

No.: \_\_\_\_\_

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**In The  
Supreme Court of the United States**

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IN THE MATTER OF THE CLAIM OF  
FRANK DeLUCIA,

*Petitioner,*

v.

GREENBUILD, LLC, et al.,

*Respondent,*

-and-

WORKERS' COMPENSATION BOARD,

*Respondent.*

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**On Petition for a Writ of Certiorari to  
the New York State Court of Appeals**

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Is it a violation of the Due Process clauses of the United State Constitution, 5<sup>th</sup> Amendment and 14<sup>th</sup> Amendment to punish a party by dismissing his proceeding for the non-appearance of a witness subpoenaed by one of his adversaries when the issuer of the subpoena declines to enforce the subpoena by contempt?

**LIST OF PARTIES**

The parties to the proceeding are shown in the caption.

## **CORPORATE DISCLOSURE STATEMENT**

Greenbuild LLC is an active New York Domestic Limited Liability Company with its principal place of business at 390A Lafayette Avenue, Brooklyn, NY 11239. It does not appear to be a publicly traded company.

Phoenix Insurance Co is a subsidiary of The Travelers Indemnity Company, with its principal place of business Winston Salem, NC. The Travelers Companies, Inc is a publicly traded domestic corporation with its principal place of business in New York City, NY.

American Insurance Company (ACE) acquired Chubb Corporation in 2015. Its headquarters are in Warren, New Jersey, USA. It adopted the Chubb name in January 2016.

ESIS, Inc is a subsidiary of American Insurance Company created to process claims.

NY State Insurance Fund (NYSIF) is an instrumentality of the State of New York that provides Worker's Compensation Insurance.

Worker's Compensation Board is an agency of the State of New York. It is a necessary party to all appeals from the Worker's Compensation Board. NY Worker's Compensation Law Section 23.

**DIRECTLY RELATED PROCEEDINGS**

There are no directly related proceedings.

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**PETITION FOR A WRIT OF CERTIORARI**

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**OPINIONS BELOW**

The September 10, 2020 Order denying Leave to Appeal of the New York State Court of Appeals from the Decision and Order rendered by the Appellate Division, Third Department is reported at *Matter of DeLucia v Greenbuild, LLC*, \_\_\_ N.Y.3d \_\_\_ 2020 NY Slip Op 71245 and is reproduced as Appendix A.

The Appellate Division, Third Department's Decision and Order dated April 23, 2020 is reported at *Matter of DeLucia v Greenbuild, LLC*, 182 A.D.3d 874,122 NYS3d 181, 2020 NY Slip Op 02337 and is reproduced as Appendix B.

The Decisions of the New York State Worker's Compensation Board dated: July 12, 2018; November 28, 2017; October 30, 2017; September 26, 2017; July 27, 2017; June 22, 2017; and March 7, 2017 are unreported and are reproduced herein as Appendix C.

**JURISDICTION**

The jurisdiction of this Court to review the determination of the New York State Court of Appeals and the Appellate Division, Third Department is invoked under 28 U.S.C. Section 2101(c), 28 U.S.C. Section 1257(a), and Rule 13(1) of the Rules of this Court.

## STATUTES INVOLVED

### **Constitution of United States of America 1789**

Article VI, *U.S. Constitution*

Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

### **As Amended**

Fifth Amendment, *U.S. Constitution*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*Fourteenth Amendment, U.S. Constitution*

## Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**RELEVANT STATUTES<sup>1</sup>**

NY Civil Practice Law and Rules (McKinneys Bk 7B)  
§2302. Authority to issue.

§2308. Disobedience of subpoena. (a)

Rule 3107. Notice of taking oral questions.

State Administrative Procedure Act (McKinneys Bk 56, 56A,57)

§301. Hearings

Workers' Compensation (McKinneys Bk 64)

§20. Determination of claims for compensation.

§23. Appeals

§121. Depositions

§141. General powers and duties of the chair

New York Codes, Rules and Regulations

12 NYCRR-NY 300.10 Adjournment of hearings.

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<sup>1</sup> Set forth in appendix. Supreme Court Rule 14(1)f.

## STATEMENT OF THE CASE

Petitioner, a Claimant in worker's compensation proceedings, found his claim dismissed because an adverse party, the insurance carrier ESIS/ACE - USA, which issued subpoenas (42a-43a) refused to coordinate medical witnesses schedules in order to guarantee their appearances and declined to enforce the subpoenas by contempt. (43a-46a) The other adverse parties which did not issue subpoenas were allowed a free ride on the ESIS / ACE – USA subpoenas. Petitioner's claims against these other parties were likewise dismissed. (4a-5a)

The essential operative facts are undisputed. Foley – Smit et al attorneys for ESIS and ACE – USA issued Notices of Deposition, (46a) and subpoenas (42a-43a) for claimant's treating doctors with the conventional warning of potential punishment by contempt. (43a-46a) Co – Respondent Phoenix Insurance and NYS Insurance Fund concede their failure to issue any subpoena in this proceeding. (5a, 17a, 18a)

Eventually Doctor Kakoulides testified against the claim while claimant's other treating doctors remained contumacious. (4a, 5s, 18a) Emails from the doctors who refused to appear reveal that the carrier had not co – ordinated the appearances with the doctors' offices but had just chosen dates at random, without considering the doctors' availability. (5a)

All Respondents concede that Foley – Smit et al attorneys for ESIS and ACE – USA, the issuer of the subpoenas, declined to enforce the subpoena it

issued. Foley-Smit did not undertake contempt proceedings. (7a) All Respondents, nonetheless, truly believe that essential fairness is served by punishing the claimant for the dereliction of his adversary Respondent Foley – Smit et al attorneys for ESIS and ACE – USA, in their flat refusal to enforce they issued subpoenas by contempt. (43a-46a) The text of the Worker's Compensation Board's regulation would impose upon the employer – carrier the obligation to enforce its subpoenas. *"The obligation to invoke court action for the enforcement of the subpoena shall be that of the employer or its carrier or special fund."* 12 NYCRR Sec 300.10 emphasis added. (59a-61a)

Upon the refusal of ESIS and ACE to enforce the subpoenas, the Worker's Compensation Law Judge dismissed the proceeding and compensation was denied. In administrative appeals pursuant to Section 23 (53a-57a) of the NY Worker's Compensation Law, the Worker's Compensation Board (16a-24a) rejected petitioner's argument that the result was "unjust." (6a, 19a)

An appeal was taken to the New York State Supreme Court, Appellate Division, Third Department, challenging the constitutionality of the Board's action as a violation of due process. Said appeal was denied on April 23, 2020. See Appendix B. (2a-9a) A Motion was made for permission to Appeal to New York State Court of Appeals on the grounds that due process was violated by the incongruous result. Said Motion was denied on September 10, 2020. See Attached Appendix A. (1a) The proceedings are now finally dismissed.

Petitioner has no further recourse through the courts and boards of the state of New York.

## REASONS FOR GRANTING THE WRIT

The Fifth Amendment to the U.S. Constitution clearly provides that “no person shall be ... deprived of life, liberty or property, without Due Process of Law.”

The Fourteenth Amendment to the U.S. Constitution applies the Fifth Amendment guarantee of Due Process to the several states:

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without Due Process of Law.”

The question in this case is as follows: Do these Constitutional Due Process guarantees prohibit state courts from punishing a litigant by dismissing his proceeding for the non-appearance of a witness subpoenaed by one of his adversaries when that adversary has refused to enforce the subpoena it issued?

A careful review of this Court’s jurisprudence on the nature and extent of the Due Process Constitutional guarantee in various types of Hearings indicates that the answer must be “YES.” In effect, Petitioner’s adversaries were empowered, in their discretion, to derail petitioner’s case. By employing procedures, the state created for its benefit, ACE/ESIS the insurer, *sua voluntas*, left Petitioner without recourse. In short, procedures created by the state afforded ACE the opportunity to ACE the Petitioner and obtain a dismissal of proceedings without reaching the merits. The New

York State Supreme Court, Appellate Division (2a-6a) saw no constitutional infirmity in this anomaly.

While claimant is correct that the carriers could have invoked court action to enforce and compel compliance with their subpoenas in order to cross-examine the treating physicians (see 12 NYCRR 300.10 [c]; CPLR 2308 [b]), the carriers were not obligated to do so.

*Matter of DeLucia v Greenbuild, LLC*, 182 A.D.2d 874, 122 N.Y.S.2d 181, 2020 NY Slip Op 02337 (NY App Div 2020) leave denied \_\_\_ N.Y.3d \_\_\_, 2020 NY Slip Op 71245 (2020) (6a)

It would take the word irrational to a new meaning to allow a party to defeat a claim by its voluntary act in refusing to enforce a subpoena it issued. The irrationality is at such a variance with good sense it works a deprivation of due process. Such is consistent with the view taken in the US Supreme Court in *Logan v. Zimmerman Brush Co.*, (455 U.S. 422, 433, 102 S. Ct. 1148, 71 L. Ed 265 [1982]) In *Logan*, Illinois had devised a procedure which permitted an administrative agency's nonfeasance to torpedo the *Logan* grievant's claim regardless of the underlying merits.

While the legislature may elect not to confer a property interest, . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate

procedural safeguards. ...[T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.

*Logan, supra* at 433

The *Logan* grievant lost his rights to the mere convenience of a neutral party, the state agency. In the instant case, the deprivation is even more egregious; here the state gave petitioner's adversaries the power in their unreviewable discretion to derail petitioner's case. Conferring a veto power over Petitioner's case to his adversary is a measure which due process cannot envision. The Supreme Court of the sister state of Connecticut saw such a generous grant to an adverse party of unbridled power over the outcome of litigation, a violation of due process as defined by *Logan*. *Worsham v. Greifenberger*, 242 Conn 432, 438, 698 A.2d 867 (1997)

The State may but need not create a system of Worker's Compensation. *New York Central R v. White*, 243 U.S. 188, 197, 37 S. Ct. 247, 61 L.Ed.2d 667 (1917). It has been said that there is no vested right in the substantive Common Law as would prevent its amelioration. *Arizona Employer's Liability Cases*, 250 U.S. 400, 429, 39 S. Ct 553, 63 LE 1058 (1919); *Chicago, Rock Island & Pacific Ry v. Cole*, 251 U.S. 54, 55, 40 S. Ct 68, 64 L. Ed 133 (1919). Nor is there any such vested right in the States' rules of evidence as they may from time to time be changed. *Thompson v. Missouri*, 171 U.S. 380, 385, 43 L. Ed 204, 18 S. Ct 922 (1898) Unquestionably however the states' power in

procedural law has limits which must be judged by federal standards. *Ward & Grow v. Krinsky*, 259 U.S. 503, 520, 42 S. Ct 529, 66 L. Ed 1033 (1922)

"The history of American freedom is, in no small measure, the history of procedure." But in addition, the procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. "Procedure is to law what 'scientific method' is to science." *In re GAULT*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) quoting Justice Frankfurter concurring *Malinski v. New York*, 324 U.S. 401, 413 - 414, 65 S. Ct. 781, 89 L. Ed. 1029 (1945) and Foster, "Social Work, the Law, and Social Action" 45 Soc Casework 383, 386 (1964)

In New York administrative law, as a general rule, "[a] doctor's report...is admissible...and such a report in affirmation form...may constitute substantial evidence even though the doctor is not called by complainant..." *Matter of National Basketball Assn v. New York State Div. of Human Rights*, 68 N.Y.2d 644, 505 N.Y.S.2d 63, 496 N.E.2d

222 (1986). This conforms to the view espoused by the US Supreme Court. “[M]edical report[s] ... , [have been] uniformly recognized [for] reliability and probative value...” *Richardson v. Perales*, 402 U.S. 389, at 405, 91 S. Ct. 1420, 28 L.Ed.2d 842 (1971). In Worker’s Compensation, New York State, by contrast, gratuitously created a right to live testimony of a medical doctor. This procedure must be administered fairly, (*Cleveland Bd of Ed v. Loudermill*, 470 U.S. 532, 541, 105 S. Ct 1487, 84 L.Ed.2d 494 [1985]), and subject to meaningful safeguard against arbitrary administrative action protecting the individual against the exercise of arbitrary administrative power (*Vitek v. Jones*, 445 U.S. 480, 488-489, 100 S.Ct 1254, 63 L.Ed.2d 552 [1980]) embodied in the Fifth and Fourteenth Amendment’s guarantee of the “fundamental ...opportunity to be heard.” *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L. That the state’s conception of essential fairness may at times vary from orthodoxy emphasized in due process does not bind the federal courts which must assay under the Supremacy Clause (US Constit Art VI, Cl 2) whether the procedures conform to due process guaranteed by the 14<sup>th</sup> Amendment. *Ward & Grow v. Krinsky*, 259 U.S. *supra* 520. The Federal Constitution’s well-known due process clause embodied in the 14<sup>th</sup> Amendment prohibiting the state from “depriv[ng] any person of life, liberty, or property, without due process of law.” (US Constitutional Amendment V, XIV) requires adherence to certain “[m]inimum [procedural] requirements ... [imposed by] Federal law...[regardless of] the State’s...specificat[ion]

of...procedures...it...deem[s] adequate." *Logan supra* at 432) "Fairness of procedure is due process in the primary sense...Administrative officers... may [not] disregard the fundamental principles that inhere in due process of law...opportunity to be heard...[is] basic to our system of jurisprudence." Frankfutter J. concurring in *Joint Anti-Fascist Refugee v. McGrath*, 341 U.S. 123, 161-165, 95 L. Ed. 817, 848-850. (1951). In administrative law, this commitment due process requires the state to afford the party "an opportunity to be heard" (*Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S. Ct. 1011, 25 L. Ed. 2d 287 [1970]) and a "given a meaningful opportunity to present their case." *Mathews v. Eldridge* 424 U.S. 319, 349, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)

Over petitioner's objection that the practice was "unjust," the New York Worker's Compensation Board (Appendix C, 16a-24a) confirmed an administrative Judge's decision dismissing petitioners claim.

The Appellate Division (Appendix B, 2a-8a) found no cause to cure the deprivation of due process. It specifically noted the anomaly created. The deviation of this ruling from the minimal commands of due process bring to mind the stirring words of the late Chief Judge Charles D. Breitel oft quoted dissent.

While justice and law may not be coextensive, and indeed they are not, a divergence too great is not tolerable or acceptable under constitutional limitations based on due process of law, equal protection of the law, and cruel

and unusual punishment. Margin for discrepancy there may be between law and justice but not an ocean's breadth justified only by adherence to the letter. *People v. Jones*, 39 N.Y.2d 694, 385 N.Y.S.2d 525, 350 N.E.2d 913 (1976).

The New York Courts have not merely violated an abstract sense of symmetry by failing to honor the dictate of *Logan* to prevent the loss of the right to be heard through inadvertence, without fault of Petitioner, but have come into conflict on their approach to *Logan* with the sister court in Connecticut in *Worsham (supra)* which is faithful to the dictates of due process announced in *Logan*.

Since the case is finally resolved in the state courts and there is no further recourse there, the case is ripe for this Court to determine whether Petitioner/Claimant's federal right to due process have been violated.

### **CONCLUSION**

For all of the above stated reasons, the Petition for a Writ of Certiorari should be granted.

Dated: September 24, 2020  
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Respectfully submitted,  
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