.*, 37 AD2d 378, 380 [1<sup>st</sup> Dept 1971], *affd* 32 NY2d 852 [1973] [in determining the question of causal relationship between the accident and the injuries, the test is the existence of some credible evidence to support the findings of the board of trustees]). As such, respondents’ denial of petitioners’ ADR application was arbitrary, capricious and an abuse of discretion.

#### WHETHER PETITIONER IS ENTITLED TO ADR BENEFITS

The burden of proving whether there is a causal connection between the October 10, 2003 incident and petitioner’s disability rests upon petitioner (*Matter of Petrella v Board of Trustees of the Police Pension Fund*, 141 AD2d at 362 [petitioner has the burden of establishing a causal connection between a line-of-duty occurrence and his disability]). Petitioner has met this burden by sufficiently establishing that the second accident precipitated and/or aggravated her first disability.

As set forth by plaintiff, evidence in the record indicates that, following the February 23, 2003 incident and prior to the October 10, 2003 incident, although petitioner’s knees continued to cause her some pain, she was deemed capable, by medical staff, of returning to full-duty police work. During this time, petitioner was able to climb up and down stairs. In fact, just a couple of days before the October 10, 2003 incident, petitioner was even capable of making an arrest. Importantly, although petitioner’s condition seemed to be gradually improving up until the time of the October 10, 2003 incident, or at the very least, her condition had stabilized to the point that she was able to return to her duties as a police officer, after said incident, petitioner’s condition began to markedly worsen.



To that effect, it was only after the October 10, 2003 incident that petitioner's pain and swelling in her knees increased to the extent that she eventually had to undergo surgeries to both knees, followed by extensive physical therapy. Moreover, in petitioner's February 18, 2009 ADR application, petitioner stated that, due to the accidents of February 23, 2003 and October 10, 2003, she now has difficulty climbing stairs and standing for an extended period of time.

In addition, Dr. Mandel, who gave a 50% apportionment of the left and right knee disabilities to the February 23, 2003 incident and a 50% apportionment to the October 10, 2003 incident, as well as Dr. Rokito, also reported that petitioner was no longer able to climb stairs and run due to the periodic buckling of her knees (*see Matter of Nastasuk v Board of Trustees of N.Y. Fire Dept. Art. 1-B Pension Fund*, 289 AD2d at 335 [in finding that board of trustees failed to provide credible evidence that petitioner's disability was caused by his non-service-related injuries in 1986 and 1987, and not by his service-related injury occurring in 1997, the Court considered that, before petitioner's 1993 injury, the petitioner's hand and wrist were asymptomatic for approximately four years, whereas after the injury on February 17, 1993, in which petitioner's hand and wrist were crushed by a hydraulic lift gate, the petitioner was unable to fully recover]).

"The court may set aside a denial of accident benefits ... when it concludes that the applicant is entitled to them as a matter of law" (*Matter of McCambridge v McGuire*, 62 NY2d at 568). Thus, petitioner is entitled to ADR benefits retroactive to the date of her retirement plus interest.

#### CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

17]

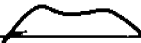
**ADJUDGED** that respondents Raymond Kelly, as Police Commissioner of the City of New York (the City) and as Chairman of the Board of Trustees, the Board of Trustees and the City's (together, respondents) determination to deny petitioner Diana Torres's application for accidental disability retirement (ADR) benefits was arbitrary, capricious and an abuse of discretion; and it is further

**ORDERED** that the application by petitioner seeking to vacate and annul respondents determination to deny petitioner's ADR benefits is granted, and it is further

**ORDERED** that respondents retire petitioner with ADR allowance retroactive to the date of petitioner's retirement, plus interest.

ENTER:

Dated: March 11, 2011

  
\_\_\_\_\_  
Manuel J. Mendez  
J.S.C.

**MANUEL J. MENDEZ**  
**J.S.C.**

**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).