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Social Remedial Legislation: Justices Struggle to Maintain Liberal Aspects of the Workers' Compensation Act

NJ Supreme Court Review 1999-2000

By Jon L. Gelman[1]

The New Jersey Supreme Court, struggling to maintain the remedial social aspects of the Workers' Compensation Act, adopted a liberal "quantification of disability" rule to determine the Statute of Limitations date to be utilized in occupational disease claims. This approach is in stark contrast to the Court's conservative interpretation "notice" requirement that it had enunciated in Brock v. Public Service Electric & Gas Co., 149 N.J. 378 (1997).

NOTICE AND KNOWLEDGE

Joan Earl was employed as a secretary at Johnson & Johnson (J&J) from 1973 to 1993. She was assigned to work in a file room in an old building maintained by the company. The ventilation was very poor in the building, and she was exposed to a powder known as anhydrite gypsum, which contained calcium sulfate and hydrous powder. It was known that exposure to anhydrite could cause irritation to the eyes and skin upon contact and that inhalation of the powder could also irritate the upper respiratory tract. Additional occupational exposure occurred since the air in the building was contaminated by stale cigarette smoke, employees' perfume, and exhaust fumes from a helicopter that landed nearby the building once or twice a week.

In 1988 the petitioner, Joan Earl, suffered respiratory and sinus infections and bronchitis. Other maladies she experienced were sore throats, headaches, and eye irritation. Her family physician treated her for these conditions. In February of 1989, she suffered serious breathing difficulty while at work and was immediately treated by her family physician, who administered an adrenaline injection; she lost two weeks from work. In April of 1989, she suffered a respiratory attack and, at that time, she was admitted to the John F. Kennedy Medical Center, where she was diagnosed by her doctor with asthma and referred to a pulmonary specialist who treated her for that condition as well as chronic obstructive pulmonary disease. The petitioner was prescribed medications and continued under the doctor's care every three months after that. Following her discharge from the hospital, she requested her employer to change her duties and her employer complied by significantly reducing the amount of time that she spent working in the contaminated file room until October 1, 1993, when her department was relocated to a new building. Shortly after that, she was offered early retirement and accepted the offer even though she could continue to work.

A claim petition was filed by Earl on September 10, 1993, alleging disability as a result of her occupational exposure. J&J raised the defense that the claim was barred by the statute of limitations since the petitioner knew of the condition and its relationship to her employment in 1989. The Court did not find the claim to be barred, using the rationale that the petitioner did not become aware of the extent of her disability, the quantification of the permanent loss in pulmonary function, until 1993.

The trial court had relied upon the Supreme Court's decision in Sheffield v. Schering Plough Corporation, 146 N.J. 442 (1996) and deemed the medical treatment, even though provided by the major medical carrier, to toll the statute of limitations. The Trial Court reasoned that the claim was not barred by N.J.S.A. 34:15-34, which requires a claim to be filed within two years of the last payment of compensation. While the Supreme Court recognized this issue, it did not base its reversal upon the

Sheffield doctrine but left discussion about that interpretation available for future cases.
While sidestepping the Sheffield issues and a decision on whether or not the statute of limitations is tolled where there is continuous employment until the end of the employment period, the Court based its decision upon the basic premise of the Workers' Compensation Act, that there must be a quantification of disability sufficient to sustain an award under N.J.S.A. 34:15-36. This, indeed, is an ironic twist in events and demonstrates that the reforms to the Act mandated in 1979 are a dual-edged sword. For over twenty years, respondents have followed a rigid interpretation of N.J.S.A. 34:15-36 and relied upon that section of the Act to deny benefits in cases with minimal disability. However, the Court ruled in Earl that the statute of limitations does not toll a workers' compensation occupational disease action until the petitioner knew that the condition was related to the employment and that the medical condition itself could be quantified to the extent required for a claim according to N.J.S.A. 34:15-36. The Court found that Joan Earl had respiratory problems in 1989; however, she did not undergo pulmonary function testing until 1993, when her medical condition deteriorated. The quantification of her condition in 1993 provided her with the knowledge of the "nature of the disability" and therefore established 1993 as the statute of limitations date, permitting the viability of the workers' compensation action. The Court rationalized that the Legislature would not have intended to preclude a claim for occupational exposure that had not yet come into existence. Earl v. Johnson & Johnson, 728 A. 2d 820 - NJ: Supreme Court 1999.

CONTINUOUS-TRIGGER THEORY

The Supreme Court raised and has left for a future date issues involving the balancing of the "continuous-trigger theory" that it established in an environmental contamination claim in Owens-Illinois, Inc. v. United Insurance Co. 138 N.J. 437 (1994) and the date of medical quantification of disease. Owens expanded insurance company liability during each phase of environmental contamination --exposure, exposure in residence, defined as further progression of the injury even after the physical exposure has ceased (incubation), and the manifestation of disease. Perhaps the Supreme Court will utilize this concept to revisit The Bond Doctrine and mandate the apportionment of liability in occupational disease claims to a broad spectrum of insurance companies/employers, which can now be easily justified based upon more precise scientific data and a more efficient, accurate database of insurance coverage available through the Compensation Rating and Inspection Bureau. Currently, the Court in Earl has tempered its strict interpretation of the notice defense enunciated in Brock with a liberal and rational interpretation of the knowledge defense to fulfill the social, remedial aspects of the Workers' Compensation Act.

JURISDICTION

The Supreme Court further elaborated upon its prior decision in the Kristiansen matter, which involved a claim of concurrent jurisdiction between a Superior Court civil action and a claim petition before the New Jersey Division of Workers' Compensation (DWC). The Court reiterated the intent of the Legislature, in enacting N.J.S.A. 34:15-10, to provide an election of remedies to children under the age of 18. The court indicated that the election was available to those under age without proper employment certificates or those minors employed in violation of child labor laws. These individuals have the option of seeking double benefits before the DWC as a penalty or, in the alternative, filing a common law action in the Superior Court against the employer and/or the co-worker. Kristiansen v. Morgan, No.A-27, 1999 WL 240744 (N.J., March 15, 1999)). The original Kristiansen decision, 153 N.J. 298 (1998), indicated that the Court preferred that issues regarding employment status be decided before the Division of Workers' Compensation.In those instances with concurrent jurisdiction, the DWC was deemed to have primary jurisdiction to decide compensability. In its supplemental opinion, the court elaborated upon the areas where an election of remedies exists regarding concurrent jurisdiction.

IN THE COURSE OF THE EMPLOYMENT

The Court strengthened the "sturdy wall of co-employee immunity" by not extending to an employee the ability to sue a fellow physician employee for failing to diagnose and treat a pre-existing condition. Donald Hawksby was an employee of The New York Times Company (NYT) on December 13, 1993, when he fell from a ladder injuring his left thigh and knee. He came under the care of the company doctor, who was the medical director and full-time employee of his employer, the NYT. Approximately one year later, the petitioner was examined at the Memorial Sloan-Kettering Cancer Center in New York and was diagnosed with a large high-grade sarcoma of his left calf.

Hawksby filed a workers' compensation claim petition against his employer, the NYT, and also commenced a medical malpractice claim against the treating physician, Dr. DePietro.The injured worker consented to the resolution of his workers' compensation claim according to N.J.S.A. 34:15-20, which acted as a settlement with dismissal.

Affirming a dismissal at the trial level by way of summary judgment motion, the Court indicated that an employee might not maintain an action for professional negligence against a fellow-employee physician arising out of the treatment of a compensable workers' compensation injury. In following what appears to be the majority position in the United States, the Court held that the injured employee was barred from maintaining an action against a company physician for the negligent aggravation of his pre-existing medical condition. The Court rejected the petitioner's argument that the injury did not occur within "the course of the employment" since the tumor was a pre-existing condition. The Court, in its rejection of that proposition, relied upon its conclusion that the alleged aggravation to the petitioner's injury, a pre-existing tumor, occurred in the course of the petitioner's employment and, therefore, the exclusivity bar applied. The Supreme Court rationalized that the Workers' Compensation Act enacted in 1911 barred such claims in exchange for theoretically permitting the petitioner to pursue what it indicated to be "assurance of relatively swift and certain compensation payments" under a compensation program. Hawksby v. DePietro, 319 N.J.Super. 89 (App.Div. 1999). [Note: Hawksby v. DePietro, 754 A. 2d 1168 - NJ: Supreme Court 2000.]

INTENTIONAL TORT CLAIM

In reviewing a claim of an injured worker who suffered a severe injury after her employer had removed a machine guard and defeated the safety device, the Court permitted the employee to pursue a liability action directly against the employer. The Appellate Division recognized that there are severe inequities suffered by injured workers who sustain injuries due to employers' actions seeking greater productivity at the risk of injury to employees. The worker sustained severe injuries to her hand that became entangled in the machine's wheels while she was cleaning excess glue from the bands of the machine with the machine in operation. The machine had no safety device attached that would have prevented access of her hand to the inner compartment of the apparatus. The employer defeated the safety mechanism of the machine and placed the machine in a "bypass" or "maintenance" mode 95-98% of the time, which allowed the operator of the machine to open the Plexiglas doors of the apparatus while the machine remained in operation.

Testimony was presented that the plant was understaffed, that there had been substantial personnel turnover, and that the management maintained workplace pressure to improve production. Even though the petitioner received workers' compensation benefits totaling $192,683.34, the Appellate Division considered that to be inadequate and rationalized that the conduct of this employer rose to the degree of egregiousness that would cause a reasonable person to conclude that it was substantially certain that an employee would be injured the way the employer required the machine to be operated. The Court followed a long line of cases advancing the theory that the employer should be held liable for the intentional wrong of altering a workplace machine by deliberately removing a safety device. Mabee v. Borden Inc., 316 N.J. Super. 218 (App. Div. 1998). [Note: Mabee v. Borden, Inc., 720 A. 2d 342 - NJ: Appellate Div. 1998.]

TEMPORARY DISABILITY LIENS

The reimbursement of State temporary disability benefits (TDB) liens has now become an acute problem in workers' compensation actions. In recent years, the DWC, relying upon an advisory opinion issued by the Deputy Attorney General, David Powers, in a memorandum to Deirdre Webster dated February 2, 1995, has been required to scrutinize requests for reimbursement by State Temporary Disability.

When reimbursement of a TDB lien cannot be anticipated from a viable source, the Division of Temporary Disability Insurance has been reluctant to provide benefits. In support of this principle, the Appellate Division affirmed that the disposition of a workers' compensation claim by way of a lump sum payment with dismissal under N.J.S.A. 34:15-20 would act as a bar to the filing of a claim for temporary disability benefits where the claim is filed for the same medical condition and the same period.

Mark Sperling had filed a workers' compensation claim that the Court considered being in a "twilight zone" of compensability. It was doubtful that compensation benefits would be paid due to the contested claim petition. The claimant settled his workers' compensation claim according to a lump sum benefit available under N.J.S.A. 34:15-20 in the gross amount of $1,500.00.Subsequently, the injured worker applied for TDB and was determined to be ineligible because he had received a workers' compensation payment for the same disability. Since the petitioner's subsequent TDB award may have been greater than the prior lump sum and reimbursement could not be anticipated [of the TDB lien from a workers' compensation award], benefits were declined. This decision was affirmed by the Supreme Court, but the question of whether full reimbursement of TDB payments was required regardless of the award before the Division of Workers' Compensation remained unanswered.

In a partially dissenting opinion, Justice O'Hern stated that temporary disability benefits could be considered a duplication of workers' compensation benefits only to the extent that the comp award was for temporary disability during the same period that state TDB benefits were paid. He further pointed out that a workers' compensation award disposed of according to N.J.S.A. 34:15-20 clearly indicated that the injury was not work-related and that, therefore, any State TDB benefits paid were attributable to a non-work-related condition. Sperling v. Board of Review, 156 N.J. 466 (1998).

In a more liberal approach to the payment of TDB benefits, the Appellate Division ruled that an employee was entitled to workers' compensation benefits for a part-time job and was also entitled to TDB benefits from his full-time employment. The injured worker received wages of $208.25 per week from the part-time employer, and his temporary compensation benefit amounted to only $145.77 per week. The Court held that the employee should not be worse off because he was receiving temporary workers' compensation benefits from an employer that only afforded part-time work while he was working for a full-time employer simultaneously. The instance of multiple employment does not act as a bar to simultaneous benefits from parallel programs. In Re: Scott, 321 N.J. Super. 60 (App.Div. 1999).

THIRD-PARTY LIENS

The issue of third-party liens and the extent of their reimbursement again came under the scrutiny of the Appellate Division. The Court held that per quod claims were not subject to a lien under N.J.S.A. 34:15-40. John Weir was a passenger in a motor vehicle accident and sustained serious injuries. In a civil action filed against the ultimate wrongdoer, the employee and his spouse settled the liability matter for a value far above the workers' compensation claim; however, the settlement made no distinction between the employee's recovery and that of his wife, the per quod claim. The trial court subsequently held a hearing and allocated 20% of the award to the per quod claim. Holding that the per quod claim is derivative and dependent, the Appellate Division concluded that there was no recovery in the workers' compensation proceeding, which was attributable to the per quod claim and, therefore, Liberty Mutual's assertion of its lien according to N.J.S.A. 34:15-40 against the spouse's per quod recovery in the third-party action was denied. Weir v. Market Transition Facility of N.J., 318 N.J.Super. 436 (App.Div. 1999).

MEDICAL EXPENSES

The question of what constitutes "medical expenses" to be included in a lien to be asserted according to N.J.S.A. 34:15-40 was the subject of review by the Appellate Division. The Court considered whether the services of a rehabilitation nurse are recoverable as medical expenses. The Court limited recovery to only those expenses incurred by an insurance company which could be demonstrated to be necessary to provide "medical, surgical and other treatment…to cure and relieve" the injured worker of the effects of the injury per N.J.S.A. 34:15-15.

James Raso suffered severe injuries in August of 1992 as a result of a work-related event where there was a third-party liability. Harleysville Insurance Company assigned a "rehabilitative nurse" to the petitioner. The "rehabilitative nurse" was an employee of an outside company, American International Health & Rehabilitation Services, Inc., which was under contract with the workers' compensation insurance company to provide management services and coordinate medical treatment. The dispute was presented to the Court by way of a class action complaint filed against Harleysville asserting that the insurance carrier had improperly lodged a lien against the employee's third-party recovery in violation of several laws, including N.J.S.A. 34:15-40, The Consumer Fraud Act, common law fraudulent and negligent misrepresentation, negligence per se, common law breach of duty of good faith and fair dealing; and unjust enrichment.

In adjudicating the claim, the Court remanded the matter back to the DWC for a determination of whether the rehabilitative nurse's services were reasonable and necessary to cure or relieve the injury of the worker and therefore warranted reimbursement. The Court concluded that merely showing that the injured worker could have benefited from the added services was not sufficient. The DWC was mandated to review whether the care coordination for an injured worker suffering an injury, even though no hands-on medical care was provided, qualified for reimbursement.

The Court noted that even though the plaintiff's attorney asserted that the assignment of a rehabilitation nurse might be an invitation for "chicanery," the nurse was not retained until the injured worker's attorney had agreed to her retention. While medical cost reduction benefited the carrier, it ultimately benefited the employee additionally, and therefore, it was expressed that there was no basis for the suggestion of misuse of the services by the insurance carrier. Ultimately, the matter of reimbursement was left to the discretion of the DWC after a review of the substantive issues to be addressed with regard to N.J.S.A. 34:15-15. Raso v. Ross Steel Erectors, Inc., 319 N.J. Super. 373(App. Div. 1999).

CONFLICT OF LAWS

The Appellate Division reviewed two conflict of law cases this term. One involved successive awards, and the other involved the choice of law. The court held that the pursuit of a claim under the law of one state does not bar the pursuit of a distinct right to recover under the laws of another state. A claimant who had filed a claim for benefits in the state of Pennsylvania was permitted to file a subsequent claim in the state of New Jersey against the same company. Even though the employer had declared bankruptcy, the employee was permitted to file for benefits from the New Jersey Uninsured Employers Fund. Williams v. A & L Packing and Storage, 314 N.J. Super. 460 (App. Div. 1998).

In a claim involving successive awards, the Appellate Division ruled that jurisdiction by the New Jersey DWC cannot be asserted over the employees of an interstate compact agency, The Port Authority of New York and New Jersey (Port Authority), if the site of the injury was not within the State of New Jersey. The mere maintenance of a physical facility in the State of New Jersey was insufficient to confer jurisdiction. If an employee of the Port Authority worked at sites in the State of New York, lived in New York, and had entered into a contract of employment in the State of New York, a claim for workers' compensation benefits could not be asserted in New Jersey. The mere dual location of the employer's place of business in New York and New Jersey did not permit the Court to have jurisdiction of the claim in the State of New Jersey. Connolly v. Port Authority of New York and New Jersey, 317 N.J. Super. 315

(App.Div. 1998).

EMPLOYMENT STATUS

In several cases, the Appellate Division again reviewed the issue of employment status. In affirming a Chancery Court opinion, the Appellate Division determined that a real estate sales agent held employee status due to the agent's economic dependence upon the broker. The broker was liable for the payments of the premiums for workers' compensation insurance coverage that ultimately benefited its sales agents. Therefore, the allegation that the sales agents were independent contractors and not employees was defeated purely on economic grounds. Re/Max, Inc. v. Wausau Insurance Companies, 316 N.J. Super. 514 (App. Div. 1998). In addition, the Court endorsed using the"relative nature of the work test" when the "control test" is not determinative of employment status and where public policy considerations mandate a more liberal interpretation. Lowe v. Zarghami, A-192, 1999 WL 359457 (N.J., June 7, 1999).

In another fact-sensitive status of employment case, the Appellate Division used both "the relative nature of the work test" and "the right to control test" in determining that an insurance adjuster was, in fact, an employee. Richard Conley was an insurance claims adjuster who was employed temporarily after catastrophic events such as hurricanes. These insurance adjusters were known in the trade as "stormtroopers." Following a severe windstorm in December of 1992, an insurance company that agreed to pay him 60% of the fees received for claims that he processed hired Conley. The insurance company that had agreed to hire him made Conley responsible for most of his business expenses; however, it provided Conley with an office and a telephone. The employer did not withhold income tax or deduct social security payments. Each morning the insurance company required Conley to drive to the respondent's office to deliver claim forms, and he would call in at least once a day to speak to the company.

The Appellate Division used both tests and concluded that the petitioner was an employee of the respondent and not an independent contractor. The respondent's control encompassed reviewing claim forms and agreements with claimants before sending them to the insurance company for final approval. The employer required the employee to spend some time each morning communicating by telephone with supervisors and other personnel at other times during the day. Furthermore, the nature of the work that he performed demonstrated that he was an employee. The work was performed like that of the regular employees during the day, and the petitioner shared office space and participated in meetings with the other workers. Conley v. Oliver & Co., 317 N.J. Super. 250 (App. Div. 1998).

The Appellate Division reviewed what constitutes "special employee" status. A truck driver of a company who was lent to another employer was barred from instituting a third-party claim against the other employer. The Court determined that the injured worker was a special employee. The Court utilized the "right to control" test since the other employer had full control of the employee, including the right to hire and discharge the employee. Furthermore, the other employer paid the petitioner's salary and owned equipment (trucks) that the employee used in his work. Gore v. Hepworth, et al., 316 N.J. Super. 234 (App. Div. 1998).

IN THE COURSE OF THE EMPLOYMENT

Factual issues involving both horseplay and off-premises liability were considered by the Court. When an employee commits an intentionally violent act, which produces a reasonably expected injury, the injury is considered to be a non-compensable event. An electrician became emotionally enraged following criticism by his supervisor. The employee, in a rage, smashed his fist into an electrical box resulting in multiple fractures to his hand. The injured worker was denied benefits since the Court deemed the injury self-inflicted. It reasoned that a worker should not be awarded compensation benefits where the injury resulted from a willful, unreasonable, and idiosyncratic reaction to a common workplace personnel action. Klein v. The New York Times Co., 317 N.J. Super. 41 (App. Div. 1998).

In another fact-sensitive claim, the Court denied compensability for an off-premises injury, alleging that an assault had not occurred within the course of the employment. The petitioner, a cook for the Claridge Hotel & Casino in Atlantic City, was working the 7 a.m. to 3 p.m. shift, had changed her clothes, and "clocked out." She had left the Claridge Hotel & Casino building at approximately 3:15 p.m. and crossed Indiana Avenue to the employer's administrative office building to pick up her paycheck. After she had picked up her check and while she was walking, the employee was attacked by several young men who grabbed her by her sleeve and knocked her to the ground, and then attempted to steal her pocketbook. She screamed for help, but the assailants ran away. A passerby and an employee of the Claridge came to her assistance and placed her on a chair on the sidewalk.

The Appellate Division affirmed the trial judge's dismissal of the claim since the site of the accident was off the employer's premises, and the employer did not have control over the property where the accident occurred.The Court found that the petitioner was assaulted and knocked down on a public sidewalk after she had left Claridge's office building. The sidewalk area was not under the control of the Claridge and was not used for any business purpose by the Claridge. Cannuscio v. Claridge Hotel & Casino, 319 N.J. Super. 342 (App. Div. 1999).

In another "in the course of the employment" case, the Appellate Division affirmed the dismissal of a workers' compensation claim where the petitioner suffered an accident when she slipped and fell while shopping in the employer's supermarket after work. The Court held that the injury did not "arise out of" her employment with the respondent, even though the petitioner's accident occurred in the "course of her employment."

The petitioner worked four hours as a part-time cashier for the Pathmark food store. She "punched out" and remained in the store at the end of her shift to purchase items for her mother. The Court analyzed whether the risk was incidental to her employment and whether the risk was connected to what the injured worker was required to do in fulfilling her employment. Relying upon the three categories of risk that the New Jersey Supreme Court has identified: risks "distinctly associated" with the employment, such as a hand crushed in a machine; "neutral" risks, such as an employee being struck by lightning, and risks that are "personal" to the employee such as a non-work related cardiovascular event, the Court reasoned that the petitioner's risk was personal and therefore did not arise out of her employment.

In dicta, the Appellate Division noted that the petitioner had instituted a civil action against the respondent, Pathmark Stores, Inc. The Court indicated its approval of that filing since the Court expressed the possibility that a transfer of the workers' compensation action to the Law Division under R.1:13-4(b) would not withstand a statute-of-limitations defense in the Law Division. Zahner v. Pathmark Stores, Inc., No. A-5673-97T3, 1999 WL 343807 (N.J. Super. A.D., May 28, 1999).

MEDICAL PROVIDER CLAIMS

The payment of medical bills and the jurisdiction over a medical provider's claim were discussed before the Appellate Division. The Court determined that a provider of medical services is not permitted to maintain an action at common law for unpaid medical bills when a defendant has a pending claim for workers' compensation benefits before the New Jersey DWC for unpaid medical expenses incurred in connection with compensable injuries. Therefore, the provider's complaint should have been transferred to the DWC for adjudication. Rather than dismissing the matters, the Court has instructed that if a medical provider proceeds directly in the DWC, the statute of limitations for the provider's claim for unpaid services would be tolled during the period that the claimant's compensation claim is pending before the DWC. Medical Diagnostic Associates v. Hawryluk, 317 N.J. Super. 338 (App. Div. 1998).

THE BOND DOCTRINE

The trend to emasculate the "Bond Doctrine," which places all liability on the last carrier of the last exposure where there is difficulty in assessing liability for an employee's occupational disease, continued

in a court decision this term. In those instances where the inception of the disease cannot be accurately identified, and the employee worked for successive employers, or successive insurance carriers covered the employer he worked for, the issue becomes acute. Keeping in tandem with the progress of medical science, the Court analyzed the factual situation and decided based upon the evidence presented that if the petitioner suffered from a prior occupational pulmonary condition that could be determined to be "fixed, arrested and definitely measurable" or "obvious, diagnosable and capable of measurement," the liability could be apportioned against multiple employers and/or insurance carriers. Liability could also be assessed against the Second Injury Fund, where the disability could not be fully apportioned among the worker's various employers.

A sheet metal worker, who was employed from 1957 to 1991 in the trade, suffered an increase in his pulmonary symptoms during a renovation project from 1990 to 1991 at the Ford Motor Co. plant in Edison under the employment of several different employers. He required medical treatment and was hospitalized on three occasions during this period of employment. The Court felt that since the employee had been exposed to dust and fumes at multiple job sites for many years, a portion of the petitioner's disability could be apportioned against the prior employers. If the petitioner is deemed totally and permanently disabled and it cannot be determined which, if any, of the prior employers is responsible for the disease, then the Court expressed the opinion that the Second Injury Fund should be assessed and held responsible for the pre-existing disability. The case was remanded for further determination of liability among the prior employers. Levas v. Midway Sheet Metal, 317 N.J. Super. 160 (App. Div. 1998). [Note: Levas v. Midway Sheet Metal, 766 A. 2d 1212 - NJ: Appellate Div. 2001.]

PERMANENT PARTIAL DISABILITY

In a ruling affirming the trial court, the Appellate Division provided guidance in the calculation of disability by distinguishing occupational disease claims that contained misjoined multiple events from a continued occupational exposure due to a repetitive motion trauma claim involving disability to multiple areas of the body. A judge of compensation found that the petitioner suffered from orthopedic, neurological, and psychiatric disabilities in the form of 25% of Partial Total for the right shoulder, 5% of Partial Total for the left shoulder, 15% of Partial Total for the cervical area and 7.5% of Partial Total for an adjustment disorder and depression stemming from the repetitive traumas at work.

The petitioner had worked for Sunshine Biscuits as a cookie packer for eight hours per day with two short lunch breaks. She was required to work on a "high-speed cookie conveyor" production line where she was compelled to "raise her arms above her head, rotate her body to the left and dump the cookies into a hopper." This activity would be repeated ten to fifteen times within a three to five-minute period during which she was required to keep her speed up with that of the line.

An initial condition was diagnosed involving the neck in March 1993. The medical records demonstrated that the petitioner was subsequently diagnosed on different dates for different medical conditions. The Court determined that the petitioner should be compensated for this type of occupational disease case in the same manner that a petitioner is compensated in a single traumatic injury case, even though the disabilities flowing from the repetitive motion trauma were diagnosed at different times and might have been capable of separate numerical assessment. The Court reasoned that the Legislature did not intend to benefit a worker who misjoined separate claims in one claim petition, i.e. pulmonary, hearing loss, and ophthalmologic claims. The Court found that a repetitive motion trauma claim is all-encompassing and may be the subject of a single cumulative award reflecting an aggregation of the weeks of compensation resulting from the disabilities and may be paid at a single rate of compensation. Kaneh v. Sunshine Biscuits, No. A-3919-97T2, 1999 WL 345601 (N.J. Super. A.D., June 1, 1999).

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