# WEBER GALLAGHER SIMPSON STAPLETON FIRES & NEWBY LLP

**ANNUAL UPDATE ON THE LAW**

**New Jersey Worker's Compensation**

Volume XV No 1 October 2011



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The Appellate Division has rendered several important decisions in 2011. While we have kept you apprised as these decisions were rendered, this is our summary of all pertinent published and unpublished Appellate decisions.

## CASELAW SUMMARY

## Medical Causation

### NJ Superior Court – Appellate Division-Unpublished

In *McKeever v. JC Penney*,[1] the Appellate Division reviewed the standards applicable to work related "cardiovascular or cerebral vascular" events discussed in N.J.S.A. 34:15-7.2. The Petitioner's claim petition was dismissed because he did not establish causation for his disability under the applicable standards. The Petitioner appealed and the Appellate Division affirmed the lower Court's dismissal.

The Petitioner was employed with the Respondent JC Penney beginning in 1989 as a loss prevention internal officer. On May 21, 2004, the Petitioner was in a Jersey City store when he saw a customer behaving in a suspicious manner. He eventually ran after the customer grabbed some merchandise and fled the store. After running approximately 50 yards, the Petitioner experienced a "bright in my eyes" and a sensation of "floating". The Petitioner was later taken by ambulance to the hospital and treated and released without a diagnosis. Two days later, the Petitioner returned to the hospital and was diagnosed as having suffered an acute stroke or strokes. At that time, the Petitioner was a 36 year old who was physically active and healthy. The central issue at the workers' compensation hearing and on appeal was whether the Petitioner met his burden of proof pursuant to N.J.S.A. 34:15-7.2.

The Petitioner's expert, Dr. Peter Crain, a board certified psychiatrist, attributed the cerebral vascular incident to a compromised blood supply to the brain as a result of the physical and emotional exertion of the chase. Respondent's expert, Dr. Charles Effron, a board certified neurologist testified that the chase and subsequent stroke were unrelated. Dr. Effron opined that the stroke resulted from a vertebral artery dissection unrelated to his work duties. The Trial Judge gave substantial credence to Dr. Effron's opinion, indicating that he was a board certified neurologist with greater training and experience, entitling his opinion to greater weight.

This case stresses the importance of choosing the most qualified medical expert where there is a genuine medical issue in a workers' compensation case.

In the matter of *Renner v. AT&T*,[2] the Respondent appealed an Order awarding dependency benefits to Petitioner following

[1] A-0992-09T1 (App. Div. Oct. 18, 2010)

[2] A-2393-10T3 App. Div. June 27, 2011

his wife's death from a pulmonary embolism. The Petitioner worked for AT&T at a desk job for 25 years. When the Petitioner worked from home, she sat at her computer for long hours to meet various deadlines imposed by AT&T.

The WC Judge held that the claim was compensable under Section 7.2 and found that her work inactivity was greater than her non-work inactivity. He determined the Petitioner's inactivity at work caused her pulmonary embolism in a material way. Furthermore, he stated that she led an active life compared to her job, which required her to spend unusually long hours at her computer and that the blood clot developed as a result of her work inactivity. AT&T appealed.

The Appellate Division affirmed holding that sufficient credible evidence existed to support the WCJ finding that prolonged inactivity while working caused her pulmonary embolism.

**Workers' Compensation Judge (WCJ)**

In *Lyons v. Omega Service Maintenance Corporation* ,[3] the Court discussed the standard for evaluating allegations for work related cardiovascular injury or death. The issue was whether the Petitioner's diagnosed condition was causally related to a syncope work event. Applying the requirements set forth in N.J.S.A. 34:15-7.2 and related case law principles, the judge rejected this argument and found insufficient medical evidence showing the petitioner's heart attack arose out of his work.

The Court held petitioner's expert needed to establish "(1) why the work strain or effort caused or contributed to the attack, (2) how it caused or contributed, (3) what were the physiologic mechanics which followed in the wake of the strain or effort which demonstrate that the attack was probably related to the strain or effort, (4) what went on within the employee if the strain or effort precipitated or contributed materially to the attack, (5) what, if any, signs or symptoms might be expected to accompany a heart attack or appear immediately thereafter which a layman might observe, or which a doctor might observe or regard as significant[.]"

The Judge found Respondent's expert more persuasive as he was a board certified cardiologist. Also, Petitioner's expert did not explain what happens within the Petitioner physiologically in the wake of the work strain or effort to demonstrate the Petitioner suffered cardiac damage and how the damage was related to strain or effort.

In *Ippolito vs. County of Bergen Road Dept*.,[4] Judge Tornetta reviewed and considered the issue of whether a subsequent event to the same area of the body as the work-related injury constitutes an intervening, superseding event that would insulate the employer from liability. The court rejected that argument and found that the employer was still responsible for the consequences of both the original injury and the event in August 2007.

The Judge relied upon the "*Larson Treatise"* which states, "When the injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's

[3] 2006-30194 decided September 17, 2010

[4] 2007-25823 decided August 1, 2011

own intentional conduct." (Larson's Workers' Compensation Law, Chapter 10: Scope 2009). Here, the Judge concluded that the medical evidence established that the L5-S1 disc level became more susceptible to re-herniation which is what in fact occurred in August 2007. The medical evidence on behalf of petitioner contended that an every day activity (such as shutting off an alarm clock in this case) posed a much greater risk of re-herniation for the petitioner as the result of the mechanics of the disc which were changed as the result of initial injury and surgery.

## Going and Coming Rule

### NJ Superior Court – Appellate Division-Unpublished

The Appellate Division reviewed the merits of a 3rd party claim in a co-employee situation in the case of *Bianco v. Smith-Robotham*[5]. Plaintiff was injured when she was struck by a car driven by a fellow employee, in her employer's parking lot immediately after they both left work. She appealed an Order granting summary judgment and dismissing her Complaint on the grounds that her suit was barred by the WC Act. The Appellate Division affirmed.

The critical question is whether both employees were in the course of their employment at the time the accident occurred. If not, the fact that both motorists were co-employees is without legal significance.

The Appellate Division held that since both employees were on the employer's parking lot directly after finishing their work day they were still in the course of their employment at the time the accident occurred. The Court indicated that under N.J.S.A. 34:15-36, employment is deemed to commence when an employee arrives at the employer's place of employment to report for work and shall terminate when the employee leaves the employers place of employment, excluding areas not under the control of the employer. Thus, the plaintiff's sole remedy was the pursuit of workers' compensation.

## Statutory Defenses

### NJ Superior Court – Appellate Division-Unpublished

The Court held in *Huntoon v. Borough of Clementon*[6], that the Statute of Limitations is still alive and well and a valid defense in an occupational disease claim. This matter involved Petitioner's allegation of occupational exposure leading to bilateral carpal tunnel syndrome. The Employer defended the matter with, among other arguments, the violation of the two year statute of limitations. The facts revealed that the petitioner admitted that in July 1998 her primary care physician told her that her condition was "probably" work-related because of the requirement of typing and constant hand movement. She was employed as a full-time senior clerk for the police department.

Most importantly, an EMG was conducted on July 9, 2004, confirming that Petitioner had a severe degree of carpal tunnel in her right hand. She saw her physician on July 13, 2004, who told her that he was convinced that her carpal tunnel syndrome was secondary to her work. Despite this knowledge, Petitioner did not

[5] A-2651-09T1 (App. Div. January 24, 2011)

[6] A-0956-09T3 (App. Div. July 28, 2010)

file a claim for occupational exposure until April 30, 2007.

The Judge dismissed the claim stating that the petitioner knew that she had a work-related disability in July 1998 and, at the very latest, knew in July 2004 that her condition was work-related. However, the petitioner failed to file a claim within two years of July 2004.

The Appellate Court rejected the Petitioner's contention that the Statute of Limitations does not begin to run until the date of last exposure. The decision held that for the purpose of the Statute of Limitations, the statute begins to run 2 years from when the Petitioner knows of the nature of the disability and its relationship to the employment. In this case, Petitioner clearly knew of the relationship between her disability and her employment in 1998, at the latest, in 2004.

## Accident & Occupational Disease

### WCJ

WCJ George Gangloff, denied a claim for psychiatric disability in *J.K. vs. Audubon Savings Bank*[7]. In this case, the petitioner testified that she had been employed by the bank for approximately 20 years and was subjected to abusive behavior by her superiors.

Judge Gangloff reviewed the controlling legal standards as set forth in the key decision of *Williams vs. Western Electric Company*,[8] wherein the court held that the petitioner's subjective reaction is not to be disregarded but can not be the sole ingredient in determining compensability. *Williams* was re-visited in *Goyden vs. State Judiciary*,[9] where the court set forth the factors to determine the viability of an occup. psych claim: 1) Whether the work conditions are objectively stressful; 2) Whether the believable evidence supports a finding that the worker reacted to them as stressful; 3) Whether the objectively stressful work conditions are peculiar to the particular work place; 4) Whether there is objective evidence supporting a medical opinion of the resulting psychiatric disability in addition to the bare statement of the petitioner; 5) Whether the occup. exposure had a material impact on the workers' condition.

The court applied these factors and concluded that petitioner could not meet her burden of proof. Initially, the court noted that there was no corroboration of the petitioner's allegations of being repeatedly screamed at in the work place. The court found that the petitioner was subjected to only constructive criticism. The court found that there were no factors that were peculiar to this work place. With respect to the medical evidence, the court noted that the expert's opinion depends on the facts on which the expert relies. Since both experts relied upon the history and chronology of events as solely presented to them by the petitioner, the Judge determined that the resulting opinion of causal relationship offered by both experts was unreliable.

In ***J.T. v. UMDNJ***,[10] petitioner, a former security officer filed claim alleging an "occupational exposure to stressful work situations and harassment from supervisor." Applying N.J.S.A. 34:15-31 and the Goyden

[7] 2010-6282 decided September 7, 2011
[8] 178 N.J. Super. 571 (App. Div.; cert denied 87 N.J. 380 (1981))
[9] 256 N.J. Super. 438 (App. Div. affirmed 128 N.J. 54 (1992))
[10] 2007-12153; decided November 29, 2010

rule, the WCJ found that the petitioner failed to meet the burden of proving the two critical elements of an alleged occupational psychiatric disability: (1) that her working conditions were objectively stressful; and (2) such conditions were peculiar to her particular workplace.

Specifically, petitioner's expert failed to provide an independent professional medical analysis of the subjective statements of the patient. She merely based her opinion on: 1. History according to the patient. 2. The physical examination. 3. Duties of the patients' occupation. 4. Review of medical records. Petitioner also failed to produce anyone to corroborate her testimony or other documented proofs that her perceived harassment were anything but "merited criticism" within the meaning of Goyden.

## Permanent Partial Disability

### NJ Superior Court – Appellate Division-Unpublished

The issue of reconstruction of a petitioner's average weekly wage when the petitioner works part-time for the purposes of calculating an appropriate permanency rate was addressed in *Gruzlovick v. Giovanni's Trattoria*.[11] Petitioner's counsel argue all too often that if petitioner is injured while employed in a part-time position then their wages should be reconstructed automatically in calculating their permanency rate. The Decision in *Gruzlovick* makes it clear once again that this is an inaccurate and superficial way to approach this issue. The Court makes it clear that reconstruction is appropriate if there is an impact on the employee's ability to return to work in a full-time capacity.

Applied to this matter, the petitioner was 77 years of age at the time of injury. She had worked one day a week for 13 years. During those 13 years, she had never sought to have full-time employment or additional part-time employment with any other entity. Petitioner did not return to work after the accident simply stating, "I thought I had my share". Applied to this matter, the Court felt that Petitioner's permanent disability did not have any impact on her earning capacity or inclination to work full-time in the future. Thus, there was no reason to reconstruct her wages for calculating a higher permanent disability benefit rate.

## Temporary Disability

### NJ Superior Court – Appellate Division-Published

In *Quereshi v Cintas Corporation*,[12] the Appellate Division held that an award of attorneys fees is mandatory, in addition to a 25% penalty, when a petitioner is forced to resort to N.J.S.A. 34:15-28.1 to obtain temporary disability benefits after unreasonable delay or refusal by an employer or its carrier to pay such benefits. Furthermore, the WCJ is not limited by the statutory formula in N.J.S.A. 34:15-64 governing fee awards.

### NJ Superior Court – Appellate Division-Unpublished

In Calle v. Dejana Industries[13] where the issue of reconstruction of petitioner's permanent total disability rate was the issue.

[11] A-1519-08T1 (App. Div. April 15, 2010)

[12] 413 N.J. Super. 492 (App. Div. 2010)

[13] A-0797-10T2 (App. Div. October 7, 2011)

Petitioner worked part time in a seasonal job for Dejana. The facts revealed when not working for Dejana he would look for full time work. He would stand on a street corner and wait for painting work that would pay at least $120.00 per day. The Appellate Division affirmed the Judge's decision to reconstruct petitioner's part time wages to full time in calculating his permanent total disability rate. The WCJ concluded petitioner held himself out for full time work pre injury and his disability due to his injury with his part time employer should be calculated accordingly.

The evidence certainly seemed rather thin to conclude that petitioner was working and would work full time in the future but the analysis was correct. That is, wages will be reconstructed for permanency purposes if the petitioner is injured while working at a part time job if the injury prevents them from seeking full time employment that their past employment history reveals they would have pursued.

In *Ottens v. Board of Review and Murphy Bus Service, Inc.*,[14] the Appellate Division ruled that NJ State Temporary Disability benefits must be reimbursed when an employee is also receiving Workers' Compensation benefits for the same injury. After an employee reached maximum medical improvement, he applied for State Temporary Disability Benefits indicating he could not return to work. The Tribinal held that the Petitioner was paid State Plan disability benefits for the same period that Workers' Compensation benefits were received and that the Petitioner signed an agreement to reimburse the Division of any advances that were paid. The Petitioner appealed.

The Appellate Division affirmed and held that N.J.S.A. 43:21-30 prohibits the payment of Workers' Compensation and Disability benefits for the same injury. When an employee is disabled by accident or illness he will be entitled to benefits under either compensation law or benefits law, but not under both.

Several immunity decisions have been rendered recently. On two occasions, the Court held that the employer was entitled to immunity from a third-party law suit with the Workers' Compensation Bar (N.J.S.A. 34:15-8) limiting the recovery to workers' compensation benefits.

In *Schock v. Morristown Memorial Hospital*,[15] the court addressed a number of issues regarding the entitlement to benefits in a cervical injury claim. The key issue was whether the respondent was obligated to provide temporary total disability benefits (ttd) during the period when petitioner could not treat for her injuries while she treated for non work related asthma flare-ups. In a decision of first impression the Appellate Division affirmed the holding of the WCJ in concluding that ttd was owed during the 3+ months, petitioner treated for her non work related asthma. The court stated that during those 3+ months, petitioner could not return to work and there was not evidence of maximum medical improvement (MMI) during that time frame. The court relied upon a number of cases outside of New Jersey to support this conclusion including a case from South Carolina where the petitioner's disability was prolonged by her pregnancy.

The Court in *Condi v. Compucom*,[16] confirmed the fact that in order for a

[14] A-4566-08T3 (App. Div. July 13, 2010)

[15] A-1658-09T2 (App. Div. July 16, 2010)

[16] A-6453-08T3 (App. Div. April 16, 2010)

petitioner to be entitled to temporary total disability benefits, there must be wages to replace. In this case, the petitioner had been terminated from her employment effective August 18, 2008. She was released from orthopedic treatment with permanent restrictions. Subsequently, the petitioner's psychiatric expert felt that petitioner needed psychiatric treatment. In response, the employer arranged for an examination that provided psychiatric treatment. Despite the fact that Dr. Hewitt, the respondent's authorized physician, deemed petitioner to be temporarily totally disabled in March 2009, the Judge felt that temporary total disability benefits were not due since petitioner was unemployed in March of 2009 and had no wages to replace. It was significant that in December 2008, Dr. Tobe did not indicate in his report that the petitioner was unable to work. Had he done so, it appears that the Judge and the Appellate Court would have reached a different conclusion.

**WCJ**

In *Paucay v. Hickory Ridge Horse Farm*,[17] Judge Ingrid French addressed the issue of whether an employer is obligated to continue to pay the petitioner temporary totally disability (ttd) despite the fact that the petitioner had returned to work at the 2nd job but was under active treatment and the employer was not able to offer modified duty to the petitioner.

Judge French concluded that N.J.S.A. 34:15-38 requires a respondent to pay temporary total disability benefits only until a petitioner has either resumed work or has been discharged from care. Since the petitioner here was able to resume full-time work for one of her employers, the judge found he was no longer entitled to temporary disability benefits from the respondent. The Judge pointed out the the NJ statutes are focused on functional loss not wage loss. There is no temporary partial wage loss in NJ and thus there is no requirement to look at the petitioner's overall wage loss and compare that to the post injury RTW to determine if there is a shortfall.

## Medical Treatment

**NJ Superior Court – Appellate Division-Unpublished**

In *Kudelka v. City of South Amboy and Encompass Insurance Company of New Jersey*,[18] the Court resolved the issue as to whether an employee's personal injury protection (PIP) insurer or the WC provider is obligated to pay for certain medical treatments provided to the injured worker.

Petitioner was involved in a motor vehicle accident while performing his duties as a police officer for the City of South Amboy. He also applied to his private PIP insurer (Encompass) chiropractic treatment and epidural injections. The WC carrier was neither made aware of, nor was it consulted about, such procedures. Petitioner then filed a Petition for WC benefits against the employer. The PIP carrier filed a Motion to intervene requesting reimbursement from the workers' compensation carrier for the PIP benefits made on behalf of the Petitioner pursuant to N.J.S.A. 39:6a-6, and N.J.S.A. 33:15-15.1. The Judge of Compensation granted the PIP carrier's Motion and declaring that the PIP carrier was entitled to be reimbursed by the workers' compensation carrier.

[17] 2010-14249 decided April 14, 2011

[18] A-4953-09T4 (App. Div. February 16, 2011),

The WC carrier appealed contending that since neither the Petitioner nor the PIP carrier made a demand upon the workers' compensation carrier for PIP sponsored treatment, reimbursement of PIP benefits must be denied. They also argued that as a public entity, South Amboy was protected from reimbursement by the anti subrogation provision in the New Jersey Tort Claims Act. The Appellate Division found no foundation in the law for either of South Amboy's arguments and rejected both.

Based on this holding, a PIP carrier is entitled to seek reimbursement from the workers' compensation carrier regardless of whether a demand was first made for treatment, if the treatment is necessary and causally related, or if authorized care was already being provided. This is a poor decision and must be challenged in the future. Petitioner should not be able to seek unauthorized care to support a 3rd party claim and expose the WC carrier to those bills when authorized care is being provided.

In *Thompson vs. Quality First Contracting vs. Plumbrite Plumbing & Heating*,[19] the Appellate Division affirmed the decision of the WCJ which was rendered on reports only with respect to a Motion for Medical and Temporary Benefits. Petitioner suffered an injury to his right wrist on October 31, 2005 while working for Quality and a subsequent injury at home on March 19, 2006. He then became employed by Plumbrite. Quality's Motion to Implead Plumbrite was granted.

During the Motion hearing, the Judge noted that there was no dispute that petitioner required surgery. The only issue is whether the need for surgery was occasioned by the initial injury, the subsequent fall at home or the job duties with Plumbrite. Each party retained experts, however, the court ordered an IME to be performed by Dr. Joseph Barmakian. Dr. Barmakian concluded that petitioner's condition was occasioned by the October 31, 2005 injury. As a result, the Judge ordered benefits to be paid by Quality.

Quality appealed the Judge's decision by stating that it was denied a plenary hearing. The Appellate Court rejected the argument concluding that the Judge is authorized to order one carrier or employer to pay benefits without prejudice pursuant to N.J.A.C. 235-3.2(h). The Judge noted that Quality would have the opportunity to cross-examine all witnesses and challenge the issue of causal relationship prior to the conclusion of the case. The power of the Judge in this circumstance with respect to a Motion for Medical and Temporary benefits can not be underestimated. Accordingly, respondents must gather as much factual and medical information to defeat a Motion and not assume that a full trial is their right in the setting of a Motion for Medical and Temporary Benefits.

## Jurisdiction

### NJ Superior Court – Appellate Division-Published

In *Stancil v. Ace USA*,[20] a recent Appellate Division Decision, the petitioner filed a civil action seeking damages for pain and suffering and increased disability alleging that the employer wantonly refused to comply with orders of the Workers' Compensation court resulting in delay or denial of necessary medical treatment. The

[19] A-1117-10T1 (App. Div July 27, 2011)

[20] 418 N.J. Super 79 (App. Div. 2011)

Appellate Division rejected the plaintiff's argument pointing out that the WC Act was amended in October 2008 providing the WC Judges with additional powers of enforcement and sanctions and in October 2009 regulations were promulgated to carry out those additional powers. The Court concluded that the WC Act therefore had an exclusive scheme to address plaintiff's allegations.

Further, the court rejected plaintiff's argument that the carrier's conduct fell within the intentional wrong exception of Section 8 of the WC Act. The Court noted that intentional conduct must be on the part of the employer and not the compensation carrier. If the plaintiff felt that any Order in WC court was not being followed, the court stated the plaintiff could seek enforcement of a Contempt Order in Superior Court.

In *Sentinel Insurance Company v. Earthworks Landscape Construction*,[21] the Appellate Division concluded that the Workers' Compensation Court is an appropriate forum to resolve a declaratory judgment action seeking to void a workers' compensation policy. In this August 16, 2011 decision, the court was asked to determine whether the Division of Workers' Compensation was an appropriate forum for determination of the workers' compensation insurance carrier's declaratory judgment action seeking recission of a workers' compensation policy on the grounds of misrepresentation.

The carrier had filed a complaint for declaratory judgment with the law division subsequent to receiving a claim for injury when a worker fell 35 feet from above the ground while removing oak trees from a building site. The policy of insurance confirmed that all such tree work would be subcontracted out to other companies thus the carrier disclaimed coverage due to a material misrepresentation of the work to be performed. The Motion judge dismissed the complaint without prejudice and transferred the matter to the compensation division. The Workers' Compensation judge found that the policy was valid under the Workers' Compensation Statute but declined jurisdiction to void the policy. On appeal, the Appellate Division found no error in the Motion judge's decision to transfer the rescission issue to the compensation division so that both compensability of the underlying claim and the applicability of the policy could be decided in one proceeding. The court noted that the Workers' Compensation Division was the only forum that has jurisdiction over the compensation claim and thus consolidating the issue of the rescission of the policy was appropriate.

**NJ Superior Court – Appellate Division-Unpublished**

In *McGlinsey v. George H. Buchanan Co.*,[22] the court reviewed the issue of whether an employee had jurisdiction in NJ when he worked for 25 years in Pennsylvania and then 16 months in NJ.

The Petitioner, Gerard McGlinsey lived in Pennsylvania and worked as a laborer from 1974 – 2001. In 1995 he began working for the Respondent, George H. Buchanan Co. and moved for the company to New Jersey in June 2001. The Petitioner worked in New Jersey from June of 2001 until September 13, 2002, approximately 16 months of exposure. The WC Judge found the Petitioner worked as a pressman which

[21] A-0748-10T1 (App. Div. August 16, 2011)

[22] A-4653-08T3 (App. Div. Sept. 30, 2010)

required him to engage in strenuous physical activity, noting that he performed these job duties since 1974 in Pennsylvania for different employers.

In 1987, the Petitioner underwent lumbar spine surgery. In 1996, he underwent an MRI of the cervical spine which revealed four disc herniations. In 1997, he had an MRI of the right knee and left shoulder which revealed degenerative joint disease and torn meniscus. Thereafter, the Petitioner had arthroscopic surgery to the right knee. Of note was that the Petitioner was advised by a representative of the Respondent in 1999 that he "could have pursued a workers' compensation claim" relating to some or all of these conditions.

The Respondent filed a Motion to Dismiss for lack of subject matter jurisdiction and relied upon the ***Williams v. Port Auth. of N.Y. & N.J.***[23] The WC Judge applied ***Williams*** three part test and dismissed the NJ Petition holding that his fifteen months of employment in New Jersey with the Respondent was de minimus and insubstantial. The WC Judge found that there was clear evidence that the manifestation of the occupational exposure took place in Pennsylvania and not New Jersey. Additionally, the WC Judge noted that the Petitioner knew of his occupational injuries for more than two years in advance of the filing of the claim

The Appellate Division affirmed the WCJ despite the fact that the petitioner in ***Williams*** had very brief initial employment in New Jersey followed by decades of work in New York State. These distinctions did not tip the jurisdictional balance in Petitioner's favor. The Appellate Court agreed with the WC Judge's conclusion that Petitioner's conditions manifested long before he set foot in New Jersey and that the evidence failed to establish that the Petitioner's employment thereafter contributed to or aggravated his multiple pre-existing conditions.

In the matter of ***Catalano v. United Parcel Service***,[24] addressed whether NJ WC, has jurisdiction to hear a compensation claim filed by a UPS employee, who resides and works in Staten Island, NY, and who had two works accidents during his employment in Staten Island.

The WC Judge concluded that there was no compelling reason to invoke New Jersey's jurisdiction and dismissed the petitions with prejudice. The Petitioner appealed.

The Appellate Division noted that after completion of the initial one to two week training classes in Tinton Falls, NJ, Petitioner had no contact with New Jersey. He resided in New York, and his work assignment, situs of the equipment and his injuries were exclusively in New York. The mere fact that UPS may have classified some of the Staten Island employees as part of the "Central Jersey District" for corporate organizational purposes, or that the union, within its sole prerogative, assigned Petitioner to a New Jersey local, does not detract from the clear evidence that Petitioner's employment relationship with UPS was carried out in New York. Therefore, the Court held that there was no legal basis or policy justification for New Jersey assuming jurisdiction over Petitioner's claims.

[23] 175 ***N.J.*** 82 (2003)

[24] A-3845- 08T3, (App. Div. March 9, 2010)

**US District Court New Jersey**

In *Salinas v. John Doe*,[25] the Federal Court held that New Jersey had a greater interest in the outcome of a case venued and in Texas and applied New Jersey law allowing for a potential civil suit against the employer. The Petitioner was hired by Geo-Marine, Inc., to gather information on New Jersey coastal wildlife during 2008. The company also hired John Abroult, to transport the Petitioner over the Atlantic Ocean so that the Petitioner could view aerial wildlife. The airplane crashed while attempting to land at Eagles Nest Airport in West Creek, NJ, killing Abroult and injuring Petitioner. Petitioner, a citizen of Mexico, brought a lawsuit against both Abroult's Estate and GMI, alleging that GMI breeched its duty to exercise care in selecting an aerial survey company. GMI is a Texas corporation which does business in several States, including New Jersey. GMI filed a Motion to Dismiss, stating that it is immune from the suit under Texas' workers' compensation law.

Both New Jersey and Texas law prohibits suits against one's employer, but for New Jersey's exception for intentional wrongs. Petitioner argued that New Jersey law should apply and GMI argued that Texas law should apply.

When there is a question of choice of law, New Jersey uses a governmental interest analysis to determine what State's law apply in a case. Ultimately, the Court "must apply the Law of the State with the greatest interest in governing the particular issue". The Court found that New Jersey has a greater interest in the outcome of the litigation noting that while the case clearly affects Texas' interest in encouraging employer participation in the workers' compensation scheme, it has a greater impact on New Jersey's interest in regulating conduct within its borders.

**Employer Immunity From Civil Actions**

**NJ Superior Court – Appellate Division-Unpublished**

In the case of *VanDunk v. Reckson Associates*,[26] the petitioner was injured in a trench collapse at a construction project. There were multiple violations of OSHA. There was no doubt from the evidence presented that the supervisor was aware of the danger of anyone going into the trench which was not properly secured. The Plaintiff had initially offered to go into the trench to perform some work activities but was told by the supervisor that is was unsafe to do so. Unfortunately, the supervisor then lost patience with the construction project and ordered the plaintiff to go into the trench. Upon doing so, the trench collapsed causing petitioner injuries. The facts in this case do not appear to meet the substantial virtual certainty standards set forth in the *Millison* and *Laidlaw* decisions but nevertheless were found sufficient in order to establish the employer had lost its immunity under the Statute. The Court found that the supervisor knew that the trench was unstable and that it could fail and yet nevertheless allowed and even directed the employee to enter the trench without any safety device.

[25] 2010 *U.S. Dist. LEXIS* 95640 (D.N.J. 2010)

[26] 415 N.J. Super. 490 (App. Div. 2010)

**US District Court New Jersey**

In *Mechin v. Carquest Corp*.,[27] the Court concluded that the actions on the part of the employer did not constitute an intentional wrong. The petitioner was employed as an automobile mechanic and was removed the gas tank from a van. The gas tank spilled and petitioner got drenched in gas which ignited burning the petitioner. The Court noted that there were no prior "close-calls", no previous notice or complaints of a hazardous condition related to the accident suffered by the petitioner. The employer did not disable safety equipment for profit or production, but simply removed a hydraulic lift because it was no longer working. There was no evidence of prior OSHA citations or deception directed to OSHA inspectors during work-site inspections.

In *Calavano v. Federal Plastics Corp.*,[28] the employer was once again found immune from civil suit despite the fact that former employees of the employer had experienced work place amputation injuries using the vertical blender; the machine in question in this matter. The Court found no evidence in the record that any safety device was disabled or that the employer attempted to deceive OSHA. Neither the plaintiff nor any other employee had notified management about safety concerns due to the absence of the interlocking device which would have prevented the accident. While the employer may have been negligent, the Judge and Appellate Court found that their conduct did not amount to a substantial certainty that an injury would take place. The facts revealed that the only accident using the vertical blender had occurred 26 years earlier. There was no evidence that the employer directed or suggested that any safety steps should be skipped in order to meet production concerns.

[27] 2010 WL 3259808 (D. N.J. Aug. 17, 2010),

[28] 2010 WL 3257784 (App. Div. Aug. 18, 2010)

## Second Injury Fund

**NJ Superior Court – Appellate Division-Unpublished**

In *Allen v. Great Atlantic & Pacific Tea Company*,[29] the Court held that the Second Injury Fund does not have to pay for conditions where no prior loss of function was proven by the Respondent. The Respondent, Greater Atlantic & Pacific Tea Company appealed a final Order determining the Petitioner was totally and permanently disabled solely from injuries he suffered in a work related automobile accident. A & P contended that the workers' compensation Judge erred by dismissing the claim against the Second Injury Fund. The Appellate Division affirmed.

The Petitioner seriously injured his low back in a car accident that occurred while working for A & P on February 4, 1999. He sustained a disc herniation at L4-5 and underwent three surgical procedures. Despite the extensive medical treatment, the Petitioner developed severe depression and suffered from L5-S1 radiculopathy and bilateral foot drop.

A & P conceded that the Petitioner was totally and permanently disabled, but disputed that the disability was attributable solely to the February 4, 1999, automobile accident, relying on past medical history of a 1994 lumbar disc surgery and post traumatic

[29] A-1333-09T1 (App. Div. Dec. 21, 2010)

stress from his Vietnam service. The Judge in her decision, acknowledged the Petitioner's pre-existing low back injury and his pre-existing post traumatic stress disorder, but emphasized that neither condition limited his ability to work, maintain his home, or pursue his hobbies and interests. The Fund was dismissed as a party and all benefits awarded against A&P.

The Appellate Division was satisfied that the Trial Judge's conclusions and findings were supported by sufficient credible evidence. None of the medical experts could give an opinion that there was a material lessening of the Petitioner's working ability or an impairment in carrying on his ordinary pursuit of life before the compensable automobile accident.

This case establishes that a prior medical condition is not the same as establishing prior disability for Second Injury Fund involvement. There needs to be either material lessening of the Petitioner's working ability or an impairment in carrying on the ordinary pursuits of life for prior disability to be established.

## Miscellaneous

### NJ Superior Court – Appellate Division-Unpublished

In *Calle v. Hitachi Power Tools*,[30] the Court addressed whether an employer that paid a lump sum settlement pursuant to N.J.S.A. 34:15:20, should be reimbursed from a third party tort recovery in favor of the Claim Petitioner. The Court held in the affirmative.

Petitioner was paid a lump sum of $100,000.00, pursuant to the Section 20 settlement. Of the $100,000.00 Section 20, the Order explicitly provided that the Respondent retained Section 40 lien rights on $50,000.00 of the amount paid should the Petitioner recover in a third party action. Furthermore, when the settlement was placed on the record, the Petitioner acknowledged that he understood that $50,000.00 of the money was reserved by the insurance company with regard to the Section 40 lien. The Court held that since retention of the Section 40 lien was negotiated as a material part of the settlement, it would be inconsistent with the agreement and unjust, to permit the Petitioner to reject that understanding after the fact.

This case confirms that a Section 20 settlement can allow for Section 40 lien rights if they are preserved at the time of settlement. Keep in mind that lien rights always attach to the payment of indemnity and medical benefits.

### WCJ

In *Johnson v. State of New Jersey*,[31] Judge Emile Cox confirmed that New Jersey section 40 lien rights apply to a recovery in Pennsylvania from the proceeds of a petitioner's personal uninsured motorist coverage from a policy issued in Pennsylvania when the petitioner obtained New Jersey workers' compensation benefits. The Judge rejected the argument that Pennsylvania law should apply which would prevent a recovery of any workers' compensation lien. The court applied a balance of interests test concluding the New Jersey law had the greater interest in having its law apply regarding due to the payment of New Jersey workers' compensation benefits.

[30] A-1015-09T1 (App. Div. Feb. 15, 2011)

[31] 2004-29233 decided October 18, 2010

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