

WORKERS' COMPENSATION LAW

REVIEW OF THE NJ SUPREME COURT TERM 1993-1994

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During the 1993-1994 court term, the attention of the New Jersey Supreme Court was on evidential issues while the Appellate Division addressed an entire spectrum of issues arising before the Division of Workers' Compensation. Those issues included [conflict of law](#) questions, further definition of the [coming and going rule](#), and [apportionment](#) of traumatic and occupational disease claims [as well as issues of [credibility](#). The court also addressed such perennially important issues as [dependency benefits](#), the "[fellow servant](#)" rule, [casual employment](#), and [psychiatric illness](#)]. The court term marked further reiteration by the reviewing tribunals that [permanent disability](#) can be recognized at minimal levels and that a cause of action exists for an occupationally-induced [cardiovascular](#) condition.

Credibility

The New Jersey Supreme Court's direct focus was on the evaluation of evidence before the Division of Workers' Compensation. By reversing the Appellate Division in *Cancel v. City of Passaic Police Department*, 134 N.J. 479 (1994), the court again reiterated that the hearing official at the Division of Workers' Compensation is the trier of fact and that decisions made at the trial level, based upon credible evidence, can not be overturned by a reviewing tribunal. In the *Cancel* matter, the Judge of Compensation relied upon oral testimony presented at the time of trial by various witnesses. The petitioner presented testimony that as a police

officer he suffered a cardiovascular event while racing to an area of a building in response to an emergency. While conflicting evidence was presented by way of live testimony, the respondent also relied upon a hospital record introduced which referred to the petitioner's suffering chest pains while walking his dog. Whereas the Appellate Division had reversed the Judge of Compensation, the Supreme Court, following the doctrine of *Close v. Kordulak Bros.*, 44 N.J. 589 (1965), concluded that the findings at the trial level were based on sufficient credible evidence, and reinstated the award of compensation for the police officer.

The Appellate Division provided additional definition of how a determination on the issue of credibility is made. Such an evaluation requires more than a review of the testimony in the transcript. The opinion of the trial judge regarding the candor and truthfulness of the testimony of the witness must be taken into account by the reviewing tribunal. *Della Rose v. Van-Rad Contracting Co., Inc.*, 267 N.J.Super. 290 (App.Div.1993).

Conflict of Law

The Appellate Division had an opportunity to review an issue concerning conflict of laws in an attempt to determine whether or not an illegally employed minor working at a New York construction site was subject to the sole remedy provided under New York law which was the workers' compensation remedy. The court held that New Jersey's interest in protecting public policy was not strong enough to overcome New York's interest in immunizing employers from tort liability claims of its minor employees. In this case, a minor was injured in an accident in the State of New York, the corporation had offices in the State of New Jersey, and its work was equally distributed between the two jurisdictions. The New Jersey court did not permit the adoption of New Jersey law allowing an alternate common law cause of action against the employer. The court adopted the New York law which permitted the minor to accept only the exclusive jurisdiction of workers'

compensation. It reasoned that both jurisdictions protected minors, and while New York's workers' compensation law may have provided a lower monetary remedy, the employee had the option of pursuing a claim for workers' compensation benefits in the State of New Jersey. The court further reasoned that there was no public policy in New Jersey dictating that a minor receive the greatest monetary award possible. *Mastice v. Interstate Industrial Corporation*, 270 N.J.Super. 350 (App.Div.1994).

Casual Employment

The issue of casual employment was also considered by the Appellate Division during this past court term. In a case involving a tenant's companion, who undertook to waterproof the owner's premises for a period of 14 hours, and who suffered a fractured femur after falling from the roof, the injured individual was considered to be a casual employee and not subject to the Workers' Compensation Act. The court concluded that the petitioner was either a casual employee or an independent contractor, and, under any interpretation of the facts, was not entitled to workers' compensation benefits. Additional material factors were that the landlord exercised no control over the work and the petitioner had another regular full time job. *Martin v. Pollard*, 271 N.J.Super. 551 (App.Div.1994).

Insurance

Several cases involving insurance issues were the subject of decisions by the reviewing tribunals this judicial term. An insurance carrier was held liable for work-related accidents by its insured's employee even though the carrier had notified the insured and the Compensation, Rating and Inspection Bureau that it was canceling coverage. The carrier's responsibility continued since it did not provide notice in accordance with N.J.S.A. 34:15-81. An insurance carrier is required to provide at least (10) days written notice to the assured by registered mail of the

company's intent to cancel a policy. This notice must be provided in addition to any renewal offer or notice of intent not to renew the policy. *Bright v. T & W Suffolk, Inc.*, 268 N.J.Super. 220 (App.Div.1993).

Coming and Going

As more employees are permitted to work in unconventional time and space settings, the court has been required to provide more guidance in defining the coming and going rule. While New Jersey statutorily recognizes the travel-time exception which permits an employee to obtain portal-to-portal coverage under the Workers' Compensation Act, the employer must pay for the travel time to and from a distant job site or the employee must be using an employer-authorized vehicle for the travel time to and from the job site. If the employee has a non-conventional job site, such as working out of one's home, and must travel to a distant location to perform work, the journey is deemed compensable. A phlebotomist was traveling to various sites on behalf of her employer to draw blood from various donors. The employer paid for travel time and mileage from the employee's residence to the job site. The employee was involved in an accident while traveling from a distant job site back to her home. The court deemed the accident to be compensable even though the employee was traveling home rather than to the employer's premises because the employee was considered to have no conventional workplace. *Brown v. American Red Cross*, 272 N.J.Super. 173 (App.Div.1994).

"Fellow Servant" Rule

Claims against co-employees are prohibited under the New Jersey Workers' Compensation Act. A paid borough police officer brought an action against a volunteer fireman of the same municipality alleging that the fireman's negligence resulted in the police officer's personal injuries. The police officer was directing traffic at the scene of the fire, and the volunteer fireman was engaged in driving a fire truck when the hose

trailing behind the fire truck and attached to a fire hydrant struck the police officer causing him to fall to the ground. Since both employees were injured in the "line of duty", the statutory "fellow servant" rule prohibited an action between them for personal injuries. *Maggio v. Migliaccio*, 266 N.J.Super 111 (App.Div.1993), N.J.S.A. 34:15-8.

Dependency

In determining what benefits are payable to minor children in dependency actions, the court held that minor children are usually entitled to full statutory dependency benefits. The legal status conferred by the statutory provision is not necessarily determined by the deceased employee's actual contribution to the child's support. Even though the amount of benefits paid to a minor child may exceed that which is actually necessary for the child's needs and expenses at the present time, the court concluded that full benefits were to be awarded. *Costa-Hughes v. Mullen Construction Company*, 267 N.J.Super. 439, (App.Div.1993).

Apportionment

The apportionment of liability in occupational disease claims continues to be a perennial topic for review at the appellate level. The court continues to struggle in an attempt to stay in tandem with an ever increasing body of research material involving medicine and other scientific data. The courts continue to distinguish specific traumatic event claims from those of an occupational nature. Where there are traumatic incidents and subsequent occupational claims, there has been a tendency to discourage responsibility of the subsequent employers and to place the liability on the employer under whom the specific incident occurred.

A truck driver injured his back on October 1, 1982 while working for a trucking company. Approximately four and one-half years later, a notice of motion to join the Commissioner of Labor as Trustee for the Second

Injury Fund as a party respondent was granted. The petitioner then filed approximately six additional claim petitions joining five additional respondents alleging aggravation of his condition due to continued occupational exposure to repetitive motion trauma. The actual trial of the consolidated matters occurred approximately 10 years following the initial accident at which time there was insufficient medical evidence to apportion disability among the respondents and to determine whether or not the subsequent employment aggravated or accelerated the underlying condition. The trial court relied on Bond and held the last employer responsible. On appeal, the appellate court held that the employer during whose employment the initial trauma occurred was liable for the petitioner's disability and that the subsequent employers were not responsible for the progressive nature of the disease. The court reasoned that a contrary decision would discourage employers from hiring individuals who have suffered from prior injuries but needed to work even though the subsequent work might be painful. Noting that the petitioner was required to wait a decade for justice, the court also indicated that the consequences of this specific accident could not be placed on a subsequent employer merely because there was difficulty in fixing disability arising from the specific accident. Lacking substantial contributions to the disability from the subsequent accidents or employments, the court was unable to apportion disability and assessed it on the employer during whose employment this specific incident occurred. *Peterson v. Hermann Forwarding Co.*, 267 N.J.Super. 493 (App.Div.1993).

Psychiatric Illness

Consistent with the higher standard imposed in order to prove that a psychiatric illness arose out of the employment, New Jersey has adopted the position that, lacking evidence of a clear legislative intent to require that workers' compensation benefits be paid to employees for psychiatric claims flowing from a termination of employment, such claims will be denied. Emotional distress and mental suffering caused by the receipt of

a layoff notice is not considered to be an event arising out of the employee's employment once contemplated by the Workers' Compensation Act.. The court held that to allow recovery for these circumstances would cause the employer to become a general health and welfare insurer of all employees for conditions not arising out of the employment and would unduly subject all employers to potential claims whenever there was an adjustment in the work force. *Cairns v. City of East Orange*, 267 N.J.Super. 395 (App.Div.1993).

Standards for Permanent Disability

The Appellate Division has further defined the minimum standards under which permanent disability can be awarded under the New Jersey Workers' Compensation Act. The Division of Workers' Compensation is not bound by the standards utilized under N.J.S.A. 39:6A-8 which established a "verbal threshold" in an effort to limit recovery for non-economic losses involving motor vehicles. A court will take into consideration the credibility of the witness in determining the nature and extent of an injury. Even where there have been negative diagnostic evaluations, including a CAT Scan and x-rays, concerning an injury and where the employer's physician examining on behalf of the insurance carrier has indicated that the petitioner is exaggerating his complaints, an award for disability can be entered based upon credible evidence and objective findings.

A 28 year old grocery stock clerk injured his back while pulling crushed cardboard out of a bale machine. The petitioner underwent a diagnostic CAT Scan of the brain and had cervical spine and lumbosacral x-rays. All tests were basically negative. The authorized treating physician indicated that the petitioner was "pretending to be in too much pain." The injured worker was reportedly unable to go to physical therapy because he couldn't obtain a ride, and he did not take the medication prescribed by the authorized treating doctor because the drugs prescribed "were not strong enough." The testimony of the petitioner was taken and

medical reports were offered into evidence. The court recognized the petitioner as a credible witness and relied upon objective findings of the petitioner's examining orthopedist which included "mild tenderness and restrictions of motion." The award of 5 percent of partial total for the residuals of a contusion and strain involving the lumbar area was affirmed by the Appellate Division. *Rakip v. Madison Avenue Food Town*, _____N.J.Super._____, (App.Div.1994).

The Division of Workers' Compensation was directed by the Appellate Division to award permanency in a claim involving a hernia. In that instance, there was testimony from the petitioner and/or a medical expert sufficient to establish a basis for an award of permanent disability. Where three surgical interventions were required to repair a left inguinal hernia, and where the petitioner's medical expert, as well as the petitioner, testified to complaints of pain, discomfort and restriction of movement, the burden of proof was met for an award of permanent disability. The court concluded that there are instances where hernia surgery is unsuccessful or where the surgery itself produces sequelae which render an individual permanently impaired. *Schmitt v. Mayfair Supermarkets, Inc.*, 272 N.J.Super. 408 (App.Div.1994).

The Appellate Division reversed a lower court decision in a case in which an employee injured herself after accidentally slipping on a rug in the courthouse lobby where she worked. The trial judge had concluded that the petitioner's knee condition caused the event and, therefore, that her injury was caused solely by her pre-existing condition. The trial judge attempted to limit the petitioner's attorney from presenting testimony from the petitioner on direct examination and limited the production of the petitioner's corroborating testimony. The judges above held that the evidence did not establish that the employee's fall was an "idiopathic event" and further stated that the burden of proof was on the employer to establish that the petitioner did not accidentally slip while at work. A knee predisposed to pathology was considered to be a risk for which the employer was responsible. The court determined that an

employer is responsible if the employment aggravated, accelerated, or combined with a pre-existing condition to produce a disability. *Verge v. County of Morris*, 272 N.J.Super. 118 (App.Div.1994).

Cardiovascular Disease

A new cause of action was recognized by the Appellate Division in *Fiore v. Consolidated Freightways, Inc.*, 270 N.J.Super. 520 (App. Div.1993).

The court recognized that an occupational exposure could result in cardiovascular disease and that this disease could be the basis of an award for benefits. In the *Fiore* matter, while recognizing the cause of action, the Appellate court set forth unusually stringent standards in order to establish causal relationship on a scientific basis while reviewing studies not presented to the trial court below. The far reaching impact of the standards in summary workers' compensation proceedings may have a significant effect upon the remedial legislative intent of the Workers' Compensation Act. This case has been granted certification and is scheduled for review by the Supreme Court in the 1994-95 term.

[Editor's Note: "We granted certification, 137 N.J. 165, 644 A.2d 613 (1994), to determine the standard of proof required to establish an occupational heart-disease claim under N.J.S.A. 34:15-1 to -128, the Workers' Compensation Act (the Act). We conclude generally that an employee claiming an occupational heart disease must show that the disease is due in a material degree to causes or conditions that characterize the employee's occupation and that substantially contribute to the development of the disease. That conclusion leads to a remand to the Division of Workers' Compensation (Division) to determine whether the work of petitioner, John Fiore, substantially contributed to his angina attack and coronary-artery disease. Complicating that determination are Fiore's personal-risk factors, including the facts that he had smoked two packs of cigarettes a day for twenty years, was fifty-sixty pounds overweight, and had a family history of heart disease. Thus, the case presents a question of dual causation concerning an occupational

disease." Fiore v. Consol. Freightways, 659 A. 2d 436 - NJ: Supreme Court 1995].