



# Injuries Off The Employer's Premises

NJ Supreme Court Review 1990-1991

Quantity and quality marked the 1990-1991 Court term, with the entire spectrum of the Workers' Compensation Act and the Rules of the New Jersey Division of Workers' Compensation the subject of significant decisions.

The Court focused on such major issues confronting workers' compensation judges and practitioners as "the Fireman's Rule," jurisdiction over insurance carriers in cases where employers negligently failed to provide coverage, [the federal government as a dual employer, the "arising out of..." rule, responsibility for diagnostic services, mental disability, hearing-loss claims, the statute of limitations, liens and offsets, judicial pay, processing delay, ethics claims,] and employer actions that would entitle employees to seek additional remedies beyond workers' compensation.

## FIREMAN'S RULE

In 1960, New Jersey adopted the "Fireman's Rule," which provided that the owner or occupier of a premises was not liable for injuries to a paid fireman for negligence with respect to the creation of a fire. *Krauth v. Geller*, 31 N.J. 270 (1960). However, an exception to the rule permitted recovery against the owner or occupier of a premises where there was willful or intentional misconduct. The rationale of the rule was that it was the firefighter's business to deal with the very hazards of a fire and that this public employee was considered to be an expert whose duties required him or her to remedy dangerous situations.

This year the New Jersey Supreme Court expanded the Fireman's Rule beyond attendance at a fire and limited a firefighter's or police officer's recovery to workers' compensation benefits when the employee was injured while performing incidental duties such as responding to a medical emergency. [\*Rosa V. Dunkin' Donuts of Passaic\*, 122 N.J. 66 \(1991\)](#). In *Rosa*, a police officer, who, while responding to a call for emergency medical assistance, slipped on the kitchen floor of a donut shop due to the presence of confectioners' sugar or flour and injured his foot, was barred from pursuing a negligence action and was limited exclusively to a claim for workers' compensation benefits.

## JURISDICTION OVER INSURANCE CARRIERS

The Court also has recently addressed issues involving coverage. The Division of Workers' Compensation was barred from exercising jurisdiction to join a professional liability carrier or its insurance broker in a case in which the employer failed to provide workers' compensation coverage. The Court reasoned that such a joinder was a relationship in which the worker was not directly involved. [\*Sherwood v. E.H. Johnson\*, 246 N.J. Super. 530 \(1991\)](#).

Workers' compensation insurance carriers are bound by a 30-day written notice of conditional intent not to renew an employer's policy. Even though the workers' compensation insurance carrier had provided a non-renewal notice for a workers' compensation policy 89 days prior to its termination, the lower court determined that such a notice was unsatisfactory. This decision was reversed by the Appellate Division. While N.J.S.A. 17:29C-1 authorizes that a 30-day written notice provision is included in insurance policies concerning intent not to renew a workers' compensation policy, notice within not more than 120 days nor less than 30 days before the expiration of a commercial policy in accordance with N.J.A.C. 11:1-20 (b) was deemed to satisfy the requirement for notice of "non-renewal" of this workers' compensation policy. [\*Meric Trucking & Leasing Co. v. Philip Lehman Co., Ltd.\*, 247 N.J. Super 261 \(App. Div. 1991\)](#).

## **ERODING THE EXCLUSIVITY BAR**

The Appellate Division also addressed the issue of what acts committed by an employer would constitute the level of an intentional wrong and expand the employee's remedy outside the scope of workers' compensation into the negligence arena. In a restrictive interpretation of what constitutes an "intentional wrong," the court continued to follow a narrowly defined concept requiring the demonstration of "deliberate intention to injure." The court determined that neither negligence nor recklessness would suffice and that only proof of intent to injure or substantial certainty that injury would occur would warrant an exception from the exclusivity of the workers' compensation remedy. The rationale was that a narrow focus would protect against the utilization of the intentional-wrong exception destroying the exclusivity bar established by the Workers' Compensation Act. [Bustamante v. Tuliano, A-4725-89T3 \(June 6, 1991\).](#)

In Bustamante, a police officer lost sight in his left eye when he was struck by a wax bullet during training exercises with an emergency response team. The court interpreted the wrongful action of the officer who discharged the bullet, a co-worker, as lacking a subjective intent to injure the victim. The court concluded that the injury was accidental in nature, permitting the workers' compensation bar to a negligence action to remain.

The subject of what constitutes the status of an employee was reviewed in several cases. The court reaffirmed that the right to control a worker created employment status even if this was contrary to a written contract. Two corporate employers entered into a contract clearly indicating by whom the worker was employed. The court disregarded the contract and relied upon the facts to determine employment status. An individual who was a direct employee of one employer and was hired and paid by that corporation to work at the Hoffman LaRoche site was deemed a special employee of the pharmaceutical company. Even though the direct employer and the special employer had entered into a contract to determine employment status, the court considered that an implied employment contract existed between the special employer and the employee. The employee was deemed to have accepted the day-to-day decisions of the special employer, which included where to work within the plant, what jobs to perform, the order of work, and the maintenance of time records. The direct employer's ability to hire and its obligation to pay did not bar the establishment of special employment status. [Pacenti v. Hoffman LaRoche, Inc., 245 N.J. Super 188 \(App. Div. 1991\).](#)

## **FEDERAL GOVERNMENT AS DUAL EMPLOYER**

In special circumstances, the federal government may be considered a dual employer and thus subject to the New Jersey Workers' Compensation Act. To determine the employer-employee relationship, the court in [Cavaliere v. United States of America, 736 F. Supp. 68 \(D.N.J. 1990\)](#), considered an analysis of the totality of circumstances, including the right to control the employee's work and the right to discharge and assess the performance for financial consideration. In Cavaliere, the Social Security Administration contracted with Green Thumb under the Older American Community Service Employment Program to supply clerical staff. A clerk at the Social Security office in Paterson was injured at work. She sought and received workers' compensation benefits from the Green Thumb Employment Agency, which had paid her salary and had provided her with training and counseling. Green Thumb received federal, state, and local agency funding. Since the Social Security Administration could exercise the right to interview, hire, suspend, terminate and control all aspects of the employee's work, the injured worker was deemed a "dual employee" of both Green Thumb and the federal government, and thus, barred from pursuing a common law tort action by operation of law against the federal agency.

## **"ARISING OUT OF...."**

The issue of "arising out of and in the course of employment" was reviewed in [Manzo v. Amalgamated](#)

Industries Union Local 76B, 241 N.J. Super. 604 (App. Div. 1990). In that case, dependency benefits were denied to the widow of a former union president who suffered a fatal automobile accident while traveling from his office to his home even though the vehicle was paid for by the employer, the decedent did union business at home, and he maintained business records at home.

The court determined that these circumstances were not sufficient to make his home a second job site. Evidence was presented indicating that the employer rented the vehicle that the decedent was driving, that union records were maintained at the household of the decedent, that the recreational room of the decedent's house was sometimes used for meetings, and that a telephone in the residence of the decedent was paid for by the employer. Although the court below had awarded benefits, the Appellate Division held that, based upon a review of the facts presented, the decedent was traveling from his home to his office at the time of the accident, and dependency benefits were denied.

## **DIAGNOSTIC SERVICES**

The Appellate Division also addressed the issue of responsibility for diagnostic services during this recent term. The appeals court in *Bojkovic v. SCR Controls Inc.*, A-368-90T3 (App. Div. May 9, 1991) (per curiam), upheld the decision of the Workers' Compensation Court requiring the employer to pay for both neurological and ophthalmological testing to determine what kind of treatment the petitioner required. The appeals court also upheld Compensation Supervising Judge Stanley Levine's order that the respondent pay temporary disability benefits during the period of diagnostic testing. The Appellate Division panel reasoned that the trial judge had had the opportunity to hear the testimony, that the diagnostic services prescribed by Judge Levine fell within the scope of the Workers' Compensation Act, and that the "cure" to which the petitioner was entitled could not occur without a diagnosis.

## **MENTAL DISABILITY**

Benefits available for occupational exposures and diseases were again a subject for review by the Appellate Division this past year. The issue of compensability of mental disability resulting from mental stress has been an area on which the New Jersey courts have focused their attention. A permanent partial award for mixed emotional distress with depression rendered by Compensation Judge Ray A. Farrington was affirmed by the Appellate Division in *Corizzi v. Frank P. Nisi, Inc.*, No. A-463-90T2, (App. Div. May 28, 1991) (per curiam).

The finder of fact at the trial level evaluated the petitioner's testimony to be credible. It concluded that the employee's relationship with the employer and co-employee created an atmosphere at work that contributed materially to the petitioner's disability. Uncontroverted testimony establishing the employers' failure to control personnel and handle office matters placed an additional burden on the employee. Sufficient objective, credible evidence was offered to support the conclusion that the work conditions at the agency were a material contributing factor to the petitioner's breakdown, even though the employee had certain weaknesses unrelated to the employment.

## **HEARING-LOSS CLAIMS**

In evaluating occupational hearing-loss claims, the Appellate Division indicated that standards established in the 1979 Amendments to the Workers' Compensation Act were not to be retroactively applied. *Calabro v. Campbell Soup Co.*, 244 N.J. Super. 149 (App. Div. 1990). While pre-1979 audiograms were not obtained under the rigid requirements of N.J.S.A. 34:15-35.16, they were considered adequate by the court to provide sufficient credible evidence to fix a pre-1979 hearing loss. The amended Workers' Compensation Act requires that a decision be based upon objective medical evidence; however, in cases where a hearing loss existed and was evaluated pre-1979, the requirements of the Act need not be retroactively applied. The formula used in pre-1979 hearing-loss claims may be satisfactorily utilized to establish by competent evidence that a hearing loss existed before 1979.

## STATUTE OF LIMITATIONS

In reviewing defenses available to the respondent under the Workers' Compensation Act, the court in [Selective Insurance Company v. Jones, 244 N.J. Super 641, \(App. Div. 1990\)](#), restrictively interpreted the statute of limitations. The court found that payment of collateral benefits by an automobile insurance carrier under the automobile policy's personal injury protection (PIP) benefits provisions did not extend the time to file a workers' compensation claim. Even though the New Jersey Legislature has provided a more liberal statute of limitations to govern the reimbursement of personal injury protection benefits paid, the court concluded that a workers' compensation claim remains governed by a two-year limit.

In Jones, a babysitter was injured while driving children in an automobile owned by the employer. The employer's automobile insurance carrier sought to initiate a workers' compensation claim by filing a claim petition within two years of the last payment of PIP benefits under the automobile insurance plan but more than two years from the date of the accident.

The court held that while N.J.S.A. 34:6A-13.1 allows an automobile insurer to seek reimbursement for personal injury protection benefits within two years of the last payment of such benefits, this will not extend the absolute bar established by N.J.S.A. 34:15-51 under the Workers' Compensation Act - which requires filing within two years of the date of the accident. The court stated that the payment of a PIP benefit is not considered a payment of workers' compensation benefits and thus will not extend the time to file the claim. Liens and Offsets Liens and offsets to workers' compensation matters were also the subjects of several decisions last term. For an employer to exercise its subrogation right pursuant to N.J.S.A. 34:15-40, adequate notice must be provided to the employee, the court ruled in [Erricson v. Supermarkets General Corporation, 246 N.J. Super 457 \(App. Div. 1991\)](#). If adequate notice is not provided and if the required authorization to initiate proceedings on behalf of the employee is not obtained, any settlement between the workers' compensation insurance carrier and the defendant in the third-party action is not valid, the court wrote. Lacking the required notice and authorization, the employee is permitted to proceed with his own action against the third-party tortfeasor.

In [Rodlin v. Secretary of Health and Human Services, 750 F. Supp. 146 \(D. N.J. 1990\)](#), an injured worker was paid workers' compensation temporary disability benefits for approximately one year while under active medical treatment. The worker subsequently applied for and was awarded Social Security disability benefits. The workers' compensation claim was disposed of through a lump-sum payment, which the employee contended was intended to extend over his lifetime. The Social Security Administration converted the lump sum into periodic payments in accordance with instructions contained in its Program Operations Manual System (POMS). These instructions provide for three steps in pro-rating lump-sum awards as follows: the rates specified in the lump-sum award; the rate paid before the lump-sum settlement; or, in workers' compensation claims, the maximum rate in effect for the year of the injury. Since the employee had been paid temporary disability benefits, Social Security used that rate to pro-rate his award into periodic payments. Even though this resulted in his being paid more than 80 percent of his average current earnings, and therefore resulted in an offset of his Social Security disability payments over the 130 weeks during which his workers' compensation award was deemed to be payable, the court determined that the method used was neither arbitrary nor capricious and affirmed the decision of the secretary. Judicial Pay, Conduct Rules governing the conduct and payment of judges of compensation have been the subject of judicial scrutiny this past court term. The administrative rules governing the enforcement of performance criteria for judges of compensation were deemed to have been adopted invalidly due to failure to sufficiently publicize the proposed rules before their adoption as required by the Administrative Procedures Act. N.J.S.A. 52:14B-4 (a) (1), (d).

To compel payment of their annual salaries at the appropriate step of the New Jersey state compensation schedule, two judges of compensation filed suit against the state treasurer seeking retroactive payment and damages. The Appellate Division held that the statute providing for the salary of judges of compensation required that those judges who met the statutory requirements were entitled to their annual increases in compensation, and the increases could not be modified by regulation of the salary adjustment committee, which in the past had denied standard incremental pay increases. In the matter of [Boyan v. O'Connor, 246 N.J. Super 300 \(App. Div. 1991\)](#).

## **PROCESSING DELAY**

In a series of decisions, delays in the processing of workers' compensation claims have come under the watchful eye of the Appellate Division. In a claim in which an individual filed an application for review or modification of a formal award on October 17, 1981, the testimony of the petitioner was not commenced until March 13, 1985. The court was concerned over the "inordinate delay in the disposition of this case." A decision was not rendered until June 1, 1987, and the court further concluded that the decision did not satisfy the requirements of the adjudicatory process. The matter was remanded to the Division of Workers' Compensation for assignment to a judge of compensation for a decision within 60 days so that a reasoned explanation based on specific findings of basic facts could be made. *Rifati v. Luan Sadiku*, No. A-4839-89T1 (App. Div. May 15, 1991) (per curiam).

Delay became a significant factor in the Appellate Division's review of a workers' compensation claim in which a judge of compensation rendered an opinion in July 1990 based upon a petitioner's medical expert evaluation which had been conducted on April 11, 1988. The appeals court considered the respondent's argument that the judge's decision was based upon medical evidence that was "stale" and reiterated that a permanent partial disability award must be based upon recent objective medical evidence. The court also concluded, however, that the testimony of the treating physician, who was actively treating the petitioner at the time of his testimony, was not stale and that the petitioner's current symptoms made the petitioner's expert testimony current. *Daley v. Tropicana Hotel & Casino*, No. A-6735-89T1, (App. Div. June 20, 1991) (per curiam).

The so-called "halting pace" at which workers' compensation cases are perceived to proceed acted to the detriment of the respondent when it failed to heed the court's advice and obtain a re-evaluation of the petitioner. The petitioner testified in court on November 8, 1989, concerning injuries to his arm, back, and chest incurred when a motor vehicle's radiator exploded, burning him with hot antifreeze and water. Four and a half months later, the petitioner's medical expert testified and found an increase over his original estimate of disability based upon an evaluation of the petitioner conducted in court before he took the witness stand. The judge of compensation offered the employer a six-week interval in the trial so that a re-examination of the petitioner could occur. The respondent's attorney opted not to avail himself of the opportunity to obtain a re-examination.

The Appellate Division indicated that the employer was protected against prejudice due to the delay in the workers' compensation proceeding since ample time had been afforded to the respondent to obtain a re-evaluation. The court concluded that the compensation judge could rely heavily upon the increased estimate of disability offered by the petitioner's medical expert. *Mok v. Mountain Lakes Mobile*, No. A-6752-89T3, (App. Div. June 6, 1991) (per curiam).

## **ETHICS CLAIMS**

The state Supreme Court has again addressed the ethical responsibilities of attorneys handling workers' compensation claims. Disbarment resulted in a case in which an attorney misappropriated money held in escrow for the payment of a workers' compensation lien to pay his own personal debt. [In re Howard, 121 N.J. 173 \(1990\)](#).



Disciplinary action resulted in another matter in which an attorney misrepresented the status of a workers' compensation matter to a client who had attempted to seek information on a weekly basis, and refused to act on the claim or transfer the file to a successor attorney. In that case, the Disciplinary Review Board recommended a two-year suspension from the practice of law, citing the attorney's lack of cooperation with the ethics authorities by failing to file answers to the complaints, failing to cooperate with the investigator, and failing to provide medical documentation for over two years. [In re Ashley](#), 122 N.J. 52, (1991).

The 1990-1991 court term shed additional light on interpreting the Workers' Compensation Act. As a result of these decisions, the sophisticated and complex work environment of the 1990s will be served well.

...

The author, [Jon L. Gelman](#), practices law in Wayne, NJ. He 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](mailto:jon@gelmans.com) have represented injured workers and their families who have suffered [occupational accidents and illnesses](#).

**Recommended Citation:** Gelman, Jon L., *Injuries Off The Employer's Premises*, [www.gelmans.com](http://www.gelmans.com) (1991),

<https://www.gelmans.com/ReadingRoom/tabid/65/ArtMID/1482/ArticleID/444/preview/true/Default.aspx>

© 1991-2023 Jon L Gelman. All rights reserved.

Attorney Advertising

Prior results do not guarantee a similar outcome.

[Disclaimer](#)

[Download Adobe Reader](#)

*This article is reprinted with permission from the September 6, 1991 issue of the New Jersey Law Journal. (c)1991 NLP IP Company.  
Cite as: 129 NJLJ 101, No. 1, Page 101 (September 6, 1992)  
R91*

---

Tags: [NJ Supreme court Review](#) [Statute of Limitations](#) [Ethics](#) [Jurisdiction](#) [Mental Disability](#) [Fireman's Rule](#) [Exclusivity Bar](#) [Dual Employment](#)  
[Arising Out Of](#) [Diagnostic Services](#) [Depression](#) [Hearing Loss](#) [Judges of Compensation](#) [Administrative](#) [Delay](#)

---

