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Temporary Benefits While on "Light Duty"

NJ Supreme Court Review 1989-1990

The 1989-1990 term provided the court with an opportunity to furnish judicial guidance in interpreting the statutory language of the 1979 Amendments to the Workers' Compensation Act and to expand the principles previously annunciated in prior case law decisions. The court sought to focus on major issues confronting workers' compensation law, including the concepts of "light duty," the existence of the "coming and going rule," concerns over what risks are incidental to employment, the problem of the employee who is perceived to be working for multiple employers simultaneously, and other major issues such as [the "Fireman's Rule," the Falcon Doctrine, the Second Injury Fund, pension offsets, third party matters, medical treatment, and] what remedies are available to the employer where benefits appear to have been overpaid.

"Light Duty"

The issue of the eligibility of an employee to receive temporary disability benefits while authorized to return to "light duty" work was reviewed this year in the case of Williams v. Topps Appliance City, 239 N.J. Super. 528 (App.Div.1989). An employee who had injured his back while unloading a refrigerator was paid temporary disability benefits for a period of three weeks by the employer's insurance carrier. The physician who examined the injured worker told him that he could perform light-duty work if he did not do any heavy lifting or twisting. When the injured employee returned to work, he was advised by the employer that there was no "light duty" work for the employee to perform. Medical treatment continued for the injured worker, and he could not return to his original job to perform "light duty" work since the employer never offered him this opportunity.

The court considered all the evidence, especially the employee's inability to perform his usual work, which consisted of lifting heavy refrigerators weighing up to 450 lbs. The court held that the employee was entitled to receive temporary disability benefits during the period of time that he was under active and authorized medical care and able to perform only "light duty" work since this limited workload was not available from this employer. In this instance, the court reasoned that even though the employee was "theoretically available for light duty work" he was not barred from receiving temporary disability benefits when no such work was made available to him. The employer's burden was to show that light duty work was available, that it was offered to the employee, and that the employee had refused it.

"Coming and Going"

In a series of two cases, the court focused on the "coming and going rule" as it pertains to instances when the employee is off the employer's premises. In both of these cases, the court precluded recovery. In one instance, an employee, who had "punched out" on the employer's time clock and who had exited the designated parking lot which was immediately adjacent to the building occupied by the employer, was barred from receiving workers' compensation benefits when he sustained injuries as a result of a motor vehicle accident which occurred 325 yards from the leased premises of the employer. At the time of trial, the employer showed that the employee was "cutting through the adjacent complex" to reach a peripheral access route. The court concluded that the employer did not exercise control over the route that the employee would take after exiting the designated parking area, and in fact, that there were no additional hazards imposed upon the employee by his employer in that situation. Serrano v. Apple Container, 236 N.J. Super. 216 (App.Div.1989).

In a further restrictive ruling on the "coming and going rule," the court denied benefits to an employee who was required to travel 5 1/2 miles on a limited access road owned by his employer, maintained by

another company, and patrolled by a local police department. In its reasoning, the court held that the injured employee had not yet commenced his day's work at the time of the accident and that he was merely en route to work. New Jersey Manufacturers Insurance Company v. Public Service Electric & Gas Co., 234 N.J. Super. 116 (App.Div.1989).

Incidental Risks

The underlying concept of employer responsibility, despite possible fault on the part of the employee, was highlighted in a recent decision by the Appellate Division in which an employee sought to gain entrance to the respondent's premises in what the trial judge contended to be an inappropriate and unauthorized fashion. An employee, who was walking to work, was injured as she sought to gain entrance to a McDonald's restaurant not by using the traditional pedestrian walkway but by crossing over a drive-through roadway and climbing over a two-and-one-half foot fence. Citing errors in the trial judge's evaluation and interpretation of the underlying facts, the Appellate Division reevaluated the record and made its own findings and conclusions. The reviewing tribunal held that the petitioner did, in fact, arrive at the premises of the employer and that she came under the control of the employer even though her chosen, habitual, and acceptable means of access may not have been the safest approach to her place of employment. The court also noted that there was a three-month delay between the testimony and the court's decision. It reversed the lower court's decision and remanded the matter for further proceedings. Sipos v. McDonald's Corp., No. A-750-89T2 (App. Div. July 13, 1990) (per curiam).

It has been a long-standing rule, by both statutory enactment and case law interpretation, that events arising out of an employment situation are deemed to be compensable. In a recent case, however, the social conflicts arising outside the scope of the employment situation, which resulted in injuries occurring during the hours of employment, were not considered to be compensable. A female employee was shot at the place of her employment by her former boyfriend, and she was denied workers' compensation benefits since the Appellate Court considered the incident not to have arisen out of her employment, even though the assailant believed that there was a romantic relationship between the employee and a co-worker. The court reasoned that the employee had failed to meet the "but for" or positional risk at home prior to shooting her at her place of employment. Marky v. Dee Rose Furniture Company, 241 N.J. Super. 207 (App.Div.1990).

Multiple Employers

In some situations, a worker may be employed simultaneously by more than one employer. The court must determine the responsibility and/or apportionment for a single accident between what appears to be two employers. In one instance, an employee was lent to another employer with a piece of equipment. He was considered to have remained under the control of the original lending employer, who was deemed responsible for compensation benefits. In that instance, a concrete mixer truck and its operator were furnished to a contractor on a rental basis for the repair of a bridge. During a nine-day exclusive employment period at the job site, the operator of the concrete mixer truck fell and was injured. The court held that the employee continued to remain in the employment status of the renting company and not the hiring contractor. The court considered that the renter was in the business of renting machines and men simultaneously and, therefore, maintained control over the employee. An invoice offered into evidence at the time of the trial demonstrated that the contractor rented the mixer and its operator together. Murin v. Frapaul Construction Co., (App.Div.1990).

In another employment status case, the court held that, in certain situations, an employee might be employed simultaneously by more than one employer. Compensation benefits can therefore be apportioned between two employers as a result of a single accident. In reaching its decision, the court considered such controlling factors as "the existence of a separate agreement between the employee and each employer, the determination of whose work is being performed at the time of the accident, which employer has the right to control the specific details of the work, which employer paid the compensation and which employer has the power to hire, discharge, or recall the employee." In addition

to following the above criteria, the court indicated that it may rely upon the "whose interests" test. That doctrine requires the court to determine whose interests the employee is furthering at the time of the accident. In the case reviewed, an off-duty police officer, with his department's approval, was performing security services while armed and in a police uniform for a private business that had paid him directly for his services. The officer was injured while attempting to make an arrest on the premises of the private employer. The court considered that as a police officer making an arrest, the employee was required to perform that function in a manner that met the standards for all arrests. Therefore, he was found to be serving the public interest in addition to the interest of the private employer. Domanoski v. Borough of Fanwood, 237 N.J. Super. 452, (App.Div. 1989).

"Fireman's Rule"

During this past term, the court also focused on the types of employment to be covered under the Workers' Compensation Act. An emergency squad worker who was dispatched to the scene of a fire and who suffered emotional distress when he was required to render aid to his own son who had been asphyxiated was barred under the "Fireman's Rule" from recovering under a claim for negligent infliction of emotional distress. The court held that the remedy available to the volunteer emergency squad worker was a claim for workers' compensation benefits based upon the psychological injuries incurred when he observed the serious physical injury to his child, Siligato v. Hiles, 236 N.J. Super. 64 (Law.Div. 1989).

Overpayment

The court expanded upon previous decisions concerning the overpayment of workers' compensation benefits to injured employees. Voluntary offers and tenders are encouraged by the Workers' Compensation Act, and the court stated that such offers and tenders might be withdrawn or modified by the employer or its insurance carrier prior to full payment. The court reasoned that the offer and tender is not binding upon the employer or its insurance company and is revokable. A worker who had injured the first finger on his right hand and who was required to have a skin graft was advised by the insurance company that an offer and tender in the amount of 75 percent of the right first finger and 2 1/2 percent of partial total disability for the donor site would be made to him. The respondent incorrectly applied the compensation rate and overpaid temporary disability benefits to the worker. As soon as the error was recognized, the respondent-insurance company ceased payment of the offer of partial permanent disability. The court reasoned that the unpaid offer may be modified or rescinded prior to entering an award and that the Division of Workers' Compensation lacked the authority to repay temporary disability benefits. The counsel fee due to the attorney representing the injured employee would be based upon any award that was more than the offer and tender made before the hearing. Torres v. Miller, 238 N.J. Super. 158 (App.Div.1990).

Falcon Doctrine

In what was considered a direct assault upon the Falcon doctrine as enunciated by Compensation Judge Joan Mott, the New Jersey Supreme Court declined an opportunity to reverse its upholding of this decision by denying certification in Eska v. Exxon Company, U.S.A. An employee worked for Exxon from 1937 through 1974 and, except for a five-year period of military service, was exposed to asbestos fiber. Evidence was presented at the time of trial that the petitioner had developed a cough in 1962 and shortness of breath which was manifested by difficulty in carrying out household chores in 1968. In 1987, the worker was examined by a medical expert who diagnosed his condition as "pulmonary and pleural asbestosis." The respondent alleged that the rate to be applied was the lower 1974 rate which was in effect prior to the 1979 Amendments to the Workers' Compensation Act. The trial court's decision was affirmed by the Appellate Division and left undisturbed by a review of the New Jersey Supreme Court, which denied certification. The Appellate Court said succinctly, "We decline to depart from Falcon's holding." The court reasoned that, since the 1979 Amendments to the Workers' Compensation Act placed more restrictive requirements for the proof of a compensable incident, the petitioner who met these requirements should benefit from the increase in rates that the New Jersey

Legislature also provided for in these Amendments. The court asserted that manifestation of a compensable condition did not exist until medically linked by the medical expert who conducted an evaluation of the petitioner in 1987. Eska v. Exxon Company, U.S.A., No. A-1810-88T1 (App. Div. Nov. 22, 1989), certif. denied Eska v. Exxon Co., U.S.A., 121 N.J. 615, 583 A.2d 315 (1990).

Second Injury Fund

During this term, the court recognized that permanent total disability benefits payable by the Second Injury Fund are not vested. Upon the death of a Second Injury Fund beneficiary, the Second Injury Fund is required to terminate benefits. The Office of Special Compensation Funds will then advise either the legal representative of the estate, the surviving spouse, or the attorney of record that the benefits will be terminated and that only money owed to the date of death will be paid to the estate. Wehrle v. American Can Company, 224 N.J.Super. 400 (App.Div.1988).

Pension Offsets

In two related pension offset cases, benefits for eligible workers were expanded. In expanding benefits due to injured workers, the Appellate Division held that an employer is required to make pension contributions on behalf of the injured employee while the employee is receiving workers' compensation benefits. A clerk transcriber for the County of Union was enrolled in the Public Employees Retirement System (PERS) when she was injured in a job-related accident. After the accident, the injured employee was placed on extended sick leave without pay. The worker then instituted a claim for workers' compensation benefits. At the time of the hearing, an award was entered retroactively, covering an extensive period of disability benefits. The court held that the employer was required to contribute to PERS during the entire duration of the employee's receipt of workers' compensation benefits. Szczepanik v. State of New Jersey, 232 N.J.Super. 491 (App.Div.1989).

New Jersey public employees have been eligible to receive workers' compensation and public employee retirement benefits simultaneously since 1971 under N.J.S.A. 18A:66-1, et seq. 43:16A-1, et seq., and 43:15A-6 et seq.. The New Jersey Supreme Court held that those workers who select retirement plans based solely on age and service are not subject to a setoff of workers' compensation benefits. However, those who receive retirement benefits based upon disability are subject to a reduction in benefits if they also receive workers' compensation benefits. In the matter the court reviewed, a public employee was considered to have good cause to convert an ordinary disability retirement pension to an early service retirement pension and thus avoid the workers' compensation offset. The court reasoned that the employee could not make an informed choice about her retirement options until she knew the amount of the workers' compensation award and the amount of the offset. Steinmann v. State of New Jersey, 116 N.J. 564 (1989).

Third-Party

Third-party matters were also the subject of some review during this past court year. An employer who had paid full salary to an employee who was on leave due to a work-related injury was considered to be entitled to be reimbursed from the employee's recovery in a third-party action that arose out of the accident for that portion of the employee's salary which was the equivalent of temporary disability benefits payable under the Workers' Compensation Act. Gorski v. Town of Kearny, 236 N.J.Super. 213 (App.Div.1989).

Medical Treatment

In another matter, the court considered the following issue. If reasonable and necessary medical treatment is provided to an injured worker by a physician who is considered not to be "authorized" by the workers' compensation insurance carrier, then the responsible insurer must seek its remedy before the Division of Workers' Compensation. The court stated that, even though a personal injury protection (P.I.P.) carrier may ultimately be entitled to a credit for benefits that are payable by the workers' compensation carrier, the P.I.P. carrier is obligated to pay the outstanding bills and then present its

dispute before the Division of Workers' Compensation for ultimate resolution. Speiser v. Harleysville Insurance Co., 237 N.J.Super. 507 (Law. Div.1990).

The 1989-1990 court term has left us with decisions focusing on basic definitions and concepts embodied in the Workers' Compensation Act. The direction provided in the court's recent decisions will provide guidance to those who will deal with the Workers' Compensation Act in their efforts to meet the challenges of the coming decade.

By Jon L. Gelman, Attorney at Law

Jon L. Gelman of Wayne, NJ, is the author of NJ Workers' Compensation Law (Thomson-Reuters) and co-author of the national treatise, Modern Workers' Compensation Law (Thomson-Reuters). For over five decades, the Law Offices of Jon L Gelman 1.973.696.7900 jon@gelmans.com have represented injured workers and their families who have suffered occupational accidents and illnesses.

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