**SYLLABUS FOR WORKERS' COMPENSATION SEMINAR MAY 1, 2013**

**MOTION FOR MEDICAL & TEMPORARY TRIAL PROCEDURES**

**SUBMITTED BY LYNNE P. KRAMER, ESQ.**

## EMERGENT MOTIONS FOR MEDICAL CARE

I. In 2008 the New Jersey Legislature passed N.J.S.A. 34:15-15.3, Motions for Emergent Medical Treatment, in an effort to ensure that injured workers requiring medical treatment receive it in a timely manner. The Statute requires an emergent motion to contain the following:

1. Medical documentation from a physician stating that the injured worker is in need of emergent medical care;

2. Care that the injured worker has requested from his employer or the employer's carrier;

3. The physician must also state that any delay of treatment will result in irreparable harm or damage;

4. The physician must also state the specific nature of the irreparable harm or damage; and

5. All medical records in the injured worker's possession must be attached to the motion papers.

N.J.S.A. 34:15-15.3 also establishes the following timetable:

1. An Answer to the motion must be filed not later than five (5) calendar days after the date of service;

2. An initial conference shall take place within five (5) calendar days of the filing of the Answer; and

3. The respondent must secure a medical examination within fifteen (15) calendar days from the date of service of the motion.

As you will note, N.J.S.A. 34:15-15.3 is silent as to temporary disability benefits.

N.J.S.A. 34:15.4 directs that every insurance carrier or self-insured employer must designate a contact person responsible for answering issues concerning motions for medical and temporary disability benefits where a claim petition has not been filed or has not been answered. "Failure to comply with the provisions of this section shall result in a fine of $2,500 for each day of noncompliance payable to the Second Injury Fund".

After passage of N.J.S.A. 35:15-15.3 and N.J.S.A. 34:15-15.4 the Division promulgated N.J.A.C. 12:235-3.3 setting forth the procedure for filing said motions. In situations where a claim petition has not been filed or an answer received, Rule 12:235-3.3 (a), (d) and (e) set forth different procedures for filing an emergent motion. Specifically:

> N.J.A.C. 1235-3.3(a) provides that a petitioner may file a motion for emergent medical care with or after filing a claim petition directly with the district office to which the petition is or will be assigned as provided in N.J.A.C. 12:235-3.1
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> N.J.A.C. 12:235-3.3 (d) Where no answer to the claim petition has been filed by the respondent, the notice of motion and supporting papers shall be served on the employer and, if known by the petitioner, upon the employer's insurance carrier.
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> 1. Service on the employer under this subsection shall be either by personal service or by fax and a one-day delivery service.
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> 2. Service on the insurance carrier under this subsection shall be by fax and a one day delivery service to the contact person listed pursuant to N.J.A.C. 12:235-3.4 (above).
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> N.J.A.C. 12:235-3.3(e) Where the employer is uninsured or where the employer's insurer is not known by the petitioner, the notice of motion and supporting papers shall, …be served on the Uninsured Employer's Fund by fax and by a one-day delivery service.

As noted above N.J.S.A. 34:15-15.3 makes no mention of temporary disability benefits and N.J.A.C. 235-3.3(f) provides that the respondent has five calendar days after receiving service of the petitioner's notice of motion within which to answer. However, N.J.A.C. 235-3.2

for general motions for temporary disability and/or medical benefits provides the respondent with twenty-one (21) days from the date of service of the motion within which to file an answer. Therefore, it is not clear that a Judge can order payment of temporary disability in an emergent motion. However, in practice it appears likely that all issues in an emergent motion will be resolved at the same time.

With the passage of N.J.S.A. 34:15-15.3 and 15.4, N.J.S.A. 28.2, enhancing penalties was also passed. As you know, N.J.S.A. 34:15-28 provides the addition of simple interest, at the discretion of the division, of each weekly payment following entry of a judgment or order where there has been a delay of 60 or more days.

In accord with N.J.S.A. 34:15-28.1 a self-insured or uninsured employer or employer's insurance carrier who unreasonably or negligently delays or refuses to pay temporary disability compensation shall be liable to the petitioner for an additional 25% of amounts due, plus reasonable legal fees. "A delay of 30 days or more shall give rise to a rebuttable presumption of unreasonable and negligent conduct on the part of the self-insured or uninsured or an employer's insurance carrier".

> Quereshi v. Cintas Corporation, A-1848-08T31848-08T3 (App. Div. 2009)
> A petitioner who resorts to section 28.1 to force payment of temporary disability benefits receives not only the 25% penalty but also reasonable legal fees incurred "as a result of and in relation to [the] delay…or refusal…". The fee is not subject to the 20% limitation of section 64, and shall be calculated in accordance with the standard factors for constructing a fee award.

The 2009 legislation added N.J.S.A. 34:15-28.2 and 28.4 to enhance the powers of Workers' Compensation Judges to assess costs, penalties, counsel fees and other relief when a party "…fails to comply with any order of a judge of compensation or with the requirements of

any statute or regulation regarding workers' compensation, a judge of compensation may, in addition to other remedies provided by law:

a. Impose costs, simple interest on any moneys due, an additional assessment not to exceed 25% of moneys due for unreasonable payment delay, and reasonable legal fees, to enforce the order, statute or regulation;

b. Impose additional fines and other penalties on parties or counsel in an amount not exceeding $5,000 for unreasonable delay, with the proceeds of the penalties paid into the Second Injury Fund;

c. Close proofs, dismiss a claim or suppress a defense as to any party;

d. Exclude evidence or witnesses;

e. Hold a separate hearing on any issue of contempt and, upon a finding of contempt by the judge of compensation, the successful party or the judge of compensation may file a motion with the Superior Court for enforcement of those contempt proceedings; and

f. Take other actions deemed appropriate by the judge of compensation with respect to the claim."

Ferguson v. Trenton Board of Education, No. A-3053-10T4 (App. Div. February 3, 2012)
The Appellate Division affirmed an award of counsel fees against respondent plus a penalty of 25% where the respondent unilaterally halted further payment of benefits.

Stancil v. ACE USA, (A-112-10) (067640) (August 1, 2012)
The New Jersey Supreme Court held that an injured employee does not have a common law right of action against a workers' compensation carrier for pain and suffering caused by the carriers delay in paying for or authorizing treatment.

N.J.S.A. 34:15-79 was also amended in 2009 to include penalties against employers who fail to provide workers' compensation insurance for their employees. The amendments included the following: N.J.S.A. 34:15-79(a)

1. An employer who fails to provide workers' compensation coverage shall be guilty of a disorderly persons offense. If the failure is knowing, the employer shall be guilty of a crime of the fourth degree and shall be subject to a stop-work order issued by the Director of the Division of Workers' Compensation.

2. Where the employer is a corporation, any officer actively engaged in the corporate business, including but not limited to the president, vice-president, secretary and treasurer shall be liable for failure to secure workers' compensation insurance.

3. Any contractor placing work with a subcontractor who fails to provide workers' compensation insurance shall be liable for any compensation which may be due. The contractor shall then have a right of action against the subcontractor for reimbursement.

N.J.S.A. 34:15-79(b)

1. An injured worker may seek benefits not paid by the "uninsured employer's fund" from a successor firm, corporation or partnership, and such shall have all the same responsibilities regarding workers' compensation required by the original employer.

2. A rebuttable presumption that an employer has established a successor firm, corporation or partnership shall arise if the two (2) share at least three (3) of the following capacities or characteristics:
    1. Perform similar work
    2. Occupy the same premises
    3. Have the same telephone or fax number
    4. Have the same email address or internet website
    5. Perform work in the same geographical area
    6. Employ substantially the same work force
    7. Utilize the same tools and equipment
    8. Employ or engage the services of any person or persons involved in the direction or control of the other
    9. List substantially the same work experience.

N.J.S.A. 34:15-79 (d)

1. Upon finding that an employer has failed for a period of not less than ten (10) consecutive days to secure workers' compensation insurance, the Director of the Division shall impose a penalty of up to $5,000 and when the period exceeds ten (10) days, an additional penalty of up to $5,000 for each period of ten (10) days thereafter.

2. Failure or refusal to comply with a stop work order shall result in the assessment of a penalty of not less than $1,000 and not more than $5,000 for each day found not to be in compliance.

3. All penalties collected under this section shall be paid into the "uninsured employer's fund".

N.J.S.A. 34:15-79(e)

1. An employer who knowingly failed to provide workers' compensation insurance or misrepresented one or more employees and independent contractors or knowlingly provided false, incomplete or misleading information concerning the number of employees, the director shall issue, not later than 72 hours after making the determination, a stop-work order requiring cessation of business operations at every site at which the violation occurred.

2. The order shall take effect when served upon the employer, or for a particular employer worksite, when served at that site.

3. The order shall remain in effect until the director issues an order releasing the stop-work order upon finding that the employer has come into compliance with the requirement of this section and has paid any assessed penalty.

N.J.S.A. 34:15-79.1 requires every corporation, limited partnership, limited liability company, limited liability partnership or other employer required by law to submit an annual report, to include valid proof of workers' compensation coverage. Valid proof of current workers' compensation coverage shall be in the form of:

1. Documentation of a current order from the Commissioner of Banking and Insurance authorizing the employer to be self-insured.

2. A letter from an insurance carrier or verification from the employer which includes the name of the carrier, insurance policy number and date of commencement of coverage under the policy.

**MOTIONS FOR MEDICAL AND TEMPORARY DISABILITY**

**MEDICAL TREATMENT**

N.J.S.A. 35:15-15 provides "[T]he employer shall furnish to the injured worker such medical, surgical and other treatment, and hospital service as shall be necessary to cure and relieve the worker of the effects of the injury…". The "right to control" is vested in the employer. Motions for medical treatment and temporary benefits must be filed in accord N.J.A.C. 12:235-3.2(a) which provides that a motion for medical and temporary disability must be on a form prescribed by the Division. An original notice of motion shall be filed with the district office to which the case is assigned and a copy with the claim petition to the attorney of record. If the attorney of record is unknown then service shall be made by certified mail on the respondent and its carrier. Motions for medical and temporary benefits must evidence that the petitioner is currently temporarily totally disabled and/or in need of current medical treatment. Where only past periods of temporary total disability and/or medical expenses are claimed, they should be presented at pretrial and not by motion under this section. N.J.A.C. 12:235-3.2(b) provides the specifics required including:

1. A detailed account of compensable lost time claimed by the petitioner, indicating any period paid by respondent.

2. Affidavits or certifications made in personal knowledge by the petitioner or petitioner's attorney, as well as the report(s) of a physician(s) stating the medical diagnosis and the specific type of diagnostic study, referral to specialist, or treatment being sought, and, if available, an itemized bill and report of the treating physicians or institutions or both for which services past, present and future, petitioner is seeking payment and such other evidence as shall relate to the petitioner's claim for temporary disability; and

3. If the petitioner, having received treatment, cannot secure a report of the medical provider authorized by the respondent, it shall be set forth in the affidavit in lieu of physician's report.

Hogan v. Garden State Sausage Co., 223 N.J. Super 364 (App. Div. 1988)

> A motion for temporary disability or medical benefits accompanied by supporting documentation can prevail without plenary hearing only if opposing documents are facially insufficient to fairly meet, contradict or oppose the material allegations of the documents in support of the motion. The Judge of Compensation may not decide the motion by assigning greater weight to one physician's report or another, but must confine the inquiry at this point to a review of the face of the filed documents. If there are sufficient uncontradicted facts favoring relief, the Judge may order such relief. If there are not, then, unless the respondent waives its right to cross-examination, the Judge must give the petitioner the opportunity to present witnesses for respondent's cross-examination and, if petitioner so elects, for direct examination. If the petitioner presents no witnesses, the motion for benefits must be denied. If witnesses are produced, then the Judge of Compensation will decide the motion after weighing all of the evidence properly produced by the parties.

Nielsen v. L. Peres & Associates, Inc., A-5522-02T5 (App. Div. 2004)

> Both parties relied upon the medical examination and report of a doctor retained by the respondent. The Judge denied respondent's objection to proceeding on the papers and request to have petitioner and the doctor testify in an evidentiary hearing. The Judge found that the doctor's report established a prima facie case entitling petitioner to the relief sought and respondent had submitted nothing to contradict the doctor's conclusions. The Appellate Court held the Judge's determination to proceed without a plenary hearing is consistent with standard set forth in Hogan.cited above.

N.J.S.A. 34:15-36 provides "Medical services, medical treatment, physicians' services and physicians' treatment" shall include but not be limited to, the services which a chiropractor is authorized by law to perform and which are authorized by an employer pursuant to the provisions of N.J.S.A. 34:15-1 In Squeo v. Comfort Control Corp., 99 N.J. 588 (1985) the Supreme Court found expenses in connection with an addition to Squeo's parent's home were medical in nature because they were necessary for his psychological recovery. The court found, extraordinary relief can only be granted in the unusual case based upon sufficient and competent medical evidence.

Howard v. Harwood's Restaurant Co., 25 N.J. 72 (1975) Medical treatment includes not only curative treatment but also palliative treatment.

Ham v. Anchor Glass Contrainer Corp., No. A-1797-09T3 (App. Div. January 20, 2011) the court held that there is no in-state limitation to medical treatment.

Examples of the requirement to provide medical treatment:

Sheffield v. Schering Plough Corp., 146 N.J. 442 (1996)
Raso v. Ross Steel Erectors, Inc., 319 N.J. Super. (App. Div. 1999)
Benson v. Coca Cola Co., 120 N.J. Super. 60 (App. Div. 1972)
Chubb Group v. Trenton Bd. Of Education, 304 N.J. Super. 10 (App. Div. 1997)

Although the "right to control treatment" is vested in the employer, Benson v. Coca Cola, 120 N.J. Super. 60 (App. Div. 1972) confirms that while the employer has an absolute obligation to provide medical care that right is limited where the treatment offered by the employer is ineffective or unreasonable. Benson also points out two major exceptions to the employer's right to control:

1. Where the treatment is ineffective;
2. Where the claim is denied and no treatment is offered.

Another exception to the "right to control" is in emergency situations where the employee has no time to contact his employer.

In Benson, the petitioner received treatment from a doctor of his own choosing and the court ruled that a "hind-sight" review to determine whether a further demand for treatment to the employer would have been futile, whether the treatment was adequate and whether the treatment procured by the employee was reasonably necessary to cure and relieve the effect of his injury and restore function where possible.

Examples of other cases regarding the "right to control":

Witty v. Fortunoff, 286 N.J. Super. 28 (App. Div. 1996)
Gartland v. The Homestead Insurance Company, No. A-5765-05T5 (App. Div. 1996)
Amey v. Friendly Ice Cream Shop, 231 N.J. Super. 278 (App. Div. 1989)

Hodgdon v. Project Packaging, Inc., 214 N.J.Super 352 (App. Div. 1986) and

Della Rosa v. Van-Rad Contracting, 267 N.J. Super 290 (App. Div. 1993) both hold that an order for temporary disability benefits is appealable as a matter of right. The Court in Della Rosa held that

> "[A]n award for temporary medical and disability benefits shares many of the characteristics of a final judgment. It may be docketed in Superior Court and executed upon. It is presently payable in the absence of a stay. Id. at 294

**TEMPORARY DISABILITY AND LIGHT DUTY**

TEMPORARY DISABILITY

N.J.S.A. 34:15-12(a) provides temporary disability for an injured worker of 70% of the weekly wages the worker was receiving during the year in which he was injured or the occupational disability manifested. Disability benefits will be paid during the period of time that the injured worker is unable to work and will continue even if the contract of employment has expired. In accord with N.J.S.A. 34:15-14 temporary disability payments shall not accrue and be payable until the employee has been disabled 7 days whether immediately following the accident or whether they are consecutive or not. The seven days shall be termed the waiting period.

N.J.S.A. 34:15-37 covers computation of the weekly wage rate when dealing with an injured worker who works less than the customary number of working days in an ordinary week. This statute provides that the weekly wage "…shall be found by multiplying the hourly rate by the number of hours of work regularly performed by that employee in the character of the work involved". N.J.S.A. 34:15-38 explains how to calculate the amount of temporary disability due an injured worker. It also explains that when the period of disability extends beyond the 7 day waiting period, the 7 days must be added to the amount of disability.

In Cunningham v. Atlantic States Cast Iron Pipe Co., 386 N.J. Super. 423 (App. Div 2006) the injured worker was terminated for cause from the job where he suffered an injury. After his termination he was advised by a doctor that he needed further treatment due to the work related injury. Cunningham then sought treatment and temporary disability benefits. The workers' compensation judge found the petitioner eligible for temporary disability benefits, the respondent appealed. The appellate Court found that a petitioner must establish that "but for" his work-related disability he would have been employed in order to receive disability benefits. However, the court in Cunningham was "mindful of [the] remedial and beneficient purposes [of the act] whey they adopted a more flexible approach. This approach requires a court to determine whether the petitioner would gain a windfall by receipt of temporary disability benefits; conversely, would this visit harm on the respondent.

In Wood v. Jackson Township, 383 N.J. Super. 250 (App. Div. 2006) upon the death of the injured worker who was receiving Social Security Benefits, the respondent became responsible to the widow for the full amount of workers' compensation benefits from the date of petitioner's death to the end of the designated period. Upon the petitioner's death, the basis for the respondent's offset under N.J.S.A. 34:15-95.5 was ended.

Dunlevy v. Kemper Ins. Group, 220 N.J. Super. 464 (App. Div. 1987) stands for the proposition that an injured worker does not have a common law right of recovery.

Other cases dealing with temporary disability benefits:

Tobin v. All Star Gymnastics, 378 N.J. Super. (App. Div. 2005)
Outland v. Monmouth-Ocean Educ. Serv. Comm'n., 154 N.J. 531 (1998)
Amorosa v. Jersey City Welding & Machine Works, 214 N.J. Super. 130 (App. Div. 1998)

Tamecki v. Johns Manville Products Corp., 125 N.J. Super. 355 (App. Div. 1973)

LIGHT DUTY AND TEMPORARY DISABILITY

In Harbatuk v. S&S Furniture Systems Insulation, 211 N.J. Super. 614 (App. Div. 1986) the workers' compensation judge denied the petitioner temporary disability benefits based on his belief that the petitioner was able to perform light duty. The appellate court reversed and remanded finding that "[W]e conclude that even if petitioner could perform light work, there is no showing that such work was available or if available was unjustifiably spurned by him [Harbatuk].

In Williams v. Tops Appliance City, 239 N.J. Super. 528 (App. Div. 1989) the Court found a denial of temporary disability benefits to be unreasonable where the petitioner was unable to perform his regular job or light duty work. It is the employer's burden to show that light duty work was offered. In Barbato v. Alsan Masonry, 64 N.J. Super. 514 (App. Div. 1974) the court opined that a "[P]etitioner was not obligated to show that light work was offered to petitioner and that it was refused. That would require him to establish a negative, something the law rarely, if ever, imposes.

In Cherry v. Edmund's Direct Mail, C.P. 2009-21068 (November 29, 2010) the Workers' Compensation judge found the petitioner's Unemployment benefits to be wage replacement which the petitioner had to forfeit because she was unable to work due to her work related injury. The judge found this loss of benefits "constitutes a "wage loss" sufficient for respondent to provide temporary disability benefits.

Additional Workers' Compensation Decisions regarding light duty:

In re: Salmons v. Wal-Mart Stores, Inc., C.P. 98-08251 (March 6, 2000)
Tamecki v. Johns-Manville, 125 N.J. Super. 355 (App. Div. 1973)

N.J.S.A. 34:15-75(a) Provides compensation conclusively presumed to be received by volunteer fireman, county fire marshals, volunteer first aide or rescue squad workers, volunteer drivers of ambulance, forest fire wardens or fighters, members of boards of education, and volunteer special reserve or auxiliary policemen, or in the event of his death, his dependents to receive the maximum compensation by this chapter and

(b) Not be subject to the seven-day waiting period provided in R.S. 34:15-14

**DIRECTOR CALDERONE'S MEMORANDUMS REGARDING ATTORNEY FEES AND MEDICAL EXPERT ALLOWANCES**

On September 29, 2011 Chief Judge and Director Calderone issued a Memorandum regarding the Division's policy on attorneys' fees in Motions for Medical and Temporary Disability Benefits. The memorandum stated:

> In order to expeditiously conclude successful Motions for Medical and Temporary disability Benefits where counsel fees had been reserved, counsel fees to petitioner's attorney should ordinarily be paid when active treatment pursuant to the motion has been completed. There is no need in such cases to delay the payment of counsel fees until the conclusion of other issues in the case.
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> In such situations, it is suggested that petitioner's attorney by letter inform the assigned judge and respondent's counsel and where applicable the Uninsured Employer's Fund that the attorney is requesting a determination and payment of counsel fees pursuant to the motion. Respondent must then expeditiously provide an accounting of the medical treatment and temporary disability benefits that were paid or expended pursuant to the motion order. The case should be listed by the judge to set the counsel fee and issue the approproriate counsel fee order.

On January 28, 2011 Director Calderone also issued a Memorandum of Agency policy regarding specialized medical expert allowances as follows:

> Where extraordinaly and specialized medical causation or treatment in a particular case require the testimony of medical experts who do not regularly appear as evaluating physicians and are not case treating physicians, the petitioner may request

that the Judge of Compensation authorize a maximum fee not covered by the general statutory evaluating and treating physician allowances. When represented by counsel, the petitioner's counsel shall represent that petitioner has been advised and has approved the need for a specialized medical expert with the understanding that the cost of the specialized medical expert would be assessed as a cost to the petitioner should the petitioner receive an award in the case.