

**COMPILATION OF  
NEW JERSEY WORKERS' COMPENSATION  
APPELLATE DECISIONS WITH COMMENT**

This compilation of leading New Jersey Supreme Court and Superior Court Appellate Division cases has been developed as a research tool for Judges of Compensation and the Workers' Compensation Bar. The "Comments" section in each chapter reflects the views of participants in the compilation project and is not intended to be the position of the Division of Workers' Compensation. Additionally, the list of cases is not considered exhaustive of relevant case law and the case narratives are not intended to comprise a complete summary of all case issues. Since this compilation is part of the Division's web-based judicial information system, it can be made current through additions, modifications and deletions as New Jersey's workers' compensation case law evolves in the future.<sup>1</sup>

The compilation was developed under the guidance of the Honorable Joan L. Mott (retired), who served until her retirement as an Administrative Supervisory Judge and as the Judicial Training Officer for the New Jersey Division of Workers' Compensation. The late Administrative Supervisory Judge Renée C. Ricciardelli, Melpomene Kotsines, Esq., Thomas W. Daly, Esq. and Deputy Attorney General Linda Schober provided necessary legal research and writing assistance for this project. Also, the computer and technical assistance of Ms. Heather Stabile of the Division of Workers' Compensation is also acknowledged and greatly appreciated.

Russell Wojtenko, Jr., Director and Chief Judge of  
the New Jersey Division of Workers' Compensation

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<sup>1</sup> The reader should note that prior to March 2, 1972, an appeal from the Division of Workers' Compensation was to the County Court, *de novo*, on the record. Since that date, appeal is to the Appellate Division of the Superior Court. Prior to March 2, 1972, the County Court was required "to bring a new mind to the case and conscientiously reach its own independent determination." After that date the standard for review became the same as that of any appeal in a non-jury case, i.e., "whether the findings made could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole with due regard to the opportunity of the one who heard the witnesses to judge of their credibility." *Close v. Kordulak Bros.*, [44 N.J. 589, 599](#) [Shepardize](#) (1965).

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## INTRODUCTION

Workers' Compensation is a system to compensate the injured worker without consideration of fault. This system developed to address the inequities of common law remedies. The injured worker, under the common law, was required to prove negligence of the employer to recover. The worker also had to overcome the employer's defenses of fellow servant, contributory negligence, and assumption of risk. This became a costly, time consuming and unreliable remedy. When the injured worker prevailed that worker could obtain a significant recovery, but the injured worker who didn't prevail might well become a public charge. Therefore this rather remarkable remedy of Workers' Compensation developed.

In exchange for the sometimes significant recovery to the worker who could prevail under the common law, every injured worker, with a few exceptions, receives a fixed compensation. Employers, while giving up their defenses, are only responsible in Workers' Compensation. Their liability is limited to "scheduled" compensation payments. Workers' Compensation is generally the exclusive remedy available to the injured worker against his employer and/or his co-employee.

Furthermore, the costs of injury or death incident to a business ultimately fall on the consumer of the product of that business. Compensation benefits in the first instance are paid by the business (employer) but then passed on as a cost of the product to the consumer.

Workers' Compensation is a compromise between the employer and employee in which each party surrendered certain advantages in order to gain others which are of greater importance to the parties and to society.

Workers' Compensation benefits for the non-fatal injury include the provision of medical treatment, temporary disability payments while an injured employee is unable to work and has not reached maximum medical improvement, and permanent disability. Dependency benefits are paid to statutorily defined survivors when death results from an injury due to employment.

The New Jersey Workers' Compensation Law was enacted in 1911. At that time there was a question of the Federal constitutionality of such a system, so an "elective" system was adopted. *N.J.S.A. 34:15-7* includes a presumption of acceptance, or election, to submit to the jurisdiction of the Workers' Compensation Act, unless the employer and employee declare in writing prior to the happening of an accident that they do not intend to be bound by the Act. If the employee and the employer agree not to accept the jurisdiction of the Act then the employer must "make sufficient provision for the complete payment of any obligation which he may

incur to an injured employee . . .” (*N.J.S.A.* 34:15-72). Should an employer and employee elect not to be bound by the Workers' Compensation Act then the injured worker may seek his or her common law remedy. In addition to providing for the Workers' Compensation remedy in 1911, the Legislature also provided that if the employer and employee elected not to be bound by the Workers' Compensation Act then the employee could prevail under the common law if "the actual or lawfully imputed negligence of the employer" proximately caused the injury and if the employee was not "willfully negligent" (*N.J.S.A.* 34:15-1). The employer's defenses of fellow servant and assumption of risk were also abolished (*N.J.S.A.* 34:15-2). While New Jersey is technically an elective state, workers' compensation coverage has had universal acceptance for workplace injury restitution. *Peck v. Newark Morning Ledger Co.*, [344 N.J. Super. 169](#) [Shepardize](#) (App. Div. 2001).

For recent cases that discuss the history and development of the Workers' Compensation remedy see *Lindquist v. City of Jersey City Fire Dep't*, [175 N.J. 244](#) [Shepardize](#) (2003) and *Brunell v. Wildwood Crest Police Dep't*, [176 N.J. 225](#) [Shepardize](#) (2003).

There are "certain well-established principles" that ought to be kept in mind.

"For almost one hundred years, under the Workers' Compensation Act, our State has afforded protection to and for workers injured at the workplace. The Act is but one part of a statutory, decisional, and constitutional mosaic that provides dignity for all our citizens in the workplace, but it is a significant piece nonetheless. Courts may parse testimony and refine tests, as we have done here. But, as we do, we must remain mindful that this "humane social legislation," *Hornyak v. Great Atlantic & Pacific Tea Co.*, [63 N.J. 99, 101](#) [Shepardize](#) (1973) must be liberally construed "in order that its beneficent purposes may be accomplished." *Torres v. Trenton Times Newspaper*, [64 N.J. 458, 461](#) [Shepardize](#) (1974); see also *Fiore v. Consol. Freightways*, [140 N.J. 452, 465](#) [Shepardize](#) (1995)." *Sager v. O.A. Peterson Constr. Co.*, [182 N.J. 156, 169](#) [Shepardize](#) (2004).

Because of the ameliorative effect that the Workers' Compensation Act was intended to have (swift recompense for injured employees), it is characterized as important social legislation. As a salutary remedial enactment, it is entitled to liberal construction. The statute is to be construed to bring as many cases as possible within its coverage. See *Lindquist* and *Brunell*.

The employer takes an employee as is, subject to all the weaknesses and infirmities the employee possesses, even though they render the employee more susceptible to injury. *Capano v. Bound Brook Relief Fire Co. #4*, [356 N.J. Super. 87](#) [Shepardize](#) (App. Div. 2002), citing *Bober v. Independent Plating Corp.*, [28 N.J. 160](#) [Shepardize](#) (1958) and *Belth v. Anthony Ferrante & Son, Inc.*, [47 N.J. 38](#) [Shepardize](#) (1966).

The standard for review of a decision of a Judge of Compensation by the Appellate Division is the same as that on appeal in any non-jury case, “whether the findings made could reasonably have been reached on sufficient credible evidence present in the record” considering “the proofs as a whole” with due regard to the opportunity of the one who heard the witnesses to judge their credibility and in the case of agency review, with due regard also to the agency’s expertise where such expertise is a pertinent factor. *Close v. Kordulak Bros.*, [44 N.J. 589](#) [Shepardize](#) (1965). But the Judge of Compensation must keep in mind that although compensation judges are regarded as experts and their findings are entitled to deference, such findings must be supported by articulated reasons and grounded in the evidence. *Lewicki v. New Jersey Art Foundry*, [88 N.J. 75](#) [Shepardize](#) (1981).

In 1979, following hearings and reports of three study commissions over some twenty years, the Legislature undertook a far reaching revision of the New Jersey Workers' Compensation Act; These reforms are the basis for the Workers Compensation process as we know it today, having significantly affected the judicial interpretation of the original Act. *Perez v. Pantasote*, [95 N.J. 105](#) [Shepardize](#) (1984).

## **LEGISLATIVE HISTORY**

*Senate Labor, Industry and Professions Committee, Joint Statement to Senate No. 802 SCS and Assembly No 840 ACS, November 13, 1979. Purposes of the 1979 amendments.*

SENATE LABOR, INDUSTRY AND  
PROFESSIONS COMMITTEE

JOINT STATEMENT TO  
SENATE COMMITTEE SUBSTITUTE FOR

**SENATE, No. 802**

**And**

ASSEMBLY COMMITTEE SUBSTITUTE FOR

**ASSEMBLY, No. 840**

**STATE OF NEW JERSEY**

DATED: NOVEMBER 13, 1979

This bill is a revision of New Jersey Workers' Compensation Law and would make available additional dollars for benefits to seriously disable workers while eliminating, clarifying or tightening awards of compensation based upon minor permanent partial disabilities not related to the employment.

The bill would put significantly more money into the hands of the more seriously injured workers while providing genuine reform and meaningful cost containment for New Jersey employers from unjustified workers' compensation costs that are presently among the highest in the nation.

This legislation will increase the current maximum \$40.00 per week permanent partial disability rate to maximum weekly rates ranging up to 75% of the statewide average weekly wage based upon the degree of disability awarded. It would also increase the current maximum rate established for temporary disability, permanent total disability and dependency claims from 66 2/3 % of the statewide average weekly wage to 75% of the statewide average weekly wage. Calculated on the basis of the statewide average weekly wage used to determine 1979 awards, maximum awards to workers for work-related amputations would increase by approximately these amounts: arm-\$12,000.00 to \$55,340.00; leg-\$11,000.00 to \$52,825.00; hand-\$9,200.00 to \$33,440.00; and foot-\$8,00 to \$28,100.00. Since these awards are based on a percentage of the statewide average weekly wage, they will increase as the average wage increases. New Jersey's rank among the 48 contiguous states for these maximum amputations would improve as follows: arm, 47<sup>th</sup> to 6<sup>th</sup>; leg, 47<sup>th</sup> to 5<sup>th</sup>; hand, 47<sup>th</sup> to 13<sup>th</sup>; and foot, 46<sup>th</sup> to 13<sup>th</sup>. The maximum duration and the benefit amounts for work-connected permanent partial disability would increase from the current 550 weeks at \$40.00 per week (\$22,000.00) to a new maximum of 600 weeks at 75% of the statewide average weekly wage or \$176.00 per week in 1979 (about \$105,00.00). Burial benefits for work-related deaths would increase from \$750.00 to \$2,000.00.

This bill would benefit employers by: (1) allowing credits for pre-existing disabilities to employers in the determination of awards for permanent partial and permanent total disability claims; (2) counter the far-

reaching effects of *Dwyer v. Ford* in cardiac claims by requiring that the petitioner prove that the injury or death involved substantial effort or strain which was in excess of the rigors of the claimant's daily living and that the cause of injury or death was job-related in a material degree; (3) defining permanent partial disability as a work-related disease, demonstrated by objective medical evidence and diminution of the claimant's work ability; objective medical evidence is understood to mean evidence exceeding the subjective statement of the petitioner; (4) restricting the "odd lot" doctrine by a redefinition of permanent total disability; (5) clarifying the effect of the decision in *Brown v. General Aniline* by permitting compensation judges to enter an award approving settlement in matters where causal relationship, jurisdiction, dependency or liability are in issue, resulting in the payment of a lump sum having the effect of a dismissal of the petition and a complete surrender of any future right to compensation or other benefits arising out of that claim; (6) declaring injuries sustained during recreational or social activities sponsored by the employer to be noncompensable unless such activities are a regular part of employment; (7) excluding from compensability degenerative changes due to the natural aging process and limiting compensation for occupational diseases to those which are characteristic of and peculiar to a particular employment; (8) establishing relief from the far-reaching effect of the "Going and Coming Rule" decisions by defining and limiting the scope of employment; and (9) precluding retroactive application of the Statute of Limitations to occupational disease claims except in specific enumerated cases involving latent manifestation.

The bill would limit the base upon which to determine attorney fees, to be paid by the worker or his dependents and by the employer, to the amount awarded beyond an employer's offer, providing that offer is made within designated time frames.

Although this bill would be effective immediately, the provisions of the bill will apply only to accidents and occupational disease exposures which occur on or after January 1, 1980, and would not be applied retroactively to accidents or occupational diseases occurring prior to January 1, 1980, except in cases where claim is made for an occupational disease characterized by latent manifestation as set forth in *R.S. 34:15-34*.

This legislation also requires additional reporting by the Commissioner of Labor and Industry, including a detailed analysis to the responsible legislative committees on the effect of these changes after 18 months of experience. The commissioner would also prepare and make available to interested parties a monthly analysis of all claims filed and settled in the State.

On the recommendation of the Commission on sex Discrimination in the Statutes, and based on the New Jersey Supreme Court's decision in *Tomarchio v. Township of Greenwich*, [\*75 N.J. 62\*](#) *Shepardize* (1977), the bill would require that widowers, like widows, receive an automatic presumption of dependency. Administratively, the Division of Workers' Compensation is already conforming to the court's decision.

The Senate Labor, Industry and Professions Committee and the Assembly Labor Committee expressed their feeling that rehabilitation is a priority issue which must be addressed within the next two years. The statistics gathered by the Department of Labor and Industry in the first 18 months of experience with this bill will hopefully provide the basis for an extensive review of rehabilitation for disabled workers in New Jersey.

## CHAPTER ONE: EMPLOYER – EMPLOYEE RELATIONSHIP

The New Jersey Workers' Compensation Act applies to accidents and occupational diseases that arise out of and in the course of employment. Therefore, it is necessary at the outset to consider whether an employment relationship exists.

### STATUTORY PROVISIONS

#### 1. Definition of employer / employee / casual employment.

*N.J.S.A. 34:15-36* defines employer, employee and casual employment as follows:

Employer" is declared to be synonymous with master, and includes natural persons, partnerships, and corporations; "employee" is synonymous with servant, and includes all natural persons, including officers of corporations who perform service for an employer for financial consideration exclusive of (1) employees eligible under the federal "Longshore and Harbor Workers Act" 44 Stat. [1424 \(U.S.C. § 901 Shepardize](#) et seq.) for benefits payable with respect to accidental death or injury, or occupational disease or infection; and (2) casual employments, which shall be defined, if in connection with an employer's business, as employment the occasions for which arises by chance or is purely accidental; or if not in connection with any business of the employer, as employment not regular, periodic, or recurring; provided, however, that forest fire wardens and forest firefighters employed by the State of New Jersey shall, in no event, be deemed casual employees.

#### 2. Public Employees and Officers (including definitions of doing public fire duty, police duty and emergency management service).

*N.J.S.A. 34:15-43* provides:

Every officer, appointed or elected, and every employee of the State, county, municipality or any board or commission, or any other governing body, including boards of education, and governing bodies of service districts, individuals who are under the general supervision of the Palisades Interstate Park Commission and who work in that part of the Palisades Interstate Park which is located in this State, and also each and every member of a volunteer fire company doing public fire duty and also each and every active volunteer, first aid or rescue squad worker, including each and every authorized worker who is not a member of the volunteer fire company within which the first aid or rescue squad may have been created, doing public first aid or rescue duty under the control or supervision of any commission, council, or any other governing body of any municipality, any board of fire

commissioners of such municipality or of any fire district within the State, or of the board of managers of any State institution, every county fire marshal and assistant county fire marshal, every special, reserve or auxiliary policeman doing volunteer public police duty under the control or supervision of any commission, council or any other governing body of any municipality, every emergency management volunteer doing emergency management service for the State and any person doing volunteer work for the Division of Parks and Forestry, the Division of Fish and Wildlife, or the New Jersey Natural Lands Trust, as authorized by the Commissioner of Environmental Protection, or for the New Jersey Historic Trust, who may be injured in line of duty shall be compensated under and by virtue of the provisions of this article and article 2 of this chapter (*R.S. 34:15-7 et seq.*). No former employee who has been retired on pension by reason of injury or disability shall be entitled under this section to compensation for such injury or disability; provided, however, that such employee, despite retirement, shall, nevertheless, be entitled to the medical, surgical and other treatment and hospital services as set forth in *R.S. 34:15-15*.

Benefits available under this section to emergency management volunteers and volunteers participating in activities of the Division of Parks and Forestry, the Division of Fish and Wildlife, the New Jersey Natural Lands Trust or the New Jersey Historic Trust, shall not be paid to any claimant who has another single source of injury or death benefits that provides the claimant with an amount of compensation that exceeds the compensation available to the claimant under *R.S. 34:15-1 et seq.*

As used in this section, the terms "doing public fire duty" and "who may be injured in line of duty," as applied to members of volunteer fire companies, county fire marshals or assistant county fire marshals, and the term "doing public first aid or rescue duty," as applied to active volunteer first aid or rescue squad workers, shall be deemed to include participation in any authorized construction, installation, alteration, maintenance or repair work upon the premises, apparatus or other equipment owned or used by the fire company or the first aid or rescue squad, participation in any State, county, municipal or regional search and rescue task force or team, participation in any authorized public drill, showing, exhibition, fund raising activity or parade, and to include also the rendering of assistance in case of fire and, when authorized, in connection with other events affecting the public health or safety, in any political subdivision or territory of another state of the United States or on property ceded to the federal government while such assistance is being rendered and while going to and returning from the place in which it is rendered.

Also, as used in this section, "doing public police duty" and "who may be injured in line of duty" as applied to special, reserve or auxiliary policemen, shall be deemed to include participation in any authorized public drill, showing, exhibition or parade, and to include also the rendering of assistance in connection with other events affecting the public health or safety in the municipality, and also, when authorized, in connection with any such events in any political subdivision or territory of this or any other state of the United States or on property ceded to the federal government while such assistance is being rendered and while going to and returning from the place in which it is rendered.

As used in this section, the terms "doing emergency management service" and "who may be injured in the line of duty" as applied to emergency management volunteers mean participation in any activities authorized pursuant to P.L. 1942, c. 251 (C. App. A:9-33 et seq.), including participation in any State, county, municipal or regional search and rescue task force or team, except that the terms shall not include activities engaged in by a member of an emergency management agency of the United States Government or of another state, whether pursuant to a mutual aid compact or otherwise.

Every member of a volunteer fire company shall be deemed to be doing public fire duty under the control or supervision of any such commission, council, governing body, board of fire commissioners or fire district or board of managers of any State institution within the meaning of this section, if such control or supervision is provided for by statute or by rule or regulation of the board of managers or the superintendent of such State institution, or if the fire company of which he is a member receives contributions from, or a substantial part of its expenses or equipment are paid for by, the municipality, or board of fire commissioners of the fire district or if such fire company has been or hereafter shall be designated by ordinance as the fire department of the municipality.

Every active volunteer, first aid or rescue squad worker, including every authorized worker who is not a member of the volunteer fire company within which the first aid or rescue squad may have been created, shall be deemed to be doing public first aid or rescue duty under the control or supervision of any such commission, council, governing body, board of fire commissioners or fire district within the meaning of this section if such control or supervision is provided for by statute, or if the first aid or rescue squad of which he is a member or authorized worker receives or is eligible to receive contributions from, or a substantial part of its expenses or equipment are paid for by, the municipality, or board of fire commissioners of the fire district, or if such first aid or rescue squad has been or hereafter shall be designated by ordinance as the first aid or rescue squad of the municipality.

As used in this section and in *R.S. 34:15-74*, the term "authorized worker" shall mean and include, in addition to an active volunteer fireman and an active volunteer first aid or rescue squad worker, any person performing any public fire duty or public first aid or rescue squad duty, as the same are defined in this section, at the request of the chief or acting chief of a fire company or the president or person in charge of a first aid or rescue squad for the time being.

A member of a volunteer fire company, active volunteer first aid or rescue squad worker, county fire marshal, assistant county fire marshal, special, reserve or auxiliary policeman or emergency management volunteer serving a volunteer organization duly created and under the control or supervision of any commission, council or any other governing body of any municipality, any board of fire commissioners of that municipality or of any fire district within the State, or of the board of managers of any State institution, who participated in a search and rescue task force or team in response to the terrorist attacks of September 11, 2001 without the authorization of that volunteer organization's governing body and who suffered injury or death as a result of participation in that search and rescue task force or team shall be deemed an employee of this State for the purpose of workers'

compensation benefits as would have accrued if the injury or death had occurred in the performance of the duties of the volunteer company or squad of which he was a member.

Whenever a member of a volunteer fire company, active volunteer first aid or rescue squad worker, county fire marshal, assistant county fire marshal, special, reserve or auxiliary policeman or emergency management volunteer serving a volunteer organization duly created and under the control or supervision of any commission, council or any other governing body of any municipality, any board of fire commissioners of that municipality or of any fire district within the State, or of the board of managers of any State institution, participates in a national, multi-state, State, municipal or regional search and rescue task force or team without the authorization of that volunteer organization's governing body but pursuant to a Declaration of Emergency by the Governor of the State of New Jersey specifically authorizing volunteers to respond immediately to the emergency without requiring the authorization of the volunteer company or squad, and the member of the volunteer fire company, active volunteer first aid or rescue squad worker, county fire marshal, assistant county fire marshal, special, reserve or auxiliary policeman or emergency management volunteer suffers injury or death as a result of participation in that search and rescue task force or team, he shall be deemed an employee of this State for the purpose of workers' compensation benefits as would have accrued if the injury or death had occurred in the performance of the duties of the volunteer company or squad of which he was a member.

Nothing herein contained shall be construed as affecting or changing in any way the provisions of any statute providing for sick, disability, vacation or other leave for public employees or any provision of any retirement or pension fund provided by law.

### 3. Statutory Employer (Contractor – Uninsured Sub-Contractor).

*N.J.S.A.* 34:15-79 provides in part:

Any contractor placing work with a subcontractor shall, in the event of the subcontractor's failing to carry workers' compensation insurance as required by this article, become liable for any compensation which may be due to an employee or the dependents of a deceased employee of a subcontractor. The contractor shall then have a right of action against the subcontractor for reimbursement.

(See also Horse Racing Injury Compensation Board Act at *N.J.S.A.* 34:15-129 to 142.)

#### COMMENT

The Worker's Compensation statute is to be liberally construed so as to bring as many persons as possible within the coverage of the Act. *Hannigan v. Goldfarb*, [53 N.J. Super. 190](#) [Shepardize](#) (App. Div. 1958). Therefore, a variety of working relationships have been held to be covered by the Act, including some not necessarily confined to traditional employment settings.

The appellate courts have applied two tests, the "control test" and the "relative nature of the work test".

The "control test" is the older of the two and is based upon the theory that an independent contractor is one who carries on a separate business and contracts to do work according to his/her own methods, without being subject to the control of an employer except as to the results. When the relationship is that of an employer – employee, the employer retains the right to control what is done and the manner in which the work is completed. It is significant that the "control test" is satisfied so long as the employer has the right to control even if there is no exercise of that control.

The "relative nature of the work test" is the more modern of the two for purposes of the Workers' Compensation Act. This test is essentially an economic and functional one and the determinative criteria are not the inclusive details of the arrangement between the parties, but rather the extent of the economic dependence of the worker upon the business he/she serves and the relationship of the nature of his/her work to the operation to that business.

With the advent of temporary agencies and/or specialized agencies (the general employer) that provide workers to businesses or individuals, the issue of the existence of an employer-employee relationship of the worker to the supplied (or special) employer has been considered by the appellate courts. The applicable, though not exclusive, legal criteria to establish a special employer-special employee relationship involves the following fact sensitive five-pronged test:

- (1) the employee has made a contract of hire, express or implied, with the special employer;
- (2) the work being done by the employee is essentially that of the special employer;
- (3) the special employer has the right to control the details of the work;
- (4) the special employer pays the employee's wages; and
- (5) the special employer has the power to hire, discharge or recall the employee.

The issue of whether there is an employee-employer relationship is of importance in civil litigation. Employers sued in the Superior Court raise the defense of the exclusivity of the Workers' Compensation remedy (*N.J.S.A.* 34:15-8). See *Galvao v. G.R. Robert Constr. Co.*, [179 N.J. 462](#) [Shepardize](#) (2004); and *Volb v. G. E. Capital Corp.*, [139 N.J. 110](#) [Shepardize](#) (1995).

## TABLE OF CASES

[Estate of Kotsovska v. Liebman](#) 433 [N.J. Super.](#) 537 (App. Div. 2013) Decided December 26, 2013.

Defendant appealed final judgment and jury verdict in favor of plaintiff in wrongful death action,

contending decedent was his employee and thus the Workers' Compensation Act's exclusivity bar ([N.J.S.A. 34:15-8](#)) prohibited the estate from maintaining this action in civil court. The Appellate Division reversed the judgment of liability because the jury was improperly instructed on the question of employment relationship and remanded the matter to the Division of Workers' Compensation for its determination of whether decedent was defendant's employee or an independent contractor. The Division of Workers' Compensation was also directed to afterward transfer the case back to the civil court so it could either reinstate judgment in favor of the estate or dismiss the matter based on the Division's determination.

*Re/Max of New Jersey, Inc. v. Wausau Ins. Co.*, [162 N.J. 282](#) [Shepardize](#) (2000). Real estate agents are employees of the broker for whom they work under the "control test and the "relative nature of work test."

*Fitzgerald v. Tom Coddington Stables*, [370 N.J. Super. 582](#) [Shepardize](#) (App. Div. 2004). The New Jersey Horse Racing Injury Compensation Board is responsible for payment of workers' compensation to an employee of Tom Coddington Stables injured while returning horses from a race track to the stable. As an individual performing services for a trainer in connection with the racing of a horse in New Jersey petitioner is a "horse racing industry" employee.

*Auletta v. Bergen Ctr. for Child Dev.*, [338 N.J. Super. 464](#) [Shepardize](#) (App. Div.), *certif. denied*, [169 N.J. 611](#) [Shepardize](#) (2001). Petitioner, a part-time (2 days/week) school psychologist was an employee under the right to control test and the relative nature of the work test. Petitioner was injured during a staff/student tournament football game. His injuries were found to be compensable under the Workers' Compensation Act. (*Note: This case discusses many of the cases listed below in a clear manner.*)

*Lesniewski v. W.B. Furze Corp.*, [308 N.J. Super. 270](#) [Shepardize](#) (App. Div. 1998). A supervisor at a construction site is an independent contractor, although he or she is paid *per diem*, if (1) the *per diem* rate does not give the landowner control over the supervisor's work schedule or pace, and (2) the term of the supervisor's work is set by agreement between the landowner and the supervisor. When an owner of property has a building constructed on it for the owner's use, the owner does not *ipso facto* become a contractor by letting out masonry, plumbing, carpentry and electrical work to different people. The owner is not in the business of building structures.

*Sloan v. Luyando*, [305 N.J. Super. 140](#) [Shepardize](#) (App. Div. 1997). Worker while riding as a passenger in car driven to place of employment by sole proprietor, owned by sole proprietor's father, was determined to be an employee and not an independent contractor considering "control test" and "relative nature of work test."

*Street v. Universal Maritime*, [300 N.J. Super. 578](#) [Shepardize](#) (App. Div. 1997). Amendment to statute eliminating Longshore and Harbor workers as employees under the New Jersey Workers' Compensation Act effective June 22, 1994, is prospective only.

*Fernandez-Lopez v. Jose Cervino, Inc.*, [288 N.J. Super. 14](#) [Shepardize](#) (App. Div. 1996). An undocumented alien is entitled to workers' compensation benefits.

*Kertesz v. Korsh*, [296 N.J. Super. 146](#) [Shepardize](#) (App. Div. 1996). Respondent contracted to sheetrock an entire project. Petitioner, an experienced sheetrocker, was hired from time to time and worked for respondent three or four times a month. Based upon "the relative nature of the work" test, petitioner was found to be an employee and entitled to workers' compensation benefits.

*Swillings v. Mahendroo*, [262 N.J. Super. 170](#) [Shepardize](#) (App. Div. 1993). A registered nurse who obtained an assignment from a nurse's registry to care for a patient in the patient's home is an independent contractor and not an employee of the patient. Therefore she was permitted to maintain a civil action in Superior Court for injuries sustained at patient's home. She worked as a professional under doctor's orders based upon her medical knowledge and not under the control of the patient even though she occasionally performed minor household services.

*Pollack v. Pino's Formal Wear & Tailoring*, [253 N.J. Super. 397](#) [Shepardize](#) (App. Div.), *certif. denied*, [130 N.J. 6](#) [Shepardize](#) (1992). Respondent Pino owned a dry cleaning establishment and hired Polgardy, an uninsured, to install equipment. Polgardy hired Pollack to assist him. The Court found that Pino, the owner, was not a general contractor owing Pollack compensation benefits because of Polgardy's uninsured status.

*Murin v. Frapaul Constr. Co.*, [240 N.J. Super. 600](#) [Shepardize](#) (App. Div. 1990). Where company rents a cement truck and operator and operator is injured by an employee of the company renting the truck, the operator is not an employee of company renting trucks for the purpose of prohibiting a common law action.

*Harrison v. Montammy Golf Club*, [227 N.J. Super. 409](#) [Shepardize](#) (Law Div. 1988). A caddie is an employee of a golf club and not of the golfer by whom the caddie was paid.

*Pickett v. Tryon Trucking Co.*, [214 N.J. Super. 76](#) [Shepardize](#) (App. Div. 1986), *certif. denied*, [107 N.J. 149](#) [Shepardize](#) (1987). Driver of a truck leased exclusively to trucking company was employee of trucking company. *See also Tofani v. Lo Biondo Brothers Motor Express, Inc.*, [83 N.J. Super. 480](#) [Shepardize](#) (App. Div.), *aff'd o.b.* [43 N.J. 494](#) [Shepardize](#) (1964).

*Drake v. County of Essex*, [192 N.J. Super. 177](#) [Shepardize](#) (App. Div. 1983). A prisoner in county penal institution is not an employee. The prisoner's services were not performed pursuant to a bargained for and voluntarily entered into contract for hire. The ability of hire and fire are lacking.

*Veit v. Courier Post Newspaper*, [154 N.J. Super. 572](#) [Shepardize](#) (App. Div. 1977). A substitute designated by a newsboy, in this case his mother, is an employee of the newspaper. Respondent newspaper encouraged news carriers who could not complete appointed rounds to engage a substitute.

### ***Casual Employment:***

*Graham v. Green*, [31 N.J. 207](#) [Shepardize](#) (1959). Cleaning up broken bottles was a regular incident of operation of a soft drink distributor's business and therefore not casual employment. This opinion by Justice Weintraub defines the terms "casual" and "chance".

*DeMarco v. Bouchard*, [274 N.J. Super. 197](#) [Shepardize](#) (Law Div. 1994). Baby sitter employed on a single occasion is a casual employee.

*Martin v. Pollard*, [271 N.J. Super. 551](#) [Shepardize](#) (App. Div.), *certif. denied*, [137 N.J. 307](#) [Shepardize](#) (1994). Worker injured when he fell from roof while painting his landlord's house was independent contractor or casual employee.

*Biger v. Erwin*, [108 N.J. Super. 293](#) [Shepardize](#) (Cty. Ct. 1970), *aff'd. o.b.*, [57 N.J. 95](#) [Shepardize](#) (1970). A jockey was an employee of race horse owner and not a casual employee.

*Herritt v. McKenna*, [77 N.J. Super. 409](#) [Shepardize](#) (App. Div. 1962), *certif. denied* [40 N.J. 213](#) [Shepardize](#) (1963). Baby sitter a casual employee. The employment was not regular, periodic or recurring.

### ***General v. Special Employees:***

*Kelly v. Geriatric and Medical Services, Inc.*, [287 N.J. Super. 567](#) [Shepardize](#) (App. Div.), *aff'd o.b.* [147 N.J. 42](#) [Shepardize](#) (1996). An employee of a temporary nursing service provider who was injured while assigned to work at a convalescent center was a special employee of the center and therefore unable to maintain a common law cause of action against the center.

*Antheunisse v. Tiffany & Co.*, [229 N.J. Super. 399](#) [Shepardize](#) (App. Div. 1988), *certif. denied*, [115 N.J. 59](#) [Shepardize](#) (1989). A temporary worker was sent to company for employment through an agency supplying temporary help. The company using the temporary employee is a "special employer."

*Santos v. Standard Havens, Inc.* [225 N.J. Super. 16](#) [Shepardize](#) (App. Div. 1988). An employee while working at employer's wholly owned subsidiary was a "special employee" of the subsidiary under the right to control test or relative nature of the work test.

## CHAPTER TWO: ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

Having determined that an employee-employer relationship exists the next question which must be addressed is the parameters of coverage of the Workers' Compensation Act. If an employee has been exposed to some risk that results in injury or death, does that risk fall within the Workers' Compensation Act?

### STATUTORY PROVISION

*N.J.S.A. 34:15-7* provides in part:

When employer and employee shall by agreement, either express or implied, as hereinafter provided, accept the provisions of this article, compensation for personal injuries to, or for the death of, such employee by accident arising out of and in the course of employment shall be made by the employer without regard to the negligence of the employer, according to the schedule contained in sections 34:15-12 and 34:15-13. (emphasis supplied)

### COMMENT

*In the course of employment* refers to the time, place, and circumstances of the accident in relation to the employment. An accident arises in the course of employment when it occurs:

- (1) within the period of the employment, and
- (2) at a place where the employee may reasonably be, and
- (3) while employee is reasonably fulfilling the duties of the employment, or doing something incidental thereto.

*Arising out of employment* refers to the causal origin of the accident in relation to the employment. It requires an analysis of the risk which gave rise to the injury and whether such risk is contemplated as an incident of the employment.

The "but-for" or positional risk rule is now a fixture in New Jersey law. That test asks whether it is more probably true than not that the injury would have occurred during the time and place of employment rather than elsewhere. Unless it is more probable that the injury would not have occurred under the normal circumstances of everyday life outside of the employment, the necessary causal connection has not been established. The "but-for" or positional risk doctrine includes as one of its components the nature of the risk that causes the injury. These include:

- (1) **the risks distinctly associated with the employment** - all the obvious kinds of injury one thinks of as an "industrial injury." All the things that can go wrong around a modern

factory, mill, transportation system, or construction project -machinery breaking, objects falling, explosives exploding, tractors tipping, etc. Such injuries are compensable.

(2) **neutral risks** - uncontrollable circumstances that do not originate in the employment but rather happen to befall the employee during the course of employment - acts of God such as lightning. Such injuries are compensable.

(3) **risks personal to the employee** - the personal proclivities or contacts of the employee which give rise to the harm so that even though the injury takes place during the employment, compensation is denied.

### ***Activities Directed By Employer***

When an employee acts at the direction of an employer, even in what might be considered a social activity, such action can bring the employee within the scope of his employment. An employer always retains the power to expand the scope of employment by directing the employee to engage in tasks outside of the employee's general job duties.

### ***Minor Deviation***

An employee may not need to be actually performing the work of the employer to be protected under the Act. Its protection extends to injuries sustained within the scope of the work-period and workplace while the employee is engaged in personally motivated but customary or reasonably expected activities, such as smoking, making phone calls, eating, or using the lavatory. See *Jumpp v. City of Ventnor*, [177 N.J. 470, 479](#) [Shepardize](#) (2003).

### **TABLE OF CASES**

*Cooper v. Barnickel Enterprises, Inc.*, [411 N.J. Super. 343](#) [Shepardize](#) (App. Div. 2010) Petitioner was injured while driving his employer's truck when he went on a short trip from his union hall to a nearby delicatessen to get coffee. The compensation judge found petitioner's injuries compensable under N.J.S.A.34:15-7 because they arose out of and in the course of employment. The Appellate Division affirmed, finding this accident compensable where the petitioner was an "off-premises employee" making a "minor deviation" from employment during a coffee break (i.e., rather than leaving work to go on a purely "personal errand").

*Sexton v. County of Cumberland*, [404 N.J. Super. 542](#) [Shepardize](#) (App. Div. 2009). Petitioner alleged that her pre-existing respiratory illness (COPD) was aggravated by a co-worker spraying perfume into the air of the workplace. The workers' compensation judge found that such aggravation was not compensable because it did not arise out of the employment but instead arose out of a personal proclivity of the petitioner. The Appellate Division reversed his conclusion, finding that such an aggravation was compensable under [N.J.S.A.34:15-7](#) because it did arise out of this employment.

*Sager v. O.A. Peterson Constr. Co.* [182 N.J. 156](#) [Shepardize](#) (2004). On September 11, 2001, petitioner who was working on Long Island for a New Jersey construction company, was injured in a head-on motor vehicle accident. Employer's supervisor testified that at about 3:00 pm, the usual end of the work day, he suggested to his crew that they go to a diner for an early supper and then return to the job site and perform overtime work since it seemed that they could not return to New Jersey because all tunnels and bridges were closed. After eating dinner and while returning to the job site the motor vehicle accident occurred. Petitioner's injuries arose out of and in the course of his employment. The supervisor's direction brought this trip within the scope of employment since an employer always retains the power to expand the scope of employment.

*Jumpp v. City of Ventnor*, [177 N.J. 470](#) [Shepardize](#) (2003). A city employee, whose daily assignment required that he visit various sites within the city, stopped at the post office, with his supervisor's permission, to pick up his personal mail, fell and was injured. The court found that *Jumpp* was on a personal errand and, therefore, not entitled to Workers' Compensation benefits. Generally, there must be a finding that the off-premises worker is performing his or her work responsibilities at the time of injury, to be compensable. However, the court also ruled that compensability of accidents that occur during minor deviations by an employee, whether off-premises or on-premises, survive the 1979 amendments to the Act. *Justices Long* and *Zazzali* dissent arguing that the post office stop was a minor deviation for this off-premises employee, not unlike an on-premises employee who is injured while walking across an office to retrieve a piece of personal mail.

*Coleman v. Cycle Transformer Corp.*, [105 N.J. 285](#) [Shepardize](#) (1986). Employee who was injured as the result of setting her hair on fire with a lit cigarette during an unpaid lunch hour did not suffer an accident arising out of and in the course of her employment.

*Thornton v. Chamberlain Mfg. Corp.*, [62 N.J. 235](#) [Shepardize](#) (1973). Foreman, attacked by a former co-employee at a bar nine days after the foreman had terminated the co-employee following repeated reprimands, suffered an accident arising out of and in the course of employment.

*George v. Great Eastern Food Products, Inc.*, [44 N.J. 44](#) [Shepardize](#) (1965). Employee who suffered a head injury as the result of an idiopathic fall suffered an accident arising out of and in the course of employment.

*Gargiulo v. Gargiulo*, [13 N.J. 8](#) [Shepardize](#) (1953). Store clerk, returning from burning trash in rear of store, who was struck by an arrow, suffered an accident arising out of and in the course of employment.

*Valdez v. Tri-State Furniture*, [374 N.J. Super. 223](#) [Shepardize](#) (App. Div. 2005). Petitioner and his immediate supervisor were working overtime on Saturday afternoon building an office. Tri-State shared warehouse space with Federated Department Stores and others. Tri-State repaired furniture for Federated. Federated owned several fork-lifts which were parked near Tri-State's area and were used occasionally by employees of Tri-State. After finishing the day's work on building the office but while still "on the clock" petitioner and his supervisor undertook to drive the forklifts to learn how they operated for potential future use. Petitioner suffered an accident in which his leg was amputated. His injuries were compensable. He was in the course of his employment (still on the clock) and he had not made a calculated, substantial departure from his responsibilities. Therefore the accident arose out of his employment. *Note: This opinion reviews prior arising out of and in the course of employment decisions.*

*Stroka v. United Airlines*, [364 N.J. Super. 333](#) [Shepardize](#) (App. Div. 2003). Petitioner, a flight attendant for United Airlines scheduled for Flight 93 from Newark to San Francisco on September 11, 2001, had asked and received that day off to care for a child. Therefore, she was not aboard. After learning of the crash and the horrific way her fellow flight attendants died, the petitioner developed post-traumatic stress syndrome. Although her condition arose out of her employment, it did not occur in the course of her employment. It did not occur (a) within the period of the employment and (b) at a place where the employee may reasonably be, and (c) while she is reasonably fulfilling the duties of employment, or doing something incidental thereto. Nothing happened while she was working that led to her current condition.

*Sparrow v. La Cachet, Inc.*, [305 N.J. Super. 301](#) [Shepardize](#) (App. Div. 1997). A beautician injured while receiving a facial at her place of business on a day when there was no work for her did not suffer a compensable accident.

*Money v. Coin Depot Corp.*, [299 N.J. Super. 434](#) [Shepardize](#) (App. Div. 1997). A security guard who killed himself at work while playing "Russian Roulette" did not suffer a compensable accident.

*Prettyman v. State*, [298 N.J. Super. 580](#) [Shepardize](#) (App. Div. 1997). Employee questioned by a state trooper after having been found looking in a co-employee's drawer for keys and as a result developed depression, high blood pressure, and post-traumatic stress disorder, suffered a compensable event.

*Shaudys v. IMO Indus., Inc.*, [285 N.J. Super. 407](#) [Shepardize](#) (App. Div. 1995). Petitioner who twisted his knee as he turned to walk towards his workplace did suffer a compensable injury.

*Marky v. Dee Rose Furniture Co.*, [241 N.J. Super. 207](#) [Shepardize](#) (App. Div. 1990), *certif. denied*, [122 N.J. 359](#) [Shepardize](#) (1991). Employee shot by a former boyfriend did not suffer injuries arising out of her employment. Co-employee also shot did suffer a compensable event.

*Doe v. St. Michaels Medical Ctr.*, [184 N.J. Super. 1](#) (App. Div. 1982). Medical technologist, sexually attacked and robbed in her room in hospital dormitory, suffered an accident arising out of and in the course of her employment.

*Meo v. Commercial Can Corp.*, [80 N.J. Super. 58](#) [Shepardize](#) (App. Div. 1963). Plant manager, injured when assaulted at home during a violent labor dispute, suffered an accident arising out of and in the course of employment.

*Macko v. Herbert Hinchman & Son*, [24 N.J. Super. 304](#) [Shepardize](#) (App. Div. 1953). Where employee's duties were to load cement trucks and who, during a lull, went to a nearby sand pit and was killed when the embankment collapsed, suffered an accident arising out of and in the course of employment.

## CHAPTER THREE: GOING AND COMING RULE

The original 1911 Workers' Compensation Act did not contain a definition of employment but simply provided for compensation when employees were injured or killed in accidents, "arising out of and in the course of employment." Therefore it devolved upon the courts to develop principles capable of distinguishing between those accidental injuries which may fairly be said to have some work connection and those which may be fairly said to be unrelated to the employment. To make that distinction the "going and coming rule," sometimes referred to as the "premises rule," evolved. The going and coming rule precludes an award of compensation benefits for injuries sustained during routine travel to and from an employee's regular place of work. This doctrine rests on the assumption that an employee's ordinary, routine, day to day journey to and from work, at the beginning and at the end of the day, neither yields a special benefit to the employer, nor exposes the employee to risks that are peculiar to the industrial experience. However, the basic going and coming rule became diluted over the years by a series of exceptions that all but "swallowed the rule." Therefore one of the purposes of the 1979 amendments to the Workers' Compensation Act was to "establish relief from the far-reaching effect of the "Going and Coming Rule" decisions by defining and limiting the scope of employment." *Senate Labor, Industry and Professions Committee Joint Statement to Senate No. 802 SCS and Assembly No. 840 ACS, November 13, 1979.* To accomplish this purpose the legislature included a definition of employment.

### STATUTORY PROVISION

*N.J.S.A. 34:15-36* provides in part:

Employment shall be 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 employer's place of employment, excluding areas not under the control of the employer; provided however, when the employee is required by the employer to be away from the employer's place of employment, the employee shall be deemed to be in the course of employment when the employee is engaged in the direct performance of duties assigned or directed by the employer; but the employment of employee paid travel time by an employer for time spent traveling to and from a job site or of any employee who utilizes an employer authorized vehicle shall commence and terminate with the time spent traveling to and from a job site or the authorized operation of a vehicle on business authorized by the employer. Travel by a policeman, fireman, or a member of a first aid or rescue squad, in responding to and returning from an emergency, shall be deemed to be in the course of employment.

Employment shall also be deemed to commence when an employee is traveling in a ridesharing arrangement between his or her place of residence or terminal near such place and his or her place of

employment, if one of the following conditions is satisfied: the vehicle used in the ridesharing arrangement is owned, leased or contracted for by the employer, or the employee is required by the employer to travel in a ridesharing arrangement as a condition of employment.

#### COMMENT

Two exceptions to the going and coming rule are the *special-mission* and *paid travel time*.

The "special-mission" exception allows compensation at any time for employees

1. required to be away from the conventional place of employment, and
2. if actually engaged in the direct performance of employment duties.

The "travel time" exception allows portal-to-portal coverage for employees

1. paid for travel time to and from a distant job site, or
2. using an employer authorized vehicle for travel to and from a distant job site and on business authorized by the employer, or
3. travel in a ridesharing or van pool arrangement specifically covered by *N.J.S.A. 34: 15-36*.

#### TABLE OF CASES

*Hersh v. County of Morris* 217 N.J. 236 (2014) The New Jersey Supreme Court reversed the decisions of the Appellate Division and the Division of Workers' Compensation in concluding that, for purposes of *N.J.S.A. 34:15-36*, where an employer did not own or control the garage where petitioner parked, did not control the public street on which she walked when injured, did not dictate the path she took to walk to work, and did not expose her to any special or additional hazards, her injuries are not compensable

*Scott v. Foodarama Supermarkets*, [398 N.J. Super. 441](#) [Shepardize](#) (App. Div. 2008). Reversing the decision of the workers' compensation judge, the Appellate Division held that the "travel-time" exception to the going-and-coming rule does not apply where a salaried employee is reimbursed for gas, tolls, and wear and tear on his vehicle, but is not paid wages for the time of his commute to and from work.

*Acikgoz v. N.J. Turnpike Authority*, [398 N.J. Super. 79](#) [Shepardize](#) (App. Div. 2008). The Appellate Division affirmed the decision of the workers' compensation judge who found that the petitioner was not in the course of employment at the time of a car accident which occurred after he left the Turnpike Authority's premises and employee parking lot, was traveling on one of several roads available for ingress and egress, and already had started on his normal commute home.

*Carter v. Reynolds*, [175 N.J. 402](#) [Shepardize](#) (2003). An employee, who was required to use her personal vehicle for the business purpose of visiting off-site clients, was involved in an accident on her way home from an off-site visit to a business client. The Court held that her employer was liable to a third party

involved in this accident because the authorized/required vehicle exception to the going and coming rule applied to the facts in this case.

*Brower v. ICT Group*, [164 N.J. 367](#) [Shepardize](#) (2000). The mere fact that the workers' compensation claimant punched out on the time clock did not preclude compensability for an accident that occurred in a multi-tenant office building on a stairway leading to the street. Under N.J.S.A. 34:15-36, the depositive factors were the site of the accident and the employer's control of that location. Here, the employer exercised sufficient control over the site and knew or should have know that employees used the stairways for egress and for smoking breaks, none of the employer's customers or clients visited the premises, and the physical layout of the stairway prevented it from being considered as a common area with other tenants. The accident was held to be compensable because of the employer's right of control; it is not necessary to establish that the employer actually exercised that right.

*Ramos v. M & F Fashions*, [154 N.J. 583](#) [Shepardize](#) (1998). Petitioner's employer was found to have control of a building's freight elevator under "premises rule," because the employer used and operated that elevator to conduct its business. Hence, petitioner's injuries were compensable when he was hurt as the result of a fall into the shaft of that freight elevator on his way up to the fourth floor to begin work.

*Kristiansen v. Morgan*, [153 N.J. 298](#) [Shepardize](#) (1998), *modified*, [158 N.J. 681](#) [Shepardize](#) (1999). Under "premises rule," fatal injuries were compensable when suffered by a bridge employee who was struck by a car while crossing four-lane roadway on the bridge when trying to get into his car and go home. The Supreme Court also found that the Division of Workers' Compensation has primary jurisdiction to decide compensability issues before pursuing a negligence action thus voiding a jury verdict of \$1,811,000. in a Superior Court action.

*Novis v. Rosenbluth Travel*, [138 N.J. 92](#) [Shepardize](#) (1994). Petitioner was assigned to an out of town branch office and fell in a shared parking lot the day after she arrived to work at this location. The Court held that, because the petitioner fell prior to arriving at her "employer's place of employment" and fell in a parking lot over which her employer had no control, her accident was not compensable.

*Zelasko v. Refrigerated Food Express*, [128 N.J. 329](#) [Shepardize](#) (1992). Truck driver, who owned his own tractor-trailer but worked only for respondent, was injured while fixing loose pallets in the trailer after he left the respondent's terminal and was on his way to park the trailer. Accident was held not compensable under the "going and coming" rule where neither the "special mission" nor the "employer-authorized vehicle" exception applied to the facts presented here.

*Livingstone v. Abraham & Straus, Inc.*, [111 N.J. 89](#) [Shepardize](#) (1988). Employee injured while walking in a mall parking lot from area where she was directed to park by employer was injured at employer's place of employment. Application of the going and coming rule is "fact sensitive." *Note: This case outlines the history of the going and coming rule and the 1979 amendment.*

*Mule v. New Jersey Mfrs. Ins.*, [356 N.J. Super. 389](#) [Shepardize](#) (App. Div. 2003). An auto accident occurred in employer's parking lot involving an employee returning from a mid-shift meal break and an employee returning well after the end of his workday to take a shower after attending company picnic. After showering, he intended to join other co-workers at a bar. Employee returning from the mid-shift meal break suffered an accident arising out of and in the course of his employment. Employee returning to take a shower well after the end of his shift not in the course of his employment since his return was exclusively motivated by personal reasons. Therefore, there was no causal connection between the accident and his employment.

*Bradley v. State; Plumeri v. State*, [344 N.J. Super. 568](#) [Shepardize](#) (App. Div. 2001). Following judicial unification, former county employees were transferred to State employment in the unified judicial system. Employees injured at their designated parking location or enroute to or from the work sites are entitled to workers' compensation benefits from the State despite the location's non-State ownership. The State provided the employee's parking and instructed them where to go. *Note: This decision reviews prior holdings in detail.*

*Wilkins v. Prudential Ins. and Fin. Services*, [338 N.J. Super. 587](#) [Shepardize](#) (App. Div. 2001). Petitioner, a commission salesman, apart from reporting to employer's office for twice weekly meetings, essentially worked out of a home office meeting clients at times and sites of their choosing. On the date of accident, petitioner completed a sale and obtained necessary signatures of the customer. It was required that he mail the material in a special envelope. He went to a Prudential office, obtained the appropriate envelope and left intending to place the material in the mail. He fell, injuring himself, in the parking lot. Held, petitioner was required to work away from the conventional place of employment and that he was actually engaged in the direct performance of his employment duties while taking the delivery acceptance envelope to the post office.

*Zahner v. Pathmark Stores, Inc.*, [321 N.J. Super. 471](#) [Shepardize](#) (App. Div. 1999). An employee of a supermarket fell while shopping after having "punched out" at the end of her shift. The court held that the injury did not arise out of and in the course of her employment because the risk of injury was not connected with her job.

*Cannusco v. Claridge Hotel and Casino*, [319 N.J. Super. 342](#) [Shepardize](#) (App. Div. 1999). Claimant was assaulted after picking up her paycheck from her employer's administrative building. However, evidence showed that the claimant was found after the assault in a chair outside another place of business, which was several feet away from her employer's building. Based on these facts, the assault was found not to have occurred on or in front of employer's premises and the claim was denied.

*N.G. v. State, Div. of Youth and Family Services*, [300 N.J. Super. 594](#) [Shepardize](#) (App. Div. 1997). Petitioner, returning from a call and while on 24 hour call as child abuse investigator, raped in her apartment by one who saw her return to her apartment, did suffer injuries arising out of and in the course of her employment.

*Perry v. State Dept. of Law & Public Safety, Div. of State Police*, [296 N.J. Super. 158](#) [Shepardize](#) (App. Div. 1996). State trooper, although required to use an employer-authorized vehicle, a police car, on her daily commute to work was held as not on business authorized by her employer when injured shoveling to get the car out of her driveway. Therefore there is nothing to support a finding of "special mission". The Supreme Court affirmed this holding in *Perry v. State Dept. of Law & Public Safety*, [153 N.J. 249](#) [Shepardize](#) (1998) and remanded (1) for consideration of whether the State is authorized to pay benefits not required under the Workers Compensation Act to workers injured while commuting in state owned vehicles, and (2) for consideration of a defense it wished to raise that petitioner, in this case, was outside the parameters of such authorized voluntary payments since she was shoveling snow preparatory to driving her state owned vehicle.

*Brown v. American Red Cross*, [272 N.J. Super. 173](#) [Shepardize](#) (App. Div. 1994). Petitioner who has no "conventional" place of employment, but travels from home to various blood donor sites in her own vehicle and is paid travel time, qualifies for the "travel time" exception to the going and coming rule.

*Ehrlich v. Strawbridge & Clothier*, [260 N.J. Super. 89](#) [Shepardize](#) (App. Div. 1992). Injury that occurs on a sidewalk necessary to be traversed to reach parking lot is compensable.

*Manzo v. Amalgamated Ind.*, [241 N.J. Super. 604](#) [Shepardize](#), (App. Div.), *certif. denied*, [122 N.J. 372](#) [Shepardize](#) (1990). Maintaining business records at home and sometimes conducting business at home does not make home a job site so that accident that occurred during travel from home to office was not during the course of employment.

*N.J. Mfrs. Ins. v. Public Service*, [234 N.J. Super. 116](#) [Shepardize](#) (App. Div.), *certif. denied*, [118 N.J. 178](#) [Shepardize](#) (1989). Employee driving on access road two miles from parking lot, not in the course of employment.

*Walsh v. Ultimate Corp.*, [231 N.J. Super. 383](#) [Shepardize](#) (App. Div.), *certif. denied*, [117 N.J. 92](#) [Shepardize](#) (1989). Employee killed in an automobile accident in Australia not in course of employment even though sightseeing at the suggestion of his employer.

*Chisholm-Cohen v. County of Ocean*, [231 N.J. Super. 348](#) [Shepardize](#) (App. Div. 1989). County employee driving county car to her home for a respite between day shift and night assignment at her supervisor's suggestion, not on authorized business of county, therefore not in course of employment.

*Serrano v. Apple Container*, [236 N.J. Super. 216](#) [Shepardize](#) (App. Div. 1989), *certif. denied*, [121 N.J. 591](#) [Shepardize](#) (1990). Injury in parking lot in which employer has no property right and therefore no control is not compensable even though that parking lot was contiguous with parking lot over which employer had control.

*Plodzien v. Township of Edison Police Dept.*, [228 N.J. Super. 129](#) [Shepardize](#) (App. Div. 1988). Police officer in full uniform on way to work not in course of employment when injured in auto accident.

*Chen v. Federated Dep't. Stores*, [199 N.J. Super. 336](#) [Shepardize](#) (App. Div. 1985). Department store employee, injured while shopping during lunch hour, suffered an accident held as arising out of and in the course of employment because that accident occurred while the employee was shopping during lunchtime and such on-premises activity is both convenient to the employee and beneficial to the employer. *But see Zahner v. Pathmark Stores, Inc.*, [321 N.J. Super. 471](#) [Shepardize](#) (App. Div. 1999).

*Manole v. Carvellas*, [229 N.J. Super. 138](#) [Shepardize](#) (App. Div. 1988). Passenger in shuttle bus struck by a car driven by an employee of passenger's employer is not barred from suing at common law when accident occurred prior to defendant's arrival at work.

*Mahon v. Reilly's Radio Cabs, Inc.*, [212 N.J. Super. 28](#) [Shepardize](#) (App. Div. 1986), *certif. denied*, [107 N.J. 79](#) [Shepardize](#) (1987). Bus company employee injured on way to work while alighting from a bus for which he had a pass to ride without charge, not within the course of employment.

*Ohio Cas. Group v. Aetna Cas. & Sur. Co.*, [213 N.J. Super. 283](#) [Shepardize](#) (App. Div. 1986). Employee, on travel status outside State of New Jersey, not in course of employment when using a company authorized vehicle in evening not on the business of employer.

*Ehrgott v. Jones*, [208 N.J. Super. 393](#) [Shepardize](#) (App. Div. 1986). Employee injured in an automobile on his way to airport to fly to professional meeting was in the course of his employment.

*Mangigian v. Franz Warner Assoc. Inc.*, [205 N.J. Super. 422](#) [Shepardize](#) (App. Div. 1985). Employee injured while returning to her motel room with food for her supervisor and herself after having engaged in a period of exercise with supervisor, not within the course of her employment.

*Cressey v. Campus Chefs, Div. of CVI Services, Inc.*, [204 N.J. Super. 337](#) [Shepardize](#) (App. Div. 1985). Employee injured on loading dock not exclusively under the control of employer and while traversing a hazardous route of egress, is within the course of employment. (Premises rule)

*Nemchick v. Thatcher Glass Mfg. Co.*, [203 N.J. Super. 137](#) [Shepardize](#) (App. Div. 1985). Trip home after completion of an employment-assigned, off-premises task, was in the course of employment.

*Nebesne v. Crocetti*, [194 N.J. Super. 278](#) [Shepardize](#) (App. Div. 1984). Payment of travel expenses not sufficient to bring travel within the course of employment.

*Ward v. Davidowitz*, [191 N.J. Super. 518](#) [Shepardize](#) (App. Div. 1983). Subsequent to 1979 amendments, accident occurring during off premises lunch break does not arise out of and in the course of employment.

## CHAPTER FOUR: STATUTORY DEFENSES

### STATUTORY PROVISION

*N.J.S.A.* 34:15-7 provides in part:

[Compensation shall be paid] except when the injury or death is *intentionally self-inflicted*, or when *intoxication or the unlawful use of controlled dangerous substances...or willful failure to make use of a reasonable and proper personal protective device or devices* furnished by the employer...clearly made a requirement of the employee's employment by the employer and uniformly enforced and ...despite repeated ... warnings, the employee has willfully failed to properly and effectively utilize...or when recreational or social activities, unless such *recreational or social activities* are a regular incident of employment and produce a benefit to the employer beyond improvement in employee health and morale, are the natural and proximate cause of the injury or death. (emphasis added).

*N.J.S.A.* 34:15-7.1 provides:

An accident to an employee causing his injury or death, suffered while engaged in his employment but resulting from horseplay or skylarking on the part of a fellow employee, not instigated or taken part in by the employee who suffers the accident, shall be construed to have arisen out of and in the course of the employment of such employee and shall be compensable under the act.

### COMMENT

#### ***Recreational or Social Activity***

Where an injury occurs during recreational or social activity there is a two-prong test that must be met to prove the injury compensable. The activity must be:

1. a regular incident of employment *and*
2. produce a benefit to the employer beyond improvement in employee health and morale.

However, if the employer compels participation in an activity generally viewed as recreational or social in nature, the employer renders that activity work-related and therefore an injury compensable. It is not required to show the activity produced a benefit to the employer. If the employee alleges indirect or implicit compulsion he or she must show an objectively reasonable basis for that belief.

#### ***Intoxication***

Intoxication is an affirmative defense. Respondent has the obligation to prove that intoxication is the *sole* cause for the accident to avoid liability.

### ***Suicide***

In spite of the statute's prohibition of payment when an injury or death is intentionally self-inflicted, death by suicide is compensable if it is shown to be the result of the employee's becoming dominated by a disturbance of mind caused by the employee's original work-related injury and its consequences, such as severe pain and despair, which is of such severity as to override normal rational judgment. There must be an unbroken chain of causation from the work connected injury to the suicide.

## **TABLE OF CASES**

### ***Recreation:***

*Sager v. O.A. Peterson Constr. Co.* [182 N.J. 156](#) [Shepardize](#) (2004). On September 11, 2001, petitioner who was working on Long Island for a New Jersey construction company, was injured in a head-on motor vehicle accident. Employer's supervisor testified that at about 3:00 pm, the usual end of the work day, he suggested to his crew that they go to a diner for an early supper and then return to the job site and perform overtime work since it seemed that they could not return to New Jersey because all tunnels and bridges were closed. After eating dinner and while returning to the job site the motor vehicle accident occurred. Petitioner's injuries arose out of and in the course of his employment. The supervisor's direction brought this trip within the scope of employment since an employer always retains the power to expand the scope of employment.

*Lozano v. Frank De Luca Constr.*, [178 N.J. 513](#) [Shepardize](#) (2004). When an employer compels an employee's participation in an activity generally viewed as recreational or social in nature, the employer renders that activity work-related as a matter of law. To recover under this theory of compulsion, the injured employee must establish that he/she engaged in the activity based on an objectively reasonable belief that participation was required. This factual context does not require satisfaction of the two-prong test set forth in *N.J.S.A. 34:15-7*. When an employee alleges indirect or implicit compulsion, the employee must demonstrate an objectively reasonable basis in fact for believing that the employer had compelled participation in the activity. Whether the employee's belief is objectively reasonable will depend largely on the employer's conduct, taking into consideration such factors as whether the employer directly solicits the employee's participation in the activity, whether the activity occurs on the employer's premises, during working hours, and in the presence of supervisors, clients, and the like; and whether the employee's refusal to participate exposes him to the risk of reduced wages or loss of employment. *Note: A thorough analysis of recreational and social cases both prior and subsequent to the 1979 amendments by Justice Zazzali.*

*Sarzillo v. Turner Constr. Co.*, [101 N.J. 114](#) [Shepardize](#) (1985). Carpenter engaged in lunch time recreational activity on construction site not within the course of employment because the game he participated in was not a regular incident of employment that was sponsored or compelled by the employer and employer gained no benefit from the game or from participant remaining at the worksite.

*McCarthy v. Quest Int'l. Co.*, [285 N.J. Super. 469](#) [Shepardize](#) (App. Div. 1995), *certif. denied*, [143 N.J. 518](#) [Shepardize](#) (1996). Petitioner was injured playing tug-of-war at a company picnic held during business hours. The picnic was arranged to permit employees of two companies that had merged to get to know one another. Petitioner was told by the personnel department that she could be subject to a salary deduction if she did not attend and that she should set an example for those she supervised. The injury was compensable. This activity was a regular incident of employment and produced a benefit to the employer beyond improvement in employee health and morale.

#### ***Horseplay:***

*Diaz v. Newark Indus. Spraying, Inc.*, [35 N.J. 588](#) [Shepardize](#) (1961). An employee threw a bucket of lacquer thinner at co-employee in response to being wet with a hose. The lacquer thinner caught fire and caused severe burns. The injury was compensable - the conduct not the type of "skylarking" which would bar recovery because the playful acts between the workers were a normal incidence of the employment relationship.

*Quinones v. P.C. Richard & Son*, [310 N.J. Super. 63](#) [Shepardize](#) (App. Div.), *certif. denied*, [156 N.J. 384](#) [Shepardize](#) (1998). Customary and planned lunch-time arm-wrestling tournament not "skylarking" but a social activity; and not compensable because not a regular incident of employment producing benefit to the employer beyond improvement in employee health and morale.

*Money v. Coin Depot Corp.*, [299 N.J. Super. 434](#) [Shepardize](#) (App. Div.), *certif. denied*, [151 N.J. 71](#) [Shepardize](#) (1997). A security guard who killed himself at work while playing "Russian Roulette" did not suffer a compensable accident.

#### ***Intoxication:***

*Thumac v. High Bridge Stone*, [187 N.J. 567](#) [Shepardize](#) (2006). Decided July 19, 2006. The New Jersey Supreme Court affirmed the decision of the Appellate Division and the workers' compensation judge and held that an employer can establish the statutory defense of intoxication under N.J.S.A. 34:15-7 only if it can prove by a preponderance of the evidence that the employee's work-related injuries were caused solely by his or her intoxication.

*Warner v. Vanco Mfg., Inc.*, [299 N.J. Super. 349](#) [Shepardize](#) (App. Div. 1997), *certif. denied*, [151 N.J. 72](#) [Shepardize](#) (1997). Petitioner who fell from scaffold was not precluded from compensation benefits because the employer failed to demonstrate by the greater weight of evidence that the employee's injury was produced solely by his intoxication.

*Anslinger v. Wallace*, [124 N.J. Super. 184](#) [Shepardize](#) (App. Div.), *certif. denied*, [63 N.J. 552](#) [Shepardize](#) (1973). Widow of employee who drove into and under the rear of a tractor trailer traveling in the same direction was barred from recovery by the intoxication defense.

***Suicide:***

*Kahle v. Plochman, Inc.*, [85 N.J. 539](#) [Shepardize](#) (1981). Adopts the chain of causation test to determine if a suicide is compensable. There must be a showing that the original work-connected injury results in the employee's becoming dominated by a disturbance of mind directly caused by his/her injury and its consequences, such as extreme pain and despair of such severity as to override normal rational judgment. A suicide committed by an employee suffering from such disturbance of mind is not to be considered "intentional" within the meaning of *N.J.S.A. 34:15-7*, even though the act itself may be volitional.

## CHAPTER FIVE: ACCIDENT AND OCCUPATIONAL DISEASE

### Statutory Provisions

#### *Accident*

*N.J.S.A.* 34:15-7 provides in part:

[C]ompensation for personal injuries to, or for the death of, such employee by accident arising out of and in the course of employment shall be made by the employer.

#### *Cardiovascular or cerebral vascular causes*

*N.J.S.A.* 34:15-7.2 provides:

In any claim for compensation for injury or death from cardiovascular or cerebral vascular causes, the claimant shall prove by a preponderance of the credible evidence that the injury or death was produced by the work effort or strain involving a substantial condition, event or happening in excess of the wear and tear of the claimant's daily living and in reasonable medical probability caused in a material degree the cardiovascular or cerebral vascular injury or death resulting therefrom.

Material degree means an appreciable degree or a degree substantially greater than de minimis.

*N.J.S.A.* 34:15-7.3 provides:

1. a. For any cardiovascular or cerebrovascular injury or death which occurs to an individual covered by subsection b. of this section while that individual is engaged in a response to an emergency, there shall be a rebuttable presumption that the injury or death is compensable under *R.S.* 34:15-1 et seq., if that injury or death occurs while the individual is responding, under orders from competent authority, to a law enforcement, public safety or medical emergency as defined in subsection c. of this section.

b. This section shall apply to:

- (1) Any permanent or temporary member of a paid or part-paid fire or police department and force;
- (2) Any member of a volunteer fire company;
- (3) Any member of a volunteer first aid or rescue squad; and
- (4) Any special, reserve, or auxiliary policeman doing volunteer duty.

c. As used in this section, "law enforcement, public safety or medical emergency" means any combination of circumstances requiring immediate action to prevent the loss of human life, the destruction of property, or the violation of the criminal laws of this State or its political subdivisions, and includes, but is not limited to, the suppression of a fire, a firemanic drill, the apprehension of a criminal, or medical and rescue service.

## ***Occupational Disease***

*N.J.S.A.* 34:15-30 provides:

When employer and employee have accepted the provisions of this article as aforesaid, compensation for personal injuries to or for death of such employee by any compensable occupational disease arising out of and in the course of his employment, as hereinafter defined, shall be made by the employer to the extent hereinafter set forth and without regard to the negligence of the employer, except that no compensation shall be payable when the injury or death by occupational disease is caused by willful self-exposure to a known hazard or by the employee's willful failure to make use of a reasonable and proper guard or personal protective device furnished by the employer and which has been clearly made a requirement of the employee's employment by the employer and which an employer can properly document that despite repeated warnings, the employee has willfully failed to properly and effectively utilize, provided, however, this latter provision shall not apply where there is such imminent danger or need for immediate action which does not allow for appropriate use of personal protective device or devices.

*N.J.S.A.* 34:15-31 provides:

- a. For the purpose of this article, the phrase "compensable occupational disease" shall include all diseases arising out of and in the course of employment, which are due in a material degree to causes and conditions which are or were characteristic of or peculiar to a particular trade, occupation, process or place of employment.
- b. Deterioration of a tissue, organ or part of the body in which the function of such tissue, organ or part of body is diminished due to the natural aging process thereof is not compensable.

*N.J.S.A.* 34:15-32 provides:

The compensation payable for death or disability total in character and permanent in quality resulting from an occupational disease shall be the same in amount and duration and shall be payable in the same manner and to the same persons as would have been entitled thereto had the death or disability been caused by an accident arising out of and in the course of the employment.

In determining the duration of temporary and permanent partial disability, either or both, and the duration of payment for the disability due to occupational diseases, the same rules and regulations as are now applicable to accident or injury occurring under this article shall apply.

*N.J.S.A.* 34:15-43.2 provides:

Any condition or impairment of health of any member of a volunteer fire department caused by any disease of the respiratory system shall be

held and presumed to be an occupational disease unless the contrary be made to appear in rebuttal by satisfactory proof; providing

(a) Such disease develops or first manifests itself during a period while such member is an active member of such department; and

(b) Said member, upon entering said volunteer fire service, has or shall have undergone a medical examination, which examination failed or fails to disclose the presence of such disease or diseases; and

(c) Such disease develops or first manifests itself within 90 days from the event medically determined to be the cause thereof.

Any present member who did not undergo a medical examination upon entering said volunteer fire service, may undergo such examination within 180 days after the effective date of this act and in the event such examination does not disclose the presence of such disease or diseases, he shall thereafter be entitled to the benefits of this act.

*N.J.S.A.* 34:15-43.3 provides:

For the purposes herein expressed, the time of development or first manifestation of such disease or diseases shall only be determined by and run from the date of first notice of the existence of such disease or diseases to such member by a physician, or the date of death as a result of such disease or diseases.

(Occupational hearing loss - *See N.J.S.A.* 34:15-35.10 through *N.J.S.A.* 34:15-35.22)

Comment

### ***Accident***

An occurrence is an "accident" under the Workers' Compensation Act if either the circumstances causing the injury or the result on the employee's person was unlooked for, regardless of whether the inception or the underlying reason was personal or work connected. *See Klein v. New York Times Co.*, [317 N.J. Super. 41](#) [Shepardize](#) (App. Div. 1998), *citing George v. Great Eastern Food Prods., Inc.*, [44 N.J. 44](#) [Shepardize](#) (1965).

### ***Occupational Disease***

The original 1911 Workers' Compensation Act did not recognize occupational disease as compensable. In 1924, the Act was amended to list 10 specific illnesses but not until 1949 did the Act generally recognize occupational diseases as compensable. The 1979 revision to the Act modified *N.J.S.A.* 34:15-31 in three ways:

*First*, it deleted the preexisting definition of "occupational disease" that included diseases "due to the exposure of any employee to a cause thereof arising out of and in the course of employment." The purpose of this deletion was to ensure that employers would be liable solely for the diseases "characteristic of and peculiar to" a particular employment.

*Second*, the Legislature added subsection b, which restricts compensability by providing: "Deterioration of a tissue, organ or part of the body in which the function of such tissue, organ or part of the body is diminished due to the natural aging process there of is not compensable."

*Third*, the Legislature redefined a "compensable occupational disease" both to restrict and broaden coverage. The new definition restricted coverage by requiring that the disease be due in a "material degree" to "causes or conditions ... peculiar to the place of employment." The amendment broadens coverage by adding the phrase, "peculiar to the place of employment." This addition expands the definition of "compensable occupational disease" to include diseases due in a material degree to conditions characteristic of the place of employment.

The term "material degree" means "an appreciable degree or a degree substantially greater than de minimis" as "material degree" is defined in *N.J.S.A. 34:15-7.2*.

These changes require quality proofs to permit a finding of compensability.

A petitioner has the burden of proving by a preponderance of the evidence that his or her environmental exposure was a substantial contributing cause of the alleged occupational disease. A petitioner must prove legal causation (the injury is work-connected) and medical causation (the injury is a physical or emotional consequence of work exposure). It is sufficient to prove that the risk or danger in the work place was a contributing cause. Direct causation is not required. Activation, acceleration or exacerbation of disabling symptoms is sufficient. Expert testimony must only meet the standard set forth in *Rubanick v. Witco Chem. Corp.*, [125 N.J. 421](#) [Shepardize](#) (1991) (i.e., a scientific theory of causation that has not yet reached general acceptance may be found to be sufficiently reliable if it is based on a sound, adequately founded, scientific methodology involving data and information of the type reasonably relied on by experts in the scientific field). *Lindquist v. City of Jersey City Fire Dep't.*, [175 N.J. 244](#) [Shepardize](#) (2003).

### ***Occupational Cardiac Claims***

A petitioner with an occupational cardiac claim must prove that his or her work exposure exceeded the exposure caused by personal risk factors such as cigarette smoking and that the employment exposure substantially contributed to the development of the disease. *Fiore v. Consolidated Freightways*, [140 N.J. 452](#) [Shepardize](#) (1995).

### ***Cardiac Claims***

In cardiac claims the standard of proof was enhanced by the 1979 amendments to the Act, *N.J.S.A. 34:15-7.2*, to overcome the assumption that employers take their employees as they find them in heart cases. It imposes a stringent level of proof by explicitly requiring an employee to show the work effort was "in excess of the rigors of the claimant's daily living" and that the cause of the injury or death was job related in a "material degree." The employee must show that the work effort was qualitatively more intense than the strain of the physical activity to which the worker was accustomed in his or her leisure time. Attention

must be directed to the intensity and duration of the precipitating work effort or strain in evaluating its capacity to cause cardiac dysfunction. (See *Chapter Twelve: Proof Requirements*).

#### ***Psychiatric Claims (accidental or occupational)***

Psychiatric disability may be compensable without physical injury and it may be the result of gradual stimuli. The working conditions must be stressful, viewed objectively, and the believable evidence must support a finding that the worker reacted to them as stressful. The objectively stressful working conditions must be "peculiar" to the particular workplace, and there must be objective evidence supporting a medical opinion of the resulting psychiatric disability, in addition to the "bare statement of the patient". The court must consider the "credibility of the petitioner's entire case" as well as the predisposition the employee brings to the job. The existence of such a predisposition precludes compensation not otherwise supported by evidence of "peculiar" conditions which would be stressful to those without such a predisposition. *Goyden v. State*, [256 N.J. Super. 438](#) [Shepardize](#) (App. Div. 1991), *aff'd.o.b.*, [128 N.J. 54](#) [Shepardize](#) (1993).

#### ***Allocation of Disability Among Respondents***

Where an employee is exposed to work conditions which activate, aggravate or cause a progressive occupational disease, and the existence of such disease remains undisclosed and unknown over a period of time, it may be impossible upon ultimate revelation of its existence by medical examination, work incapacity, or manifest loss of physical function to pinpoint the triggering date of such activation, aggravation or inception. To avoid the morass into which litigation would be pitched were apportionment of disability among successive employers required, and to eliminate the recognized unsatisfactory nature of any such attempted ascertainment, the employer or carrier during whose employment or coverage the disease was disclosed is the respondent or carrier held liable. *Bond v. Rose Ribbon & Carbon Mfg. Co.*, [42 N.J. 308](#) [Shepardize](#) (1964). However, when the employee has suffered an accident and then returns to the same or similar employment it will not be the last employer who will be responsible for petitioner's disability unless there is a clear showing that the subsequent employment materially contributed to the employee's disability and even then, disability must be fixed for the separate and distinct accident. *Bond* only applies to occupational disease claims. *Peterson v. Herman Forwarding Co.*, [267 N.J. Super. 493](#) [Shepardize](#) (App. Div. 1993), *certif. denied*, [135 N.J. 304](#) [Shepardize](#) (1994). Nor can *Bond* be applied to two successive traumatic injuries. *Baijnath v. Eagle Plywood & Door Mfgs., Inc.*, [261 N.J. Super. 309](#) [Shepardize](#) (App. Div. 1993). *Bond* cannot be applied to impose total disability on the last employer when there is evidence that petitioner's prior latent partial disability became manifest, arrested and fixed to some degree during prior employment(s) and that employment exposure contributed in a degree substantially greater than *de minimis* to petitioner's disability. The Workers' Compensation Judge must determine the extent of the partial permanent disability at each and every manifestation. (See *Levas v. Midway Sheet Metal*, [317 N.J. Super. 160](#) [Shepardize](#) (App. Div. 1998), *appeal after remand at* [337 N.J. Super. 341](#) [Shepardize](#) (App. Div. 2001)).

## TABLE OF CASES

### *OCCUPATIONAL DISEASE*

*Renner v. AT&T* 218 [N.J. 435](#) (2014) Cathleen Renner created and executed contingency plans for AT&T under a telecommuting agreement that allowed her to work several days at home. Her job involved making and receiving numerous calls and e-mails under conditions driven by deadlines and often necessitating long working hours. Ms. Renner died of a pulmonary embolism after working for long hours on a particular project. While the petitioner's medical expert opined that sedentary work for long hours was the precipitant of this pulmonary embolism, the respondent's medical expert concluded that it was impossible to state, within a reasonable degree of medical probability, that it was work effort rather than other risk factors which actually caused Ms. Renner's death. Both a judge of compensation and the Appellate Division rendered decisions in favor of awarding workers' compensation dependency benefits pursuant to N.J.S.A. 34:15-7.2. However, the New Jersey Supreme Court reversed and held that Ms. Renner's death was not compensable because there was a failure to show that the extended sitting she did here constituted the kind of "work effort or strain involving a substantial condition, event or happening" required to support a cardiovascular claim under the statute.

*Lindquist v. City of Jersey City Fire Dep't.*, [175 N.J. 244](#) [Shepardize](#) (2003). Petitioner's occupational exposure as a fireman for twenty three years materially contributed to the development of emphysema. To establish causation in an occupational disease case an employee must prove legal causation and medical causation. Medical causation means the injury is a physical or emotional consequence of work exposure - the disability was actually caused by the work-related event. Legal causation means that the injury is work-connected. It is sufficient to prove that the risk or danger in the work place was a contributing cause, i.e., the work-related activity probably caused or contributed to the employee's disabling injury as a matter of medical fact. Direct causation is not required. Activation, acceleration or exacerbation of disabling symptoms is sufficient. Expert testimony must only meet the standard set forth in *Rubanick v. Witco Chem. Corp.*, [125 N.J. 421](#) [Shepardize](#) (1991) (i.e., a scientific theory of causation that has not yet reached general acceptance may be found to be sufficiently reliable if it is based on a sound, adequately founded, scientific methodology involving data and information of the type reasonably relied on by experts in the scientific field). N.J.S.A. 34:15-43.2 provides that any respiratory disease of a voluntary fireman is rebuttably presumed to be an occupational disease and also applies to a member of a paid fire department. The Court specifically limited *Fiore v. Consolidated Freightways*, [140 N.J. 452](#) [Shepardize](#) (1995) to cases that involve dual causes of cardiovascular injuries. *Note: This opinion sets forth the development of recognition of occupational disease and the social policy of liberally constructing the Act to implement the legislative policy of affording coverage to as many workers as possible.*

*Fiore v. Consolidated Freightways*, [140 N.J. 452](#) [Shepardize](#) (1995). Petitioner, a truck driver exposed to carbon monoxide in diesel fumes and a two pack a day smoker, alleges an occupational heart disease. This dual

causation occupational heart case requires the application of *N.J.S.A. 34:15-31* and *N.J.S.A. 34:15-7.2*. He or she must show that the work exposure exceeds the exposure caused by his personal risk factors and that the employment exposure substantially contributed to the development of the disease, i.e., when the exposure is so significant that without the exposure, the disease would not have developed to the extent that it caused the disability resulting in the claimant's incapacity. The substantial contribution must be read to require the disease is "due in a material degree" to the workplace. Material degree requires a careful evaluation of an expert witness' conclusion in the context of both the statutory criteria and prevailing medical standards. *Note: The New Jersey Supreme Court in Lindquist v. City of Jersey City Fire Dep't., [175 N.J. 244](#) [Shepardize](#) (2003) specifically limits Fiore to cardiac cases.*

*Magaw v. Middletown Bd. of Educ.*, [323 N.J. Super. 1](#) [Shepardize](#) (App. Div.), *certif. denied*, [162 N.J. 485](#) [Shepardize](#) (1999). Claimant's exposure at work to a chain-smoking employee, compared with his efforts to minimize all other exposure, rendered smoke exposure at his place of employment peculiar or characteristic for purposes of his occupational disease claim, alleging that he contracted tonsil cancer from second-hand cigarette smoke of co-employee, with whom he shared an office. Claimant's work exposure was found to be constant, consistent, and pervasive.

*Kiczula v. American Nat'l. Can Co.*, [310 N.J. Super. 293](#) [Shepardize](#) (App. Div. 1998). Finding that employee's pulmonary disease was aggravated by her employment on an assembly line that made steel cans was supported by sufficient credible evidence which included the employee's description of her workplace, expert medical testimony which established that the disease was a hypersensitivity disorder, and evidence that employee's condition improved when she was away from the workplace.

*Bird v. Somerset Hills Country Club*, [309 N.J. Super. 517](#) [Shepardize](#) (App. Div.), *certif. denied*, [154 N.J. 609](#) [Shepardize](#) (1998). For purposes of time limits for filing a worker's compensation petition, Lyme disease contracted by golf course groundskeeper was properly characterized as a disease, rather than as an accident.

*Dietrich v. Toms River Bd. of Educ.*, [294 N.J. Super. 252](#) [Shepardize](#) (App. Div. 1996), *certif. denied*, [148 N.J. 459](#) [Shepardize](#) (1997). Petitioner alleges his cardiac condition was aggravated by stress encountered in his employment. Held that petitioner failed to meet his burden of proof. The mere fact that stressful conditions at work may bring out symptoms of an underlying condition does not compel the conclusion that it has either caused, aggravated, or accelerated the disease.

*Laffey v. City of Jersey City*, [289 N.J. Super. 292](#) [Shepardize](#) (App. Div.), *certif. denied*, [146 N.J. 500](#) [Shepardize](#) (1996). Where an employee seeks to recover for occupational disease because of the general environment to which the rest of the public is exposed the petitioner must show that his work exposed him to more risks than

those in his daily life. Also held that Judge of Compensation may not consider evidence from other petitioners in other cases and outlines what may be judicially noticed.

*Wiggins v. Port Auth. of N.Y. and N.J.*, [276 N.J. Super. 636](#) [Shepardize](#) (App. Div. 1994). Claim for aggravation of multiple sclerosis by exposure to chemicals, dismissed for petitioner's failure to provide any objective medical or scientific evidence establishing a causal link between exposure and multiple sclerosis. But see cases cited therein to establish relationship between physical trauma and multiple sclerosis.

#### ***MANIFESTATION OF OCCUPATIONAL DISEASE***

*Levas v. Midway Sheet Metal*, [337 N.J. Super. 341](#) [Shepardize](#) (App. Div. 2001). Apportionment was warranted only as to those employments for which there was medical evidence to support a finding that claimant's disability, whether partial or total, reached a measurable, increased plateau during that employment.

*Falcon v. American Cyanamid*, [221 N.J. Super. 252](#) [Shepardize](#) (App. Div.), *certif. denied*, [108 N.J. 185](#) [Shepardize](#) (1987). Defines manifestation of an occupational disease (as either diagnosis by medical examination, manifest loss of physical function, or incapacity to work) and applies compensation rates in effect at time of manifestation of latent disease.

#### ***OCCUPATIONAL HEARING LOSS***

*Schorpp-Replogle v. NJ Manufacturers Ins. Co.*, [395 N.J. Super. 277](#) [Shepardize](#) (App. Div. 2007)

The Appellate Division affirmed the decision of the workers' compensation judge and held that tinnitus qualifies as a compensable disability under N.J.S.A. 34:15-36 where the condition: (1) is due in a material degree to exposure to harmful noise at the workplace; (2) materially impairs the employee's working ability or is otherwise serious in extent; and (3) is corroborated by objective medical testing.

*Calabro v. Campbell Soup Co.*, [244 N.J. Super. 149](#) [Shepardize](#) (App. Div. 1990), *aff'd o.b.*, [126 N.J. 278](#) [Shepardize](#) (1991). Apportionment of hearing loss among several insurance carriers.

*Bronico v. J.T.Baker Chem. Co.*, [209 N.J. Super. 220](#) [Shepardize](#) (App. Div. 1986). Employee need not introduce evidence of decibel levels of noise which caused loss of hearing if other evidence is sufficient.

#### ***PSYCHIATRIC CASES***

*Brunell v. Wildwood Crest Police Dep't.*, [176 N.J. 225](#) [Shepardize](#) (2003). Post-Traumatic Stress Disorder (PTSD) may qualify as either an "accidental injury" or an "occupational disease". When PTSD is an "accidental injury", time limitations set forth in the Act will not begin to run until the worker knows or should know he

sustained a compensable injury. *Note: This lengthy opinion outlines the history of the Workers' Compensation Act, the justification for a liberal construction of the statute, and an exhaustive description of post traumatic stress disorder.*

*Cairns v. City of East Orange*, [267 N.J. Super. 395](#) [Shepardize](#) (App. Div. 1993). Psychiatric claim arising from stress resulting from worker's receipt of layoff notice not compensable because layoff notice was not peculiar to employment and did not arise out of employment. To permit recovery in these circumstances would place the employer in the position of being an insurer of the general health and welfare of the employee and unduly subject all employers to innumerable potential claims.

*Wernowski v. Continental Can Co.*, [261 N.J. Super. 269](#) [Shepardize](#) (App. Div.), *certif. denied*, [133 N.J. 437](#) [Shepardize](#) (1993). Even though the employee did not suffer aluminum toxicity as the result of his occupational exposure that did not preclude award for disability resulting from traumatic stress disorder arising from his perception that he suffered from aluminum toxicity.

*Goyden v. State*, [256 N.J. Super. 438](#) [Shepardize](#) (App. Div. 1991), *aff'd o.b.*, [128 N.J. 54](#) [Shepardize](#) (1992). Petitioner, supervisor of records in the office of the clerk of the court, suffered from chronic and severe depression, but the Appellate Division found that the evidence established that petitioner's underlying condition of compulsive personality created the stress on the job. There were no stressful work conditions "peculiar" to the workplace that justified the medical opinion that those workplace conditions were "material causes" of petitioner's depression.

*Williams v. Western Electric Co.*, [178 N.J. Super. 571](#) [Shepardize](#) (App. Div. 1981). In cases of mental illness alleged to have been produced by gradual mental stimuli, the "arising out of" provision requires more than proof of subjective reaction of the employee. To be compensable, it must be due in some realistic sense and material degree to a risk reasonably incidental to the employment; the onset must issue from or be contributed to by conditions which bear some essential relation to the work or its nature.

#### ***ALLOCATION OF DISABILITY BETWEEN RESPONDENTS***

*Singletary v. Wawa* [406 N.J. Super. 558](#) [Shepardize](#) (App. Div. 2009). In December 2001, the petitioner injured her cervical spine working for Wawa. AIG, Wawa's carrier at the time, paid compensation benefits for that injury. (Note: In January 2002 Wawa became self-insured for compensation claims.) In August 2007, petitioner was found to need cervical surgery and filed a motion for temporary and medical benefits alleging occupational exposure starting in November 2003. She also requested an order to have either AIG or Wawa pay compensation benefits until liability for the occupational exposure was determined. The compensation judge granted her request and ordered AIG to pay benefits without prejudice, subject to reimbursement should Wawa later be deemed liable. Subsequently, the judge deemed Wawa liable by

finding that the 2003-2007 occupational exposure aggravated the 2001 injury. Accordingly, he ordered that Wawa reimburse AIG for its expenditures relating to the 2007 exposure claim. The Appellate Division affirmed the compensation judge's decision.

*Bond v. Rose Ribbon & Carbon Mfg. Co.*, [42 N.J. 308](#) [Shepardize](#) (1964). Where an occupational disease is caused or aggravated by exposure during a period when there are several respondents or insurance carriers on the risk, the last carrier shall be responsible for payment of compensation.

*Levas v. Midway Sheet Metal*, [317 N.J. Super. 160](#) [Shepardize](#) (App. Div. 1998), *appeal after remand at* [337 N.J. Super. 341](#) [Shepardize](#) (App. Div. 2001). Total permanent disability for an occupational disease cannot be imposed upon the last employer where it can be shown that prior employer(s) exposure contributed to the development of the disease and there is evidence that disability is fixed, arrested and measurable. In considering allocation, a compensation judge should analyze causation so that only those employers whose employment contributed to a degree "substantially greater than de minimis" be considered for allocation of their respective share of petitioner's total disability.

*Vastino v. MAN-Roland, Inc.*, [299 N.J. Super. 628](#) [Shepardize](#) (App. Div.), *certif. denied*, [151 N.J. 464](#) [Shepardize](#) (1997). To impose liability on the "last employer" in an occupational disease case there must be a showing of actual causation or contribution to the petitioner's condition by the work exposure during such employment.

*Gulick v. H.M. Enoch, Inc.*, [280 N.J. Super. 96](#) [Shepardize](#) (App. Div. 1995). Petitioner, a plumber, was exposed at his last employment for three days. He established that exposure caused or aggravated an occupational disease. However, it was not appropriate to impose total disability on this employer under *Bond* because it was clear that petitioner's significant condition was diagnosed and capable of measurement prior to that employment. Although the disability caused by prior employers could not be assigned to those employers, the last employer was entitled to a functional credit for that disability. The Second Injury Fund was responsible for the prior unassignable permanent disability.

*Peterson v. Hermann Forwarding Co.*, [267 N.J. Super. 493](#) [Shepardize](#) (App. Div. 1993), *certif. denied*, [135 N.J. 304](#) [Shepardize](#) (1994). Where petitioner suffers a compensable accident or accidents followed by subsequent employment petitioner must meet the requirements for an occupational disease against any subsequent employers and even when such an occupational disease is proved, disability must be allocated for the traumatic events. *Bond* only applies to occupational disease.

*Kozinski v. Edison Products Co.*, [222 N.J. Super. 530](#) [Shepardize](#) (App. Div. 1988). Where there is no objective evidence of aggravation due to subsequent employments, a court cannot hold subsequent employers liable for compensation and should assess all of the disability against the first employer.

## CHAPTER SIX: PERMANENT PARTIAL DISABILITY

### STATUTORY PROVISIONS

#### 1. Permanent Partial Disability.

Permanent partial disability is defined at *N.J.S.A. 34:15-36*:

"Disability permanent in quality and partial in character" means a permanent impairment caused by a compensable accident or compensable occupational disease, based upon demonstrable objective medical evidence, which restricts the function of the body or of its members or organs; included in the criteria which shall be considered shall be whether there has been a lessening to a material degree of an employee's working ability. Subject to the above provisions, nothing in this definition shall be construed to preclude benefits to a worker who returns to work following a compensable accident even if there be no reduction in earnings. Injuries such as minor lacerations, minor contusions, minor sprains, and scars which do not constitute significant permanent disfigurement, and occupational disease of a minor nature such as mild dermatitis and mild bronchitis shall not constitute permanent disability within the meaning of this definition.

#### 2. Credit for prior functional loss.

*N.J.S.A. 34:15-12(d)* provides:

If previous loss of function to the body, head, a member or an organ is established by competent evidence, and subsequently an injury or occupational disease arising out of and in the course of an employment occurs to that part of the body, head, member or organ, where there was a previous loss of function, then the employer or the employer's insurance carrier at the time of the subsequent injury or occupational disease shall not be liable for any such loss and credit shall be given the employer or the employer's insurance carrier for the previous loss of function and the *burden of proof in such matters shall rest on the employer.* (Emphasis supplied)

### COMMENT

The definition of permanent partial disability was enacted as part of the extensive amendments to the workers' compensation law which became effective January 10, 1980. This definition was, according to the

Supreme Court, one of the most significant changes in that law. It is the first statutory definition of permanent partial disability. See *Perez v. Pantasote, Inc.*, [95 N.J. 105 at 111](#) [Shepardize](#) (1984). The Supreme Court points out that the primary goal of the 1980 amendments to the workers' compensation statute was to eliminate awards for minor partial disabilities, to increase awards for the more seriously disabled, and to contain the overall cost of workers' compensation. See [Id. at 114](#) [Shepardize](#).

After carefully considering the legislative history and the case law which had developed in New Jersey prior to the legislative changes the Supreme Court instructs us that:

In summary, then, the employee must first prove by demonstrable objective medical evidence a disability that restricts the function of his body or its members or organs. Second, he must establish either that he has suffered a lessening to a material degree of his working ability or that his disability otherwise is significant and not simply the result of a minor injury. The burden of proving both of these elements rests with the petitioner. [Id. at 118](#) [Shepardize](#).

If there has not been an appreciable impairment of the employee's ability to work we may look to a second criterion, whether there has been a disability in the broader sense of impairment in carrying on the "ordinary pursuits of life". [Id. at 117](#) [Shepardize](#).

See also *Perez v. Monmouth Cable Vision*, [278 N.J. Super. 275 at 283-4](#) [Shepardize](#), (App. Div. 1994), *certif. denied*, [140 N.J. 277](#) [Shepardize](#) (1995).

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*Earl v. Johnson & Johnson*, [158 N.J. 155](#) [Shepardize](#) (1999). Minor respiratory conditions are not compensable under workers' compensation law. Many workers suffer from occasional bronchitis or mild asthma with no significant effect on their ability to work or their quality of life. A workers' compensation claimant must have a work related health problem that is not sufficiently debilitating to be compensable.

*Outland v. Monmouth-Ocean Educ. Serv. Comm.*, [154 N.J. 531](#) [Shepardize](#) (1998). Occupationally injured teacher should be entitled to workers' compensation temporary disability benefits during the summer if she can prove that she is unable to resume whatever type of work she otherwise would have had.

*Colon v. Coordinated Transp., Inc.*, [141 N.J. 1](#) [Shepardize](#) (1995). Range of motion test results are generally subjective and alone will not satisfy the requirements of "demonstrable object medical evidence". There is no numerical threshold to measure "minor injuries."

*Perez v. Pantasote*, [95 N.J. 105](#) [Shepardize](#) (1984). The Supreme Court's interpretation of the definition of permanent partial disability as defined in the 1979 amendments to the Workers' Compensation Act (i.e., as a permanent impairment caused by a compensable accident or compensable occupational disease, based upon demonstrable objective medical evidence, which restricts the function of the body or of its members or organs). *Note: This case is cited in many subsequent cases interpreting the extensive 1979 amendments to the statute.*

*Perez v. Capitol Ornament, Concrete Specialties, Inc.*, [288 N.J. Super. 359](#) [Shepardize](#) (App. Div. 1996). Workers' Compensation Judge must consider impact of injury on petitioner's ability to work in view of his limited educational and intellectual resources and not base his decision on a "range" of disability for a particular type of injury.

*Porter v. Elizabeth Bd. of Educ.*, [281 N.J. Super. 13](#) [Shepardize](#) (App. Div.), *certif. denied*, [142 N.J. 455](#) [Shepardize](#) (1995). Petitioner who underwent disc surgery demonstrated objective medical evidence of disability. His injury was not minor and the legislature never intended to deny compensation for such disability simply because petitioner did not complain enough.

*Perez v. Monmouth Cable Vision*, [278 N.J. Super. 275](#) [Shepardize](#) (App. Div. 1994), *certif. denied*, [140 N.J. 277](#) [Shepardize](#) (1995). "Hands-on" examination demonstrating loss of range of motion and strength sufficient to satisfy requirement of "demonstrable objective medical evidence". Permanent partial disability was not minor even if petitioner failed to establish lessening to material degree of his working ability.

*Rakip v. Madison Ave. Food Town*, [272 N.J. Super. 590](#) [Shepardize](#) (App. Div. 1994). Petitioner injured his back in a fall. He was diagnosed with a lumbosacral sprain and underwent several visits for physical therapy. He was temporarily disabled for about six weeks. Modest findings of restriction of flexion, extension, and bending and continuing pain in his low back that interfered with his activities of daily living were sufficient to sustain an award of 5% of permanent partial disability. Although *N.J.S.A. 34:15-36* was designed to eliminate awards of minor partial disabilities, because the legislature did not provide a percentage of disability that would have been determined to be too minor for compensability, 5% of permanent partial disability is not too minor to receive an award of compensation.

## **LEGISLATIVE HISTORY**

Senate Labor, Industry and Professions Committee Joint Statement to Senate No. 802 SCS and Assembly No 840 ACS, November 13, 1979. *See* INTRODUCTION to this compilation, *supra*.



## CHAPTER SEVEN: COMPUTATION OF PARTIAL PERMANENT DISABILITY AWARDS

Partial permanent disability awards are scheduled losses and payable in accordance with the provisions of *N.J.S.A. 34:15-12* (which is not set forth in its entirety here).

### STATUTORY PROVISIONS

#### *Wages*

Wages; Computation are defined in *N.J.S.A. 34:15-37* as follows:

“Wages,” when used in this chapter shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident. Board and lodging when furnished by the employer as part of the wages shall be included and valued at \$25.00 per week, unless the money value of such advantages shall have been otherwise fixed by the parties of the time of hiring. Where prior to the accident, the rate of wages is fixed by the output of the employee, the daily wages shall be calculated by dividing the number of days the worker was actually employed into the total amount the employee earned during the preceding 6 months, or so much thereof as shall refer to employment by the same employer. When the rate of wages is fixed by the hour, the daily wage shall be found by multiplying the hourly rate by the customary number of working hours constituting an ordinary day in the character of the work involved. In any case, the weekly wage shall be found by multiplying the daily wage by the customary number or working days constituting an ordinary week in the character of the work involved; provided, however, if the employee worked less than the customary number of working days constituting an ordinary week in the character of the work involved, the weekly wage for the purposes of compensation under provisions of *R.S.34:15-12a* only shall be found by multiplying the hourly rate by the number of hours work regularly performed by that employee in the character of the work involved. Gratuities, received regularly in the course of employment from other than the employer, shall be included in determining the weekly wage only in those cases where the employer or employee has kept a regular daily or weekly record of the amount of gratuities so received. In such cases the average weekly amount of gratuities over a period of 6 months, or for the entire time of employment, whichever period is less, shall be added to the fixed weekly wage to determine the employee’s total weekly wage. If no such record has been kept, then the average amount of the weekly gratuities shall be fixed by the judge of compensation or the referee hearing the matter.

***Credit for prior functional loss***

N.J.S.A. 34:15-12(d) provides:

If previous loss of function to the body, head, a member or an organ is established by competent evidence, and subsequently an injury or occupational disease arising out of an in the course of an employment occurs to that part of the body, head, member or organ, where there was a previous loss of function, then the employer or the employer’s insurance carrier at the time of the subsequent injury or occupational disease shall not be liable for any such loss and credit shall be given the employer or the employer’s insurance carrier for the previous loss of function and the burden of proof in such matters shall rest on the employer. (Emphasis supplied)

***Amputation of hands, arms, feet, legs***

N.J.S.A. 34:15-12(c)(21) provides:

Amputation between the elbow and wrist shall be considered as the equivalent of the loss of a hand and amputation at the elbow shall be considered equivalent to the loss of an arm. Amputation between the knee and ankle shall be considered as the equivalent of the loss of a foot, and amputation of the knee shall be considered as the equivalent of the loss of a leg. An additional amount of 30% of the amputation award shall be added to that award to compute the total award made in amputations of body members, provided, however, that this additional amount shall not be subject to legal fees.

***Loss of vision – enucleation of eye***

N.J.S.A. 34:15-12(c)(16) provides:

For the loss of vision of an eye, 200 weeks.

N.J.S.A. 34:15-12(c)(17) provides:

For the enucleation of an eye, 25 weeks, in addition to such compensation, if any, as may be allowed under paragraph 16 of this subsection.

***Loss of fingers, toes, and other members***

N.J.S.A. 34:15-12(c)(1) to (11) provides:

Lost Member	Number of Weeks’ Compensation
1. Thumb .....	75
2. First finger (commonly called index finger) .....	50
3. Second finger .....	40

4. Third finger .....	30
5. Fourth finger (commonly called little finger) .....	20
6. Great toe.....	40
7. Toe, other than a great toe.....	15
8. Hand, or thumb and first and second fingers (on one hand) or four fingers (on one hand) .....	245
9. Arm .....	330
10. Foot .....	230
11. Leg .....	315

*N.J.S.A.* 34:15-12(c)(12) provides:

The loss of the first phalange of the thumb or of any finger shall be considered to be equal to the loss of ½ of such thumb or finger, and the compensation shall be for ½ of the periods of time above specified. The loss of any portion of the thumb or any finger between the terminal joint and the end thereof shall be compensated for a like proportion of the period of time prescribed for the loss of the first phalange of such member.

*N.J.S.A.* 34:15-12(c)(13) provides:

The loss of the first phalange and any portion of the second shall be considered as the loss of the entire finger or thumb, but in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

*N.J.S.A.* 34:15-12(c)(14) provides:

The loss of the first phalange of any toe shall be considered to be equal to the loss of ½ of such toe, and compensation shall be for ½ of the period of time above specified.

*N.J.S.A.* 34:15-12(c)(15) provides:

The loss of the first phalange and any portion of the second shall be considered as the loss of the entire toe.

**COMMENT**

The first step in determining the appropriate rate of compensation is to determine “wages” as defined in *N.J.S.A.* 34:15-37. The rate of compensation may not exceed 70% of petitioner’s wages at the time of the occurrence of the accident subject to the maximum and minimum rate (\$35 for partial permanent disability) in the year in which the accident occurred.

The appropriate dollar amount of compensation can be found from the chart prepared by the New Jersey Manufacturers’ Insurance Company for the year in which the accident occurred or occupational disease

manifested by using the percent of disability (found on the first and last vertical columns on the front of the chart) or weeks of disability (found on the back of the chart for 90 weeks or more). If the award is 90 weeks or less, all weeks are payable at 20% of the State Average Weekly Wage for that year (found next to 90 weeks on the back of the chart) but keeping in mind that the rate of compensation may never exceed 70% of the petitioner’s wages (or \$35.00 if 70% of wages is less than that amount).

However, it is not appropriate to simply add up the scheduled number of weeks for each separate injury but to look at the disability reasonably found to be produced by the several injuries considered collectively and with due regard to their cumulative effect. [In addition, the Judge of Compensation must be careful not to allow the random presence of stray weeks, for example, four weeks for the loss of a tooth, to push a case to an unrealistic level of just over 30% of permanent partial disability.] (See *Poswiatowski v. Standard Chlorine Chem. Co.*, [96 N.J. 321](#) [Shepardize](#) (1984)).

Wages of a part-time employee may be reconstructed for purposes of fixing the rate for permanent partial disability in accordance with *N.J.S.A. 34:15-37* based upon “diminished future earning capacity”.

The amputation of a thumb and first and second fingers or four fingers on one hand equals the loss of a hand and entitles a claimant to the amputation allowance provided in *N.J.S.A. 34:15-12(c)(21)*.

***Credit for Prior Functional Loss (Abdullah Credits)***

When a petitioner suffers an accident or an occupational exposure to a part or parts of his or her body in which he or she suffered a preexisting impairment or condition and because of the preexisting impairment or condition the accident or occupational disease produces an impairment or condition of greater disability than might otherwise occur, the petitioner is entitled to an award of compensation equal to his or her overall disability, minus a credit for the preexisting disability, translated into present value under the applicable schedule., The compensation is paid at the rate for the overall disability. *Abdullah v. S.B. Thomas, Inc.*, [190 N.J. Super. 26](#) [Shepardize](#) (App. Div. 1983).

Example: The petitioner suffered an injury to his or her low back in 1983 to the extent of 20% of the permanent partial total. (It matters not whether the accident was work related or subject to an award of compensation). In 2004, petitioner suffers a fall, herniates two discs, L-4, L-5, requiring laminectomy and fusion. Petitioner’s overall disability to his or her low back following this second accident is 40% of the permanent partial total. The calculations are as follows:

40% of permanent partial total = 240 weeks at \$347 per week.	\$83,280
20% of permanent partial total = 120 weeks at \$186.35 per week	\$22,362
Amount of money due the petitioner	\$60,918

Therefore, the petitioner is entitled to 175.561 weeks of compensation at the \$347 rate = \$60,918. This is how the Form of Order should read.

### ***Multiple Disabilities from a Single Accident or Exposure***

When a single accident or occupational exposure results in a disability to more than one part of the body, the weeks for all disabilities are added to determine the appropriate rate and dollar amount of the award.

Example: Petitioner falls from a scaffold, in 2004, fractures three ribs, dislocates his or her shoulder, fractures his or her left ankle, and lacerates his or her kidney. The Judge of Compensation fixes disability as follows:

Ribs, 5% of permanent partial total	30 weeks
Shoulder, 12 ½% of permanent partial total	75 weeks
Ankle, 10% of statutory left foot	23 weeks
Kidney, 20% of permanent partial total	120 weeks
	Totals: 248 weeks
	248 weeks at a rate of \$390 per week
	\$96,720

(Note: This example assumes that the petitioner was paid a wage sufficient to give rise to a rate of at least \$390).

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*Gorman v. Waters & Bugbee, Inc.*, [374 N.J. Super. 513](#) [Shepardize](#) (App. Div. 2005) Decided February 2, 2005. The Appellate Division affirmed the decision of the workers' compensation judge to deny the employer the benefit of a reduced contribution to the petitioner attorney's fee award because the employer's voluntary tender of disability benefits was untimely when it occurred slightly beyond the twenty-six week period allowed by statute. In reviewing the statutory history of N.J.S.A. 34:15-64 and viewing that statute in pari materia with N.J.S.A. 34:15-16, the Appellate Division concluded that when the NJ Legislature amended this statute in 1979 it intended to create a "bright line" timeframe and set a clear and certain deadline an employer must meet to reduce its contribution to an attorney fee award by invoking the "26-week rule".

*Katsoris v. South Jersey Publishing Co.*, [131 N.J. 535](#) [Shepardize](#) (1993). Petitioner was injured in her part-time job delivering newspapers. As a result of her injuries, she could not continue her part-time employment but she could continue her full-time employment as a secretary. At issue was the propriety of reconstructing her part-time wages to establish her rate of compensation. Whether a part-time worker's wages are reconstructed to fix the rate of compensation, one must consider the fairness of an award under all of the relevant circumstances. The availability of compensation based upon a reconstructed work week must consider a "loss of future earning power" which includes the "potential for full employment." Since this petitioner returned to her full-time employment, her wages were not reconstructed and her compensation rate was computed on her part-time wages. *Note: This opinion reviews prior cases that permitted reconstruction of part-time wages.*

*Heaton v. Jersey Central Power & Light Co.*, [97 N.J. 128](#) [Shepardize](#) (1984). When an award of compensation exceeds 180 weeks, all weeks of the award are payable at the higher rate, not just those above 180 weeks.

*Poswiatowski v. Standard Chlorine Chem. Co.*, [96 N.J. 321](#) [Shepardize](#) (1984). Within the meaning of *N.J.S.A.* 34:15-36, compensation judges must treat the individual as a whole. Hence, for purposes of fixing the extent of disability in terms of its cumulative impact on the worker, separate injuries arising out of the same accident ultimately should be treated and expressed as a single compensable disability. The overall extent of disability is not to be determined merely by mechanically adding up the separate and fractional parts, but should be determined as an overall percentage of permanent disability produced by the separate injuries after they have been considered collectively with due regard to their cumulative impact. If a judge uses the schedule as an aid in determining the extent of disability, such may be regarded as reasonable if expressed in terms of permanent partial disability after careful consideration was given to the overall impact of the separate injuries. A judge must not allow the presence of stray weeks, such as four weeks for the loss of a tooth, to push a case over the top of a plateau (e.g., over the 30% plateau).

*Martinez v. Silverline*, [361 N.J. Super. 99](#) [Shepardize](#) (App. Div. 2003). If an employee amputates a thumb and the first and second finger, or four fingers on one hand and is entitled to a benefit equal to the loss of a hand under *N.J.S.A.* 34:15-12(c)(8), that employee is also entitled to the amputation “bonus” under *N.J.S.A.* 34:15-12(c)(21).

*Abdullah v. S.B. Thomas, Inc.*, [190 N.J. Super. 26](#) [Shepardize](#) (App. Div. 1983). When a petitioner suffers an accident or an occupational exposure to a part or parts of the body in which he or she suffers a preexisting impairment or condition and because of that preexisting impairment or condition, the accident or occupational disability is greater than might otherwise have occurred, the petitioner is entitled to an award of compensation equal to his overall disability, minus a credit for the preexisting disability, translated into present value under the applicable schedule. The compensation is paid at the rate of the overall disability.

*Trinter v. Esna Div.*, [186 N.J. Super. 316](#) [Shepardize](#) (App. Div. 1982). Amputation of a finger does not give rise to the amputation allowance. Reading *N.J.S.A.* 34:15-12(c) as a whole together with available legislative history requires a construction that the provision applying the amputation allowance is only meant to refer to hands, arms, feet and legs.

## CHAPTER EIGHT: PERMANENT TOTAL DISABILITY

### STATUTORY PROVISIONS

*N.J.S.A.* 34:15-12(b) provides in part:

For disability total in character and permanent in quality, 70% of the weekly wages received at the time of injury, ...(subject to a maximum compensation of 75% of the State average weekly wages and a minimum of 20% of such average weekly wages a week). This compensation shall be paid for a period of 450 weeks, at which time compensation payments shall cease unless the employee shall have submitted to such physical or educational rehabilitation as may have been ordered by the rehabilitation commission, and can show that because of such disability it is impossible for the employee to obtain wages or earnings equal to those earned at the time of the accident, in which case further weekly payments shall be made during the period of such disability, the amount thereof to be the previous weekly compensation payment diminished by that portion thereof that the wage, or earnings, the employee is then able to earn, bears to the wages received at the time of the accident. If the employee's wages or earnings equal or exceed wages received at the time of the accident, then the compensation rate shall be reduced to \$5.00. In calculating compensation for this extension beyond 450 weeks the above minimum provision shall not apply. This extension of compensation payments beyond 450 weeks shall be subject to such periodic reconsiderations and extensions as the case may require, and shall apply only to disability total in character and permanent in quality ....

Comment

Total and permanent disability has been defined as follows:

"Total and permanent disability exists where a worker is rendered unemployable in a reasonably stable job market after a work-related accident, notwithstanding that factors personal to the individual play a contributory part in such unemployability." See *Zabita v. Chatham Shop Rite, Inc.*, [208 N.J. Super. 215, 220](#) [Shepardize](#) (App. Div. 1986) and cases cited therein.

and

"Ability for light or intermittent work or labor is not inconsistent with total incapacity." See *Germain v. Cool-Rite Corp.*, [70 N.J. 1, 8](#) [Shepardize](#) (1976) and cases cited therein.

but note that these tests developed prior to the limitation of the odd-lot doctrine found at *N.J.S.A.* 34:15-36.

## TABLE OF CASES

*Ramos v. M & F Fashions, Inc.*, [154 N.J. 583](#) [Shepardize](#) (1998). Unlike permanent partial disability, a finding of permanent total disability cannot be made unless workers' compensation claimant cannot be reasonably expected to make fundamental or marked improvement, and to be final, diagnosis must be made at time when it may be presumed that disability has become permanent.

*Zabita v. Chatham Shop Rite, Inc.*, [208 N.J. Super. 215](#) [Shepardize](#) (App. Div. 1986). Petitioner injured his right knee in 1972 when it was struck by falling boxes. In 1975 he re-injured the knee while stacking boxes, required surgery for a torn meniscus and was awarded 23 ½% of the right leg. In 1977 he fell from a pallet and again injured his right knee. In 1978 while pushing a cart he felt extreme pain in the same knee. In 1978 he underwent additional surgery and his kneecap was removed. He never returned to work and was still under medical care at the time of trial. Although he was a laborer he had applied for an office job but was unable to interview because of a cardiac episode in January of 1982. He testified that even office work would be difficult because of the effort required in walking and the constant need for shifting position. The Workers' Compensation Judge found disability of 75% of the left leg and 22 ½% of partial total, neuropsychiatric in nature, and converted that to 60% of partial total. He found no causal relationship between the cardiac disease and the compensable accidents and that the petitioner was permanently and totally disabled before the cardiac incident and, therefore, entitled to Second Injury Fund benefits. Despite the petitioner's hope of reemployment, the finding of total and permanent disability within the contemplation of the Workers' Compensation Act was inescapable according to the Appellate Division opinion. "A workman need not be bedridden, paralyzed or unable to get about: nor is the ability for light or sedentary work inconsistent with total disability. The petitioner could not compete in the labor market, pass a pre-employment physical or otherwise appear as one whom an employer would be interested in hiring other than as an act of charity."

*Solymosi v. Hough Fuel Co.*, [159 N.J. Super. 586](#) [Shepardize](#) (App. Div. 1978). Prior to a compensable accident in which he lost an eye, petitioner was industrially blind in both eyes although his vision was correctable to 20/20. Petitioner was not totally disabled. Total disability resulting from the loss of two major members, *N.J.S.A. 34:15-12(c)(20)*, requires such loss to result from one compensable accident.



## CHAPTER NINE: DEPENDENCY

### STATUTORY PROVISIONS

Dependency benefits are payable in accordance with the provisions of *N.J.S.A. 34:15-13* not set forth here.

*N.J.S.A. 34:15-13* provides for:

1. the computation of death benefits for persons wholly dependent as follows:
  - a. For one or more dependents, 70% of wages.
  2. distribution of dependency compensation shall be as "ordered by the Division of Workers' Compensation, upon facts presented", and shall be "paid to or on behalf of each dependent according to the relative-dependency." (emphasis added) Payment on behalf of infants shall be made to the surviving parent, if any, or to the statutory or testamentary guardian;
3. dependent may include any or all of the following:
  - husband
  - wife
  - parent, stepparents, grandparents
  - children, stepchildren, grandchildren, child in esse, posthumous child, illegitimate children, adopted children
  - adopted children shall be considered as natural children
  - brothers, sisters, half brothers, half sisters,
  - niece, nephew
  - who are dependent on the decedent at the time of accident or occurrence of occupational disease or at time of death;
4. conclusive presumption of dependency as to decedent's spouse and to any natural child under 18 years of age or, if enrolled as a full time student, under 23 years of age, who were actually a part of decedent's household at the time of the decedent's death;
5. compensation to be paid for the following periods:
  - spouse - throughout the entire period of survivorship or until the surviving spouse shall remarry;
  - dependent or dependents under 18 years of age or if a full time student under 23 years of age – until age 18 or 23;
  - all other dependents - 450 weeks.
6. partial dependency (except in the case of a surviving spouse and children who were actually a part of the decedent's household at the time of death) compensation shall be "such proportion of the scheduled percentage as the amounts actually contributed to them by the deceased for their support consisted of his total wages" not subject to the annual minimum compensation rate;
7. expenses of last illness shall be paid in accordance with the provisions for medical and hospital services as set forth in *N.J.S.A. 34:15-15*;

8. funeral allowance not to exceed \$3,500.00 for deaths that occur on or after March 1, 1991 (For deaths occurring prior thereto the allowance is not to exceed \$2000.00); payable to the person who paid the funeral expense;

9. payment to a widow upon remarriage the remainder of benefits due had the spouse not remarried or 100 times the amount of weekly compensation paid immediately preceding the remarriage. (For remarriage that occurred prior to March 1, 1991 the maximum payment is \$1,000. For remarriage that occurred between March 1, 1991 and July 24, 1995 the maximum payment is \$2,500.00).

The above is excerpted from N.J.S.A. 34: 15-13. Please refer to this section of the Statute in its entirety.

### **Comment**

N.J.S.A. 34:15-13 was amended on January 14, 2004 to provide for computation of dependency benefits at 70% of wages for one or more dependents replacing provisions for a sliding scale of benefits from 50% to 70%, depending upon the number of dependents. No Appellate Court has interpreted whether this change is retroactive or only prospective in application.

Payment of dependency benefits is limited to those persons in relationship with the decedent specifically listed in N.J.S.A. 34:15-13, dependent on the decedent at the time of "the accident or the occurrence of occupational disease, or at the time of death". One who enters into a ceremonial marriage in good faith even though invalid and lives with the decedent as man and wife over a long period of time may be a "de facto" spouse.

There is a conclusive presumption of dependency of the decedent's spouse and children under 18 years, or 23 years if a full time student, who are part of decedent's household at the time of death.

Where one is only partially dependent on decedent then the compensation due shall be "such proportion of the scheduled percentage as the amounts actually contributed ... for support, constituted of his total wages". Therefore, if a decedent was earning \$500.00 per week and contributing \$100.00 per week to one, only partially dependent upon him, that dependent would receive 1/5th or 20% of the dependency benefits determined by the decedent's wages [not subject to the annual minimum compensation rate].

In the case of children not residing in decedent's household at the time of death and where another may be contributing to the support of that child or children, the amount of dependency benefits is not easy to ascertain. Even when a child has not been supported completely, or at all, by the decedent, that child may be entitled to full dependency benefits based upon the decedent's legal obligation to support that child. Where there are children of two marriages, the children of the first marriage who are not residing with the decedent at the time of death may be deemed as only partial dependents since their living parent also owes them support.

Prior to July 25, 1995 N.J.S.A. 34:15-13(j) provided a credit against continuing dependency benefits for earnings paid to a dependent spouse after the initial 450 week dependency period had expired. The amended statute deleted that provision, not only for death on or after that date, but for all spouses entitled to benefits on that date.

## TABLE OF CASES

***Payment to Decedent under N.J.S.A. 34:15-20 does not preclude a dependency claim by dependent who has not participated in that settlement.***

*Kibble v. Weeks Dredging & Constr. Co.*, [161 N.J. 178](#) [Shepardize](#) (1999). Rights of dependents to compensation are independent and separate rights flowing to them from the Worker's Compensation Act itself, and not rights to which dependents succeed as representatives of the deceased employee. Claims for workers' compensation dependency benefits belong not to the injured party, but to that party's spouse and other dependents, and accordingly, in both instances, the dependent (or representative of the dependent) alone has the authority to waive or compromise that claim.

## COMPUTATION OF BENEFITS

*Cruz v. Central Jersey Landscaping, Inc.*, [195 N.J. 33](#) [Shepardize](#) (2008). The New Jersey Supreme court, in reversing the Appellate Division, held that the 2004 amendment to N.J.S.A. 34:15-13 which sets dependency benefits at a uniform 70% of the decedent's wages for one or more dependents is to be applied prospectively to cover only those claims where the worker's death was on or after January 14, 2004.

*Comparri v. James Reading, Inc.*, [120 N.J.L. 168](#) [Shepardize](#) (E & A 1938). Where decedent failed to support daughter, daughter found to be a full dependent of decedent based upon decedent's legal obligation to support daughter.

*Harris v. Branin Transport, Inc.*, [312 N.J. Super. 38](#) [Shepardize](#) (App. Div.), *certif. denied*, [156 N.J. 408](#) [Shepardize](#) (1998). There is no constitutional infirmity in a secondarily retroactive application of a 1995 amendment to §13(j) that eliminated earned income credits to employers that was taken against the earnings of dependent spouses (even where 450-week dependency period for a compensable death had expired prior to the effective date of the amended statute).

*Costa-Hughes v. Mullen Constr. Co.*, [267 N.J. Super. 439](#) [Shepardize](#) (App. Div. 1992), *aff'd o.b.*, [134 N.J. 187](#) [Shepardize](#) (1993). Minor child of divorced decedent presumed fully dependent even though decedent may have contributed only a portion to the child's support

*Stone v. New Jersey Highway Authority*, [202 N.J. Super. 129](#) [Shepardize](#) (App. Div. 1985). Decedent, divorced and remarried, left a widow and step child wholly dependent upon him and two children of a first marriage for whom he was paying support. Children of first marriage were deemed only partially dependent on decedent where the surviving parent was also providing support to those children.

*Bush v. Johns-Manville Products Corporation*, [154 N.J. Super. 188](#) [Shepardize](#) (App. Div. 1977), *certif. denied*, [75 N.J. 605](#) [Shepardize](#) (1978). Rate for dependency benefits is rate applicable for year of death based upon wages at which services rendered was recompensed under contract of hiring in force at time of accident.

### **WHO IS A DEPENDANT?**

*Parkinson v. J & S Tool Co.*, [64 N.J. 159](#) [Shepardize](#) (1974). Petitioner and deceased worker had been married, divorced, and then resumed cohabitation. Parish priest had refused to remarry couple stating they were already married "in the eyes of God". Petitioner was a *de facto* "spouse" for purposes of Workers' Compensation.

*Dawson v. Hatfield Wire & Cable Co.*, [59 N.J. 190](#) [Shepardize](#) (1971). Petitioner qualified as "wife" for Workers' Compensation where she had, in good faith, entered into a ceremonial marriage with worker who had been previously married and not divorced, and where *de facto* relationship had continued over an extended period and where petitioner was economically dependent on worker.

*Toms v. Dee Rose Furniture*, [262 N.J. Super. 446](#) [Shepardize](#) (App. Div.), *certif. denied*, [134 N.J. 474](#) [Shepardize](#) (1993). Petitioner and decedent lived together in an "exclusive romantic relationship" for twelve years prior to his compensable death. They maintained joint bank accounts and purchased a home as joint tenants with the right of survivorship, intended to marry but never did. Petitioner not entitled to dependency benefits as a common law wife since that status is not recognized in New Jersey.

*Piscopo v. Lemi Excavating Co.*, [215 N.J. Super. 149](#) [Shepardize](#) (App. Div. 1986). Twenty-nine year old son of deceased worker, who was not mentally or physically disabled, was denied dependency benefits based on the "18 to 40 year old" exclusion in the statute. This statutory exclusion is constitutionally valid under the rational basis test, even if imperfect in some respects. Claimant was also not entitled to maintain common law action against employer.

## CHAPTER TEN: TEMPORARY DISABILITY

### STATUTORY PROVISIONS

*N.J.S.A. 34:15-12(a)* provides in part:

For injury producing temporary disability, 70% of the worker's weekly wages received at the time of injury, subject to a maximum compensation of 75% of the average weekly wages earned by all employees covered by the "unemployment compensation law" (R.S. 43:21-1 et seq.) and a minimum of 20% of such average weekly wages a week. This compensation shall be paid during the period of such disability, not however, beyond 400 weeks.

*N.J.S.A. 34:15-14* provides:

Except as provided pursuant to R.S. 34:15-75, no compensation other than medical aid shall accrue and be payable until the employee has been disabled 7 days, whether the days of disability immediately follow the accident, or whether they be consecutive or not. These days shall be termed the waiting period. The day that the employee is unable to continue at work by reason of his accident, whether it be the day of the accident or later, shall count as one whole day of the waiting period. Should the total period of disability extend beyond 7 days, additional compensation shall at once become payable covering the above prescribed waiting period.

*N.J.S.A. 34:15-38* provides:

To calculate the number of weeks and fraction thereof that compensation is payable for temporary disability, determine the number of calendar days of disability from and including as a full day the day that the employee is first unable to continue at work by reason of the accident, including also Saturdays, Sundays and holidays, up to the first working day that the employee is able to resume work and continue permanently thereat; subtract from this number the waiting period and any days and fraction thereof the employee was able to work during this time, and divide the remainder by 7. If, however, the total period of disability extends beyond 7 days, the waiting period shall not be subtracted from the number indicated above. The resulting whole number and sevenths will be the required period for which compensation is payable on account of temporary disability.

*N.J.S.A. 34:15-37* provides in part:

[I]f the employee worked less than the customary number of working days constituting an ordinary week in the character of the work involved, the weekly wage for the purposes of compensation under provisions of R.S. 34:15-12a only 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. 34:15-28.1* states:

If a self-insured or uninsured employer or employer's insurance carrier, having actual knowledge of the occurrence of the injury, or having received notice thereof such that temporary disability compensation is due pursuant to R.S. 34:15-17, unreasonably or negligently delays or refuses to pay temporary disability compensation, or unreasonably or negligently delays denial of a claim, it shall be liable to the petitioner for an additional amount of 25% of the amounts then due plus any reasonable legal fees incurred by the petitioner as a result of and in relation to such delays or refusals. A delay of 30 days or more shall give rise to a rebuttable presumption of unreasonable and negligent conduct on the part of a self-insured or uninsured employer or an employer's insurance carrier.

#### COMMENT

Temporary disability payments of 70% of the injured workers' wages for the year in which the injury occurred or his/her occupational disease became manifest, subject to the annual maximum and minimum, are payable until the worker is able to return to work and continue permanently thereafter, or is as far restored as the permanent character of his injuries will permit. These payments continue even if the contract of hire has expired. Therefore a school teacher is entitled to receive benefits during the summer recess or the seasonal worker after the end of the season if he or she is unable to return to work and demonstrates a loss of wages during the recess.

Temporary disability payments continue if an employee's disability is such that the worker cannot return to his or her normal job, even where the employee is capable of performing light-duty work but none is offered. Where an injured employee is still receiving active medical treatment and yet is able to perform light-duty work, his or her employer must offer such light-duty work or continue paying temporary disability benefits to the employee. The burden is placed on the employer to show that light-duty work was offered but refused by the employee if the employer wishes to be relieved of the duty to continue paying temporary disability benefits.

When an employee manifests an occupational disease years after his or her last employment with the respondent the rate of compensation is fixed by wages at the last employment with that respondent. The rate of compensation is subject to the maximum and minimum rates in effect at the time of the accident or manifestation of occupational disease.

Temporary disability for a part-time employee is based upon actual part-time wages subject to the maximum and minimum rates in effect at the time of the accident or manifestation of occupational disease.

An employee who removes him/herself from the workforce is not entitled to temporary disability for any period after that removal.

A penalty of 25% of the amount due for temporary disability and a reasonable counsel fee shall be imposed upon the respondent who unreasonably or negligently delays or refuses to pay temporary disability or delays the denial of a claim. A delay of 30 days or more gives rise to a rebuttable presumption of unreasonable and negligent conduct on the part of the respondent. The plain intent of the law is to ensure the prompt payment of temporary disability compensation. Since temporary disability payments form a partial substitute for weekly paychecks, there is need for prompt payment. [This need for prompt payment applies not only to interim payments but also to delays in payment of adjudicated awards of temporary disability.] *Dunlevy v. Kemper Ins. Group*, [220 N.J. Super. 464](#) [Shepardize](#) (App. Div. 1987), *certif. denied*, [110 N.J. 176](#) [Shepardize](#) (1988).

An award of temporary disability and/or medical treatment during the pendency of a workers' compensation proceeding may be appealed as of right.

One final comment: Unlike the rate for permanent disability benefits, which can be reconstructed in cases involving part-time employees, the rate for temporary disability benefits cannot be reconstructed.

## TABLE OF CASES

*Quereshi v. Cintas Corp.*, [413 N.J. Super. 492](#) [Shepardize](#) (App. Div. 2010) Decided May 28, 2010.

The Appellate Division held that a workers' compensation judge must award a reasonable counsel fee, 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. This "reasonable" counsel fee is not bound by the 20% limitation imposed by N.J.S.A. 34:15-64 as there is no such limitation required by the express language of section 28.1 and the intent of this statute was to make counsel fees, in the context of penalty proceedings, dependent upon the actual costs in petitioner legal fees which were incurred due to improper withholding of benefits.

*Cunningham v. Atlantic States Cast Iron Pipe Co.*, [386 N.J. Super. 423](#) [Shepardize](#) (App. Div. 2006) Decided June 26, 2006. After petitioner was terminated from his job with respondent for cause, a doctor advised petitioner that he needed treatment due to an injury he suffered on the job before his termination. The judge of compensation found petitioner eligible for temporary total disability benefits. However, the Appellate Division reversed the compensation judge's decision and remanded the case. The appellate court held that, in order to receive temporary disability benefits, the petitioner must establish on remand that "but for" his work-related disability he would have been employed.

*Wood v. Jackson Township*, [383 N.J. Super. 250](#) [Shepardize](#) Decided February 17, 2006. The Appellate Division affirmed the decision of the workers' compensation judge and held that petitioner's widow was entitled to receive the full amount of compensation benefits petitioner would have received had he not been receiving Social Security disability benefits before he died at age fifty-four. Since petitioner's Social Security disability benefits were terminated when he died, the basis for respondent's receiving an offset under N.J.S.A. 34:15-95.5 was thereby ended, making respondent responsible for paying petitioner's widow the full measure of workers' compensation benefits from the date of petitioner's death to the end of the designated period.

*Tobin v. All Shore All Star Gymnastics*, [378 N.J. Super. 495](#) [Shepardize](#) (App. Div. 2005). Decided June 24, 2005. The Appellate Division affirmed the decision of the workers' compensation judge and held that petitioner, who doubled as owner and chief instructor at respondent gymnastics school, was entitled to receive total temporary disability benefits for the period of time after she became able to resume her duties as an unsalaried owner but remained unable to perform the more physically demanding job duties of salaried chief instructor.

*Outland v. Monmouth-Ocean Educ. Serv. Comm'n*, [154 N.J. 531](#) [Shepardize](#) (1998). Temporary disability is payable to an employee until that employee is "able to resume work" even if the contract of hire would have expired (in this case a school teacher during summer recess who must demonstrate a loss of wages during that recess).

*Williams v Topps Appliance City*, [239 N.J. Super. 528](#) [Shepardize](#) (App. Div. 1989). Injured worker entitled to temporary disability for period during which he was still receiving active medical treatment yet was available for light-duty work, but no light-duty work was offered by the employer. The burden is on the employer to show that light work was offered and refused. The judge must articulate reasons for granting or denying 25% penalty.

*Dunlevy v. Kemper Ins. Group*, [220 N.J. Super. 464](#) [Shepardize](#) (App. Div. 1987), *certif. denied*, [110 N.J. 176](#) [Shepardize](#) (1988). Injured worker filed an action in Superior Court for common law compensatory and punitive damages for emotional and mental anguish sustained as a result of unilateral termination of psychiatric treatment by employer. Common law recovery was denied because N.J.S.A. 34:15-28.1 provides the exclusive remedy in cases of wrongful termination of temporary disability benefits. The plain intent of N.J.S.A. 34:15-28.1 is to ensure the prompt payment of temporary disability compensation since these payments form a partial substitute for a weekly paycheck. This need for prompt payment applies not only to delay or refusal to pay interim payments of compensation but also to adjudicated awards of temporary disability.

*Hodgdon v. Project Packaging, Inc.*, [214 N.J. Super. 352](#) [Shepardize](#) (App. Div. 1986), *certif. denied*, [107 N.J. 109](#) [Shepardize](#) (1987). An award of medical and temporary benefits can be appealed as of right.

*Amorosa v. Jersey City Welding & Machine Works*, [214 N.J. Super. 130](#) [Shepardize](#) (App. Div. 1986). Date of entry of judgment is date from which one calculated penalty and interest.

*Harbatuk v. S. & S. Furniture Systems Insulation*, [211 N.J. Super. 614](#) [Shepardize](#) (App. Div. 1986). Where employee became capable of performing light work but none was offered by employer, employee remained entitled to temporary disability benefits.

*Russell v. Saddle Brook Restaurant Corp.*, [199 N.J. Super. 186](#) [Shepardize](#) (App. Div. 1985). Temporary disability for a part-time employee is based upon actual part-time wages subject to the statutory maximum and minimum.

*Tamecki v. Johns Manville Products Corp.*, [125 N.J. Super. 355](#) [Shepardize](#) (App. Div. 1973), *certif. denied*, [64 N.J. 495](#) [Shepardize](#) (1974). An employee who removes himself from the labor market is not entitled to temporary disability.

## CHAPTER ELEVEN: MEDICAL TREATMENT

### STATUTORY PROVISIONS

*N.J.S.A. 34:15-15* provides:

The 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 and to restore the functions of the injured member or organ where such restoration is possible; provided, however, that the employer shall not be liable to furnish or pay for physicians' or surgeons' services in excess of \$50.00 and in addition to furnish hospital service in excess of \$50.00, unless the injured worker or the worker's physician who provides treatment, or any other person on the worker's behalf, shall file a petition with the Division of Workers' Compensation stating the need for physicians' or surgeons' services in excess of \$50.00, as aforesaid, and such hospital service or appliances in excess of \$50.00, as aforesaid, and the Division of Workers' Compensation after investigating the need of the same and giving the employer an opportunity to be heard, shall determine that such physicians' and surgeons' treatment and hospital services are or were necessary, and that the fees for the same are reasonable and shall make an order requiring the employer to pay for or furnish the same. The mere furnishing of medical treatment or the payment thereof by the employer shall not be construed to be an admission of liability.

If the employer shall refuse or neglect to comply with the foregoing provisions of this section, the employee may secure such treatment and services as may be necessary and as may come within the terms of this section, and the employer shall be liable to pay therefor; provided, however, that the employer shall not be liable for any amount expended by the employee or by any third person on the employee's behalf for any such physicians' treatment and hospital services, unless such employee or any person on the employee's behalf shall have requested the employer to furnish the same and the employer shall have refused or neglected so to do, or unless the nature of the injury required such services, and the employer or the superintendent or foreman of the employer, having knowledge of such injury shall have neglected to provide the same, or unless the injury occurred under such conditions as make impossible the notification of the employer, or unless the circumstances are so peculiar as shall justify, in the opinion of the Division of Workers' Compensation, the expenditures assumed by the employee for such physicians' treatment and hospital services, apparatus and appliances.

All fees and other charges for such physicians' and surgeons' treatment and hospital treatment shall be reasonable and based upon the usual fees and charges which prevail in the same community for similar physicians', surgeons' and hospital services.

When an injured employee may be partially or wholly relieved of the effects of a permanent injury, by use of an artificial limb or other appliance, which phrase shall also include artificial teeth or glass eye, the Division of Workers' Compensation, acting under competent medical advice, is empowered to determine the character and nature of such limb or appliance, and to require the employer or the employer's insurance carrier to furnish the same.

#### COMMENT

The duty of an employer to provide medical treatment is absolute. The employer has the right to choose the medical provider. If an employer refuses to provide treatment the injured employee may seek treatment on his/her own, conditioned on a demand on the employer except:

1. In an emergency,
2. Where the employer has knowledge of the injury and fails to act,
3. "Circumstances are so peculiar,"
4. The request for treatment would be futile.

The employer is only responsible for fees and charges that are reasonable and based upon the usual fees and charges which prevail in the same community for similar physicians', surgeons', and hospital services.

The requirement to provide medical treatment includes the requirement to provide "palliative" treatment when competent medical testimony demonstrates that such treatment is necessary to cure or relieve the effects of an injury.

It should be further noted that:

- a. Nursing home care is considered medical treatment.
- b. Renovation of a home for use by an invalid can be ordered as medical treatment.
- c. Provision of medical treatment is a payment of compensation for purposes of tolling the statute of limitations.
- d. Respondent is required to provide medical treatment related to its injury when petitioner is receiving benefits from the Second Injury Fund.
- e. Providing medical treatment by respondent is not an admission of liability.

A medical provider may file a collection action in the Superior Court, Law Division for unpaid services provided to an injured employee whether or not there is a workers' compensation claim pending, but if

such a claim is pending then the action must be transferred to the Division. A medical provider also may intervene in the worker's compensation proceeding initiated by the petitioner or file its own claim with the compensation court.

## TABLE OF CASES

*University of Massachusetts Memorial Medical Ctr., Inc. v. Christodoulou*, [180 N.J. 334](#) [Shepardize](#) (2004). A medical provider may file a common law collection action in the Superior Court, Law Division against an injured employee whether or not a claim is pending in the Division of Workers' Compensation. However, if a claim is pending in the Division, then the collection action filed in the Superior Court must be transferred to the Division. The Court specifically did not reach the issue of a medical provider who knows there is a pending workers' compensation claim and that its bill will not be presented to the compensation court. Does the provider have a duty to intervene or can it wait until the compensation proceeding has concluded? Nor did the Court reach the issue of the responsibility of an injured employee who contracts with a medical provider for a fee for services that a Workers' Compensation Court later deems to be unauthorized or unreasonable.

*Sheffield v. Schering Plough Corp.*, [146 N.J. 442](#) [Shepardize](#) (1996). Where employer counseled injured worker to apply for medical treatment and disability payments under its private plan and such benefits were paid, these benefits are payments of compensation and toll the statute of limitations. Medical treatment is a payment of compensation benefits.

*Squeo v. Comfort Control Corp.*, [99 N.J. 588](#) [Shepardize](#) (1985). Squeo, a 28-year-old quadriplegic, injured in a fall from a roof, had spent three years in a nursing home which led to a severe depression and three attempts at suicide. The Court ordered the construction of an apartment attached to his parent's home as "medical treatment." Such extraordinary relief can only be granted in the unusual case based upon sufficient and competent medical evidence that establishes the requested "other treatment" as reasonable and necessary to relieve the injured worker of the effects of his injuries. *Note: Review of the decision is recommended to appreciate the nature of the proofs adduced and the protection outlined for the carrier should Squeo's use of the apartment terminate.*

*Howard v. Harwood's Restaurant Co.*, [25 N.J. 72](#) [Shepardize](#) (1957). The requirement to furnish medical treatment includes not only that treatment that "cures" the injured worker, but also treatment that affords "relief." (palliative treatment)

*Raso v. Ross Steel Erectors, Inc.*, [319 N.J. Super. 373](#) [Shepardize](#) (App. Div), *certif. denied*, [161 N.J. 148](#) [Shepardize](#) (1999). When respondent seeks to include its costs for a rehabilitative nurse in its N.J.S.A. 35:15-

40 lien it must show that treatment rendered by rehabilitation nurse is “reasonable” and “necessary” to cure and relieve the injury of the worker. A mere showing that petitioner benefited is insufficient.

*Chubb Group v. Trenton Bd. of Educ.*, [304 N.J. Super. 10](#) [Shepardize](#) (App. Div.), *certif. denied*, [152 N.J. 188](#) [Shepardize](#) (1997). PIP carrier must make payments to injured insured who suffers a workers’ compensation accident within 60 days of notice of loss, but has a right of reimbursement for all reasonable and necessary costs from compensation carrier whether or not employee opts out of workers’ compensation system or where the employer authorized treatments that an injured employee requested.

*Di Bernard v. A & P*, [303 N.J. Super. 280](#) [Shepardize](#) (App. Div. 1997), *certif. denied*, [152 N.J. 365](#) [Shepardize](#) (1998). Workers’ compensation two year statute of limitations does not bar petitioner’s right to related medical treatment for a compensable injury when petitioner is receiving benefits from Second Injury Fund.

*Hanrahan v. Township of Sparta*, [284 N.J. Super. 327](#) [Shepardize](#) (App. Div. 1995), *certif. denied*, [143 N.J. 326](#) [Shepardize](#) (1996). Employer is responsible to provide treatment whether or not labeled “palliative” so long as there is a showing by competent medical testimony that the treatment is reasonably necessary to cure or relieve the effect of the injury. Palliative treatment is not limited to total disability cases.

*Amey v. Friendly Ice Cream Shop*, [231 N.J. Super. 278](#) [Shepardize](#) (App. Div. 1989). Intervening action by an employee is sufficient to excuse the employer from having to provide surgery. In this case, petitioner underwent surgical repair of the flexor tendon in his right hand. He was instructed to keep his splint on, not to lift things, not to make a full fist, and not to squeeze his fist. Prior to discharge from treatment and return to work, petitioner re-ruptured the tendon while working on his car. Respondent’s expert testified that it was very rare for the tendon to rupture spontaneously.

*Benson v. Coca Cola Co.*, [120 N.J. Super. 60](#) [Shepardize](#) (App. Div. 1972). The injured worker reported to the employer’s clinic and was offered diathermy, heat treatment, muscle relaxants and pain relievers. The worker did not give the physician the opportunity to provide treatment and did not tell the doctor that there was a need for medical attention other than what was offered. The worker did convey his feelings to a technician who told him that, while the clinic could not authorize going to another doctor, it could not stop anyone from doing so. The worker received treatment from another doctor of his own choosing and later sought reimbursement from the employer. The court ordered a “hind sight” review to determine whether a further demand for medical treatment to the employer would have been futile, whether the treatment offered was inadequate, and whether the treatment procured by the employee was reasonably necessary to cure and relieve the effects of his injury and to restore function where restoration was possible. (This case is frequently cited in subsequent cases.)

## CHAPTER TWELVE: PROOF REQUIREMENTS

### STATUTORY PROVISIONS

*N.J.S.A.* 34:15-36 provides:

“Disability permanent in quality and partial in character” means a permanent impairment caused by a compensable accident or compensable occupational disease, based upon demonstrable objective medical evidence, which restricts the function of the body or of its members or organs; included in the criteria which shall be considered shall be whether there has been a lessening to a material degree of an employee’s working ability. Subject to the above provisions, nothing in this definition shall be construed to preclude benefits to a worker who returns to work following a compensable accident even if there be no reduction in earnings. Injuries such as minor lacerations, minor contusions, minor sprains, and scars which do not constitute significant permanent disfigurement, and occupational disease of a mild nature such as mild dermatitis and mild bronchitis shall not constitute permanent disability within the meaning of the definition.

*N.J.S.A.* 34:15-7.2 provides:

In any claim for compensation for injury or death from cardiovascular or cerebral vascular causes, the claimant shall prove by a preponderance of the credible evidence that the injury or death was produced by the work effort or strain involving a substantial condition, event or happening in excess of the wear and tear of the claimant’s daily living and in a reasonable medical probability caused in a material degree the cardiovascular or cerebral vascular injury or death resulting therefrom.

See *N.J.S.A.* 34:15-7.3 for exceptions in the case of police, fire or emergency personnel in response to emergency.

*N.J.S.A.* 34:15-56 provides:

Rules of Evidence; At such hearing evidence, exclusive of ex parte affidavits, may be produced by both parties, but the official conducting the hearing shall not be bound by the rules of evidence.

### COMMENT

The Judge of Compensation must always keep in mind the standard of review when deciding a case. The Supreme Court in *Close v. Kordulak Bros.*, [44 N.J. 589, 599](#) [Shepardize](#) (1965) inquired “whether the findings made could have been reached on sufficient credible evidence in the record after giving due weight to (the

judges) expertise in the field and his opportunity to hear and observe the witness.” The standard of proof in a workers’ compensation case is preponderance of the evidence.

The standard for appellate review of a determination of a judge of compensation is that used for review of any nonjury case (i.e., “whether the findings made could have been reached on sufficient credible evidence in the record after giving due weight to (the judges) expertise in the field and his opportunity to hear and observe the witness”). *Brock v. Public Serv. Elec. & Gas Co.*, [149 N.J. 378, 383](#) [Shepardize](#) (1997). The appellate court may not substitute its own fact-finding for that of the judge of compensation, even if inclined to do so. *Lombardo v. Revlon, Inc.*, [328 N.J. Super. 484, 488](#) [Shepardize](#) (App. Div. 2000).

While *N.J.S.A. 34:15-56* provides that a workers’ compensation hearing shall not be bound by the rules of evidence, resolution of the substantive rights of the parties must be based upon legally competent evidence.

The purpose of not requiring strict compliance with the Rules of Evidence is to simplify the nature of proofs that can be offered in workers' compensation proceedings. *Reinhart v. E.I. Dupont De Nemours*, [147 N.J. 156, 163](#) [Shepardize](#) (1996). However, *N.J.S.A. 34:15-56* has not been construed to infringe upon the substantive rights of either party. A party's fundamental right to due process includes the right to present and cross examine a witness. *Paco v. American Leather Mfg. Co.*, [213 N.J. Super. 90](#) [Shepardize](#) (App. Div. 1986).

The conclusion of an expert witness should be carefully evaluated in the context of both the statutory criteria and prevailing medical standards. A Judge of Compensation is obligated to evaluate the testimony of a doctor according to demeanor, qualifications, trustworthiness of testimony, and the quality of the underlying examination. Expert testimony must only meet the standard set forth in *Rubanick v. Witco Chem. Corp.*, [125 N.J. 421](#) [Shepardize](#) (1991) which states that a scientific theory of causation that has not yet reached general acceptance may be found to be sufficiently reliable if it is based on a sound, adequately founded, scientific methodology involving data and information of the type reasonably relied upon by experts in the scientific field. The value of testimony in response to a hypothetical question depends on the accuracy of the hypothetical. A treating doctor’s opinion is entitled to more weight than an expert with a single examination. A history given to a treating doctor is admissible in evidence.

### ***Claims based upon cardiovascular or cerebral vascular causes – the heart cases***

*N.J.S.A. 34:15-7* imposes a stringent level of proof by explicitly requiring an employee to show the work effort was “in excess of the rigors of the claimant’s daily living and that the cause of the injury or death was job-related in a material degree.” The employee must show that the work effort was qualitatively more intense than the “wear and tear of claimant’s daily living” exclusive of work. Attention must be directed to

the intensity and duration of the precipitating work effort or strain in evaluating its capacity to cause cardiac dysfunction. The legislature's intention was to require more reliable proof of the connection between work effort and cardiac dysfunction.

When the heart attack is alleged to occur as the result of worry, the worry must be due in a realistic sense and material degree to a risk incident to the employment. A mere "impression" is not sufficient.

### ***Occupational heart cases***

The petitioner claiming an occupational disease must show that the disease is due in a material degree to causes or conditions that characterize the employee's occupation and that substantively contribute to the development of the disease. There may be an issue of dual causation in the occupational heart case, that is, a personal element such as smoking combined with occupational exposure. The question then becomes whether the legal cause of the disease results from the exposure at work or from personal factors. The section that controls is *N.J.S.A. 34:15-31*. The petitioner must show that the work exposure exceeds the exposure caused by the petitioner's personal risk factors *and* that the work exposure significantly contributed to the development of the disease. An occupational exposure substantially contributes to a disease when the exposure is so significant, that without the exposure, the disease would not have developed to the extent that it caused the disability resulting in the petitioner's incapacity. In addition to medical testimony the petitioner must show the extent of the worker's exposure to the alleged occupational conditions, the extent of the other non-work related exposures, and the manner in which the disease developed with reference to the claimant's medical and work history. The petitioner's testimony of the extent of exposure alone may not be sufficient to sustain his burden of proof.

### ***Non-heart occupational cases***

A petitioner has the burden of proof by a preponderance of the evidence that his environmental exposure was a substantial contributing cause of his occupational disease. A petitioner must prove legal causation (the injury is work connected) and medical causation (the injury is a physical or emotional consequence of work exposure). It is sufficient to prove that the risk or danger in the workplace was a contributing cause. Direct causation is not required. Activation, acceleration or exacerbation of disabling symptoms is sufficient.

### ***The psychiatric claim***

In the psychiatric claim that arises from a traumatic incident to the petitioner (physical-mental) there must be objective evidence to support an expert opinion of psychiatric disability. The mere "parroting" of the

petitioner's subjective statement of disability by the psychiatric expert cannot support an award of disability. However, there need not be a physical manifestation "observable" and "measurable" to support such a claim. "A professional psychiatric judgment might rest upon (1) analysis of the subjective statement of the patient; (2) observations of physical manifestations of the symptoms related to the subjective statement of the patient and/or (3) observations of manifestations of physical symptoms and analyses of descriptions of states of mind beyond those related in a patient's subject treatment."

When a psychiatric claim is alleged to have occurred as the result of gradual stressful work-related stimuli (mental-mental) there must be objective verifiable evidence. The proffered evidence must show that the employer created stressful conditions peculiar to the work place which justifies the medical opinion that there were material causes to the alleged disability. The perception of the petitioner is not sufficient.

A psychiatric claim may not be based on legitimate criticism of an employee such as that found in an evaluation. Merited criticism cannot be considered characteristic of and peculiar to a particular trade, occupation, process, or place of employment. Merited criticism is common to all occupations and places of employment.

#### ***Allocation of Disability Between Respondents***

In occupational disease cases, where multiple/successive respondents are involved and the evidence permits a reasonable allocation of liability between two or more successive employers (i.e., there is sufficient evidence supporting apportionment based on medical examination, work incapacity, or manifest loss of function), then such apportionment must be made by the compensation judge.

However, there are many situations where an employee is exposed to work conditions which activate or cause a progressive occupational disease, but the existence of such disease remains undisclosed and unknown over a period of time. Hence, it may be impossible (upon ultimate revelation of the existence of the disease by medical examination, work incapacity, or manifest loss of physical function) to pinpoint the triggering date(s) of such activation or inception. To avoid the morass into which litigation would be pitched were apportionment of disability among successive employers required under such circumstances, and to eliminate the recognized unsatisfactory nature of any such attempted ascertainment, the New Jersey Supreme Court has held that the employer or carrier during whose employment or coverage the disease was disclosed is the respondent or carrier that should be held liable. *Bond v. Rose Ribbon & Carbon Mfg. Co.*, [42 N.J. 308](#) [Shepardize](#) (1964). It should be noted that this *Bond* rule only applies to occupational disease claims – it does not apply to work accident cases. In addition, one should also remember that to hold such an employer liable there must be sufficient evidence supporting the allegation that the employer contributed

to the worker's disease or disability. *Vastino v. MAN-Roland, Inc.*, [299 N.J. Super. 628](#) [Shepardize](#) (App. Div.), *certif. denied*, [151 N.J. 464](#) [Shepardize](#) (1997).

Turning to accident cases, where the employee has suffered an accident and then returns to the same or similar employment, the last employer will not be held liable for petitioner's subsequent disability unless there is sufficient evidence to show that the last employment materially contributed to the employee's disability. Even then, there must be objective evidence showing that the ultimate disability can be affixed to a separate and distinct accident which occurred during that last employment. *Kozinsky v. Edison Prods. Co.*, [222 N.J. Super. 530](#) [Shepardize](#) (App. Div. 1988).

### ***Application to Review or Modify a Prior Award (Re-opener)***

In a proceeding to Review or Modify a Prior Award the claim must be supported by proofs that permit comparison that shows increased incapacity or functional loss. Increased disability cannot be based solely upon the estimate of the injured person's present degree of incapacity. An increase in disability need not be to the same part of the body as the original award if the petitioner shows that the increased incapacity is causally related to the same accident.

### **TABLE OF CASES**

*Gross v. Borough of Neptune City*, [378 N.J. Super. 155](#) [Shepardize](#) (App. Div. 2005) Decided June 10, 2005. The Appellate Division affirmed the decision of the workers' compensation judge and held that, pursuant to N.J.A.C. 12:235-3.9, surveillance videotapes of a petitioner will not be admissible as evidence unless the party offering such evidence has, prior to trial, given notice of its intent to present such evidence. Without such pre-trial disclosure, surveillance videotapes will be deemed inadmissible unless the employer can show it was unaware, and could not have been aware, of the facts warranting surveillance prior to trial.

*Reinhart v. E.I. Dupont De Nemours*, [147 N.J. 156](#) [Shepardize](#) (1996). Although the Rules of Evidence do not apply to workers' compensation proceedings it is well settled that a judge of compensation's determination must be based on competent evidence. The Rules of Evidence provide that all relevant evidence should be admitted unless otherwise excludable. Relevant evidence is broadly defined to mean "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." *N.J.R.E.* 401. In this case the transcript of a prior hearing was admitted in evidence. It was appropriate to use the transcript to compare petitioner's prior complaints to her complaints in this case but not appropriate for the judge of compensation to use it to buttress his conclusion that petitioner had been untruthful on more than one prior occasion and that she had the tendency to be untruthful.

*Perez v. Pantasote*, [95 N.J. 105](#) [Shepardize](#) (1984). See CHAPTER SIX: PERMANENT PARTIAL DISABILITY.

*Close v. Kordulak Bros.*, [44 N.J. 589](#) [Shepardize](#) (1965). The standard of review of a decision of the Division of Workers' Compensation is the same standard of review as that on appeal in any Superior Court non-jury case – “whether the findings made could reasonably have been reached on sufficient credible evidence present in the record,” considering “the proofs as a whole” with “due regard to the opportunity of the one who heard the witnesses to judge their credibility,” and, in the case of agency review, with due regard to the agency’s expertise where such expertise is a pertinent factor.

*Bober v. Independent Plating Corp.*, [28 N.J. 160](#) [Shepardize](#) (1958). Treating doctor’s opinion entitled to more weight than expert with a single examination. A petitioner is not required to prove his claim to a certainty: it is sufficient if the evidence establishes with reasonable probability that the employment caused or proximately contributed to the condition of disease alleged. The standard of proof is preponderance of the evidence. A history given to a treating doctor is admissible.

*Yeomans v. Jersey City*, [27 N.J. 496](#) [Shepardize](#) (1958). In a proceeding for increased disability the claim must be supported by proofs that permit comparison. Increased disability can not be based solely upon the estimate of the injured person’s present degree of incapacity.

*Levas v. Midway Sheet Metal*, [337 N.J. Super. 341](#) [Shepardize](#) (App. Div. 2001). Apportionment was warranted only as to those employments for which there was medical evidence to support a finding that claimant’s disability, whether partial or total, reached a measurable, increased plateau during employment.

*Brandt-Shaw v. Sands Hotel & Casino*, [282 N.J. Super. 106](#) [Shepardize](#) (App. Div. 1995). Petitioner suffered an injury on July 14, 1987 and received an award of 22% of her left leg but no disability for her back on January 14, 1989. On May 13, 1991, she received an increased award of 30% of her leg. On February 18, 1993, petitioner filed an application to review or modify only alleging disability to her back. Respondent alleged a statute of limitations defense. Petitioner entitled to an award for increased disability if the petitioner can show the increased incapacity was causally related to the same accident for which the prior awards were entered.

*Paco v. American Leather Mfg. Co.*, [213 N.J. Super. 90](#) [Shepardize](#) (App. Div. 1986). Although *N.J.S.A. 34:15-56* provides that a judge of compensation shall not be bound by the rules of evidence, this statute can not infringe upon the substantive rights of either party. A party's fundamental right to due process, which includes the right to present and cross examine a witness, must be respected. A judge of compensation may not force a party or parties to submit reports if they wish to present a witness or cross exam an adverse witness.

### ***Occupational Disease***

See CHAPTER FIVE: ACCIDENT AND OCCUPATIONAL DISEASE.

#### ***Heart Cases***

*Fiore v. Consolidated Freightways*, [140 N.J. 452](#) [Shepardize](#) (1995). Petitioner, a truck driver exposed to carbon monoxide in diesel fumes and a two pack a day smoker, alleges an occupational heart disease. This dual causation occupational heart case requires the application of *N.J.S.A. 34:15-31* and *N.J.S.A. 34:15-7.2*. He or she must show that the work exposure exceeds the exposure caused by his personal risk factors and that the employment exposure substantially contributed to the development of the disease, i.e., when the exposure is so significant that without the exposure, the disease would not have developed to the extent that it caused the disability resulting in the claimant's incapacity. The substantial contribution must be read to require the disease is "due in a material degree" to the workplace. Material degree requires a careful evaluation of an expert witness' conclusion in the context of both the statutory criteria and prevailing medical standards. *Note: The New Jersey Supreme Court in Lindquist v. City of Jersey City Fire Dep't., [175 N.J. 244](#) [Shepardize](#) (2003) specifically limits Fiore to cardiac cases.*

*Hellwig v. J. F. Rast & Co., Inc.*, [110 N.J. 37](#) [Shepardize](#) (1988). This opinion sets forth the test to be applied to heart cases under *N.J.S.A. 34:15-7.2*. The Compensation Judge must be informed of contemporary medical standards so they may be knowledgeable and circumspect in their assessment of conclusory expert testimony in heart cases. An expert witness' conclusion in a heart compensation case that work effort "caused in a material degree the cardiovascular injury or death" should be carefully evaluated in the context of both the statutory criteria and prevailing medical standards. The work effort should be measured against the "wear and tear of claimant's daily living" exclusive of work. The evaluation also should take into account the worker's medical history, the intensity and duration of the precipitating work effort, and the time interval between the work effort and the evidence of heart dysfunction. *Note: This opinion reviews the development of the law that governs heart cases and the legislative history of the adoption of N.J.S.A. 34:15-7.2.*

*Dietrich v. Toms River Bd. of Educ.*, [294 N.J. Super. 252](#) [Shepardize](#) (App. Div. 1996), *certif. denied*, [148 N.J. 459](#) [Shepardize](#) (1997). Petitioner alleges his cardiac condition was aggravated by stress encountered in his employment. Held that petitioner failed to meet his burden of proof. The mere fact that stressful conditions at work may bring out symptoms of an underlying condition does not compel the conclusion that it has either caused, aggravated, or accelerated the disease.

#### ***Psychiatric Cases***

See CHAPTER FIVE: ACCIDENT AND OCCUPATIONAL DISEASE.

## CHAPTER THIRTEEN: JURISDICTION

### STATUTORY PROVISIONS

*N.J.S.A. 34:15-49* (Original jurisdiction of claims) states:

The Division of Workers' Compensation shall have the exclusive original jurisdiction of all claims for workers' compensation benefits under this chapter.

*N.J.S.A. 34:15-8*. (Election surrender of other remedies) states:

Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in this article and an acceptance of all the provisions of this article, and shall bind the employee and for compensation for the employee's death shall bind the employee's personal representatives, surviving spouse and next of kin, as well as the employer, and those conducting the employer's business during bankruptcy or insolvency.

If an injury or death is compensable under this article, a person shall not be liable to anyone at common law or otherwise on account of such injury or death for any act or omission occurring while such person was in the same employ as the person injured or killed, except for intentional wrong.

*N.J.S.A. 34:15-9* (Presumption as to acceptance of elective compensation provisions) states:

Every contract of hiring made subsequent to the fourth day of July, one thousand nine hundred and eleven, shall be presumed to have been made with reference to the provisions of this article, and unless there be a part of such contract an express statement in writing prior to any accident, either in the contract itself or by written notice from either party to the other, that the provisions of this article are not intended to apply, then it shall be presumed that the parties have accepted the provisions of this article and have agreed to be bound thereby.

Every contract of hiring made or implied or in operation before the fourth day of July, one thousand nine hundred and eleven, shall be presumed to continue subject to the provisions of this article unless either party shall prior to the accident, in writing, notify the other party to such contract that the provisions of this article are not intended to apply.

*N.J.S.A. 34:15-10* (Employment of minors) states in part:

In the employment of minors, this article shall be presumed to apply unless the notice be given by or to the parent or guardian of the minor.

If the injured employee at the time of the accident or compensable occupational disease is a minor under 14 years of age employed in violation of the labor law or a minor between 14 and 18 years of age employed, permitted or suffered to work without an employment certificate or special permit if required by law or at an occupation prohibited at the minor's age by law, a compensation or death benefit shall be payable to the employee or his dependents which shall be double the amount payable under the schedules provided in R.S.34:15-12 and R.S.34:15-13. The possession of such duly issued employment certificate shall be conclusive evidence for an employer that the minor has reached the age certified to therein and no extra compensation shall be payable to any minor engaged in an employment allowed by the law for the age and sex certified to in such certificate. If the certificate presented by the employee as one issued to that person shall have been really issued to another child and the real age of the employee shall be such that employment in any capacity or in the particular capacity the employee was employed by the employer was prohibited and if the employer shall show to the satisfaction of the Division of Workers' Compensation that the employer accepted the certificate in good faith as having been issued to the employee and could not have, despite reasonable diligence, discovered the fraud, in such event no extra compensation shall be paid to the employee illegally employed.

*N.J.S.A. 34:15-34* (Time for claiming compensation for occupational disease) provides:

Notwithstanding the time limitation for the filing of claims for compensation as set forth in sections 34:15-41 and 34:15-51, or as set forth in any other section of this Title, there shall be no time limitation upon the filing of claims for compensation for compensable occupational disease, as hereinabove defined; provided, however, that where a claimant knew the nature of the disability and its relation to the employment, all claims for compensation for compensable occupational disease except as herein provided shall be barred unless a petition is filed in duplicate with the secretary of the division in Trenton within 2 years after the date on which the claimant first knew the nature of the disability and its relation to the employment; provided further, that in case an agreement of compensation for compensable occupational disease has been made between such employer and such claimant, then an employee's claim for compensation shall be barred unless a petition for compensation is duly filed with such secretary within 2 years after the failure of the employer to make payment pursuant to the terms of such agreement; or in case a part of the compensation has been paid by such employer, then within 2 years after the last payment of compensation. It is the express intention of the Legislature that, except in any case where claim is made for asbestosis, radiation poisoning, siderosis, anthracosis, silicosis, mercury poisoning, beryllium poisoning, chrome poisoning, lead poisoning or any occupational disease having the same characteristics of the above enumerated diseases as subsequently determined by the National Institute for Occupational Safety and Health, the provisions of this section shall not be applied retroactively but shall be applied only to those employees who shall cease to have been exposed in the course of employment to causes of compensable occupational diseases as defined in 34:15- 31(a) subsequent to January 1, 1980.

A payment or agreement to pay by the insurance carrier shall, for the purpose of this section, be deemed a payment or agreement by the employer.

*N.J.S.A. 34:15-41* (Claims barred after two years) provides:

In case of personal injury or death all claims for compensation on account thereof shall be forever barred unless a petition is filed in duplicate with the secretary of the workmen's compensation bureau, as prescribed by section 34:15-51 of this title.

*N.J.S.A. 34:15-48* (Representative appointed for compensation beneficiary) states:

The commissioner and each deputy commissioner of compensation is hereby authorized and empowered when in his judgment it shall be advisable, to appoint a representative with power to act for a person who may be entitled to compensation, by legally receiving and disbursing said compensation under the direction of the commissioner or any deputy commissioner of compensation, when it shall appear that such person is mentally, legally or physically unable to properly receive or disburse said compensation, or when said person, after due diligence, cannot be located. Whenever the person entitled to compensation is a minor child, and the commissioner or any deputy commissioner of compensation shall determine that there is no proper person available to receive and disburse said compensation for such child, then the State Board of Children's Guardians, as constituted by the provisions of chapter five, of Title Institutions and Agencies (§ 30:5-1 et seq.), may be appointed as the representative of such minor child.

*N.J.S.A. 34:15-51* (Claimant required to file petition within two years; contents; minors) states:

Every claimant for compensation under Article 2 of this chapter ( R.S. 34:15-7 et seq.) shall, unless a settlement is effected or a petition filed under the provisions of R.S. 34:15-50 , submit to the Division of Workers' Compensation a petition filed and verified in a manner prescribed by regulation, within two years after the date on which the accident occurred, or in case an agreement for compensation has been made between the employer and the claimant, then within two years after the failure of the employer to make payment pursuant to the terms of such agreement; or in case a part of the compensation has been paid by the employer, then within two years after the last payment of compensation except that repair or replacement of prosthetic devices shall not be construed to extend the time for filing of a claim petition. A payment, or agreement to pay by the insurance carrier, shall for the purpose of this section be deemed payment or agreement by the employer. The petition shall state the respective addresses of the petitioner and of the defendant, the facts relating to employment at the time of injury, the injury in its extent and character, the amount of wages received at the time of injury, the knowledge of the employer or notice of the occurrence of the accident, and such other facts as may be necessary and proper for the information of the division and shall state the matter or matters in dispute and the contention of the petitioner with reference thereto. A paper copy of the petition shall be verified by the

oath or affirmation of the petitioner. Proceedings on behalf of an infant shall be instituted and prosecuted by a guardian, guardian ad litem, or next friend, and payment, if any, shall be made to the guardian, guardian ad litem, or next friend. The division shall prepare and print forms of petitions and shall furnish assistance to claimants in the preparation of such petitions, when requested so to do.

## COMMENT

This chapter should be read in conjunction with CHAPTER FOURTEEN: NOTICE & KNOWLEDGE and CHAPTER FOUR: STATUTORY DEFENSES.

*N.J.S.A.* 34:15-49 states that “the Division of Workers’ Compensation shall have the exclusive original jurisdiction of all claims for workers’ compensation benefits under this chapter.” This does not mean that all questions of compensability shall be adjudicated in the Division. As a matter of fact much of the law of compensability arises in matters in which exclusivity (*N.J.S.A.* 34:15-8) is raised as an affirmative defense to claims for personal injury or death in Superior Court.

Jurisdiction for an accidental injury can be laid in the New Jersey Division of Workers’ Compensation when:

1. the injury occurs in New Jersey, or
2. New Jersey is the place of contract of hire, or
3. the employee resides in New Jersey, and there are some employment contacts in New Jersey.

To exercise jurisdiction in extraterritorial occupational disease cases, the petitioner must show either that (1) there was a period of work exposure in New Jersey that was not insubstantial, (2) the materials were highly toxic, or (3) the disease was obvious or disclosed while working in New Jersey.

There is no subject matter jurisdiction over an employee of the Port Authority of New York and New Jersey simply because the Port Authority is a bi-state agency. There must be some contact with New Jersey. Four months of toxic exposure in New Jersey during an employment of some 28 years with the Port Authority is not sufficient to maintain an occupational claim.

There may be dual jurisdiction. That is, more than one state may invoke the provisions of its Workers’ Compensation Act. An injured worker may collect benefits in one state and then chose to pursue his remedy in another. For example, an employer may provide medical treatment and pay temporary disability payments under the law of Pennsylvania and then the employee may choose to invoke the jurisdiction of New Jersey. Assuming jurisdiction is established, New Jersey may enter an award granting benefits. Of course, the employer is entitled to credit for benefits paid in the sister state.

*N.J.S.A.* 34:15-8 establishes an exception to the Workers' Compensation Act for an "intentional wrong." In addition to the obvious intentional wrong, such as an assault, an action of an employer may be an intentional wrong if an employer knows (a) that an injury is substantially certain to result and (b) that such an action is beyond anything the legislature contemplated as entitling the employee to recover only under the Compensation Act. Such an act is cognizable under the Workers' Compensation Act, and if the employee is later successful in a civil action the employer or its carrier may receive credit for monies paid in workers' compensation.

The Division has ancillary jurisdiction to determine questions related to an insurance policy, including fraud in the procurement, mistake by the parties, reformation of the policy, cancellation, etc. It may consider and order reimbursements among carriers as well as set-offs and credits between the parties. However, the Division may not enter an enforceable money judgement against one not an employer or its insurance carrier. Where the respondent insurance carrier alleges an overpayment of compensation the Division has jurisdiction to modify its judgment based upon principles of unjust enrichment. If the judgment is modified then respondent may institute enforcement proceedings in the Law Division of the Superior Court. The Division does not have jurisdiction to adjudicate the liability of an allegedly negligent insurance carrier to an employer.

When PIP benefits and workers' compensation benefits are available to an injured party the initial source of recovery is from the PIP carrier which is required to pay all due benefits. The PIP carrier is entitled to reimbursement from the workers' compensation carrier and may maintain an action in its own name when the employee has not filed a petition. The PIP carrier may not be forced to participate in a settlement under *N.J.S.A.* 34:15-20.

The New Jersey Workers' Compensation Act provides for an elective system where the parties may agree in writing prior to the happening of an accident not to be bound by Article II of the Act.<sup>2</sup> An effective election (a) must be in writing, (b) must spell out in clear and unambiguous language that both parties know that they are entitled to be bound either by Article I or Article II as well as the risks inherent in rejecting Article II in favor of Article I, (c) must describe in exact detail the benefits which each party would receive under Article I and Article II, (d) must be made prior to the occurrence of the injury or illness, and (e) there must be independent evidence to show that the parties understood exactly what they were getting and what they were giving up under the election and that neither party agreed to the election because of fraud, duress, misrepresentation or undue influence. In the case of occupational disease the election must occur prior to exposure and an election to opt out of the Act for occupational disease but not for accidents is inconsistent with the Workers' Compensation Act. Should there be a valid election not to be bound by Article II of the Act, *N.J.S.A.*

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<sup>2</sup> When the New Jersey Compensation Act was passed in 1911 the constitutional validity of compulsory compensation statutes was in doubt. Therefore the Legislature provided for an elective system. Subsequently the Supreme Court of the United States upheld the compulsory compensation acts. The only states that continue to provide for election are New Jersey, South Carolina and Texas.

34:15-72 requires every employer, except public entities, to make sufficient provision for the complete payment of any obligation which the employer may incur to an injured employee or his administrators or next of kin under said Article I. To the writer's knowledge no insurance company writes a policy that provides such coverage.

### ***Statute of Limitations***

A claim petition must be filed within two years of an accident or the last payment of compensation. Unless the accident causes an injury that is "latent or insidiously progressive" then the accident, "for Workers' Compensation filing purposes has not taken place until the signs and symptoms are such that they would alert a reasonable person that he has sustained a compensable injury." *Brunell v. Wildwood Crest Police Dept.*, [176 N.J. 225](#) [Shepardize](#) (2003). There is no statute of limitations for an occupational disease but claimant must file a claim within two years after the date on which the claimant first knew the nature of the disability and its relation to the employment.

Medical treatment is a payment of compensation and extends the period for the tolling of the statute of limitations. It is the provision of the treatment and not the date of payment for that treatment that is controlling. Payments of medical benefits under a respondent's private plan toll the statutory limitations period if the employer is aware of the existence of the work-related injury and the employee reasonably understood that such payments constituted, wholly or in part, compensation for an injury compensable under the Act.

Occupational disease claims must be filed "within two years after the date the claimant first had knowledge" of the nature of his disability and its relation to his employment. Knowledge connotes knowledge of the most notable characteristics of the disease sufficient to bring home substantial realization of its extent and seriousness. Knowledge of the "nature" of a disability includes knowledge that the injury is compensable. Where a petitioner knows the nature of his disability and its relationship to his employment and does not file a claim but continues to be exposed, it is the administrative understanding of the workers' compensation bench and bar that the statute of limitations runs from the last date of exposure. Although there is no court decision speaking to this issue the Supreme Court notes that the Division may continue to apply this administrative understanding until such time that the issue is squarely presented to a court. *See Earl v. Johnson & Johnson*, [158 N.J. 155](#) [Shepardize](#) (1999).

Where a petitioner participates in an employer funded voluntary program to monitor the existence or progression of an asbestos related disease such monitoring is considered medical treatment to toll the statute of limitations.

## TABLE OF CASES

### *Jurisdiction – Generally*

[\*Estate of Kotsovska v. Liebman\*](#) 433 N.J. Super. 537 (App. Div. 2013) Decided December 26, 2013.

Defendant appealed final judgment and jury verdict in favor of plaintiff in wrongful death action, contending decedent was his employee and thus the Workers' Compensation Act's exclusivity bar ([N.J.S.A. 34:15-8](#)) prohibited the estate from maintaining this action in civil court. The Appellate Division reversed the judgment of liability because the jury was improperly instructed on the question of employment relationship and remanded the matter to the Division of Workers' Compensation for its determination of whether decedent was defendant's employee or an independent contractor. The Division of Workers' Compensation was also directed to afterward transfer the case back to the civil court so it could either reinstate judgment in favor of the estate or dismiss the matter based on the Division's determination.

[\*Stancil v. ACE USA\*](#) \_\_\_N.J.\_\_\_(2012) The New Jersey Supreme Court affirmed the decisions of the Appellate Division and Superior Court in holding that an injured employee does not have a common-law right to sue a workers' compensation insurance carrier for pain and suffering caused by a carrier's delay in paying for or authorizing medical treatment, prescriptions and other services. The remedies provided by the Workers' Compensation Act constitute the exclusive remedy available to deal with noncompliance by a carrier with an order of the compensation court awarding such benefits

[\*Van Dunk v. Reckson Associates Realty Corp\*](#) \_\_\_N.J.\_\_\_ (2012) Applying the two-step analysis set forth in *Millison v. E.I. du Pont de Nemours & Co.*, 101 N.J. 161 (1985), the New Jersey Supreme Court concluded that the plaintiff failed to prove his employer's conduct rose to the level of an intentional wrong creating a substantial certainty of bodily injury or death. Accordingly, the Court reversed the judgment of the Appellate Division and found that the statutory bar against common-law torts (N.J.S.A. 34:15-8) applied to preclude this civil action

[\*Sentinel Insurance Company, LTD. v. Earthworks Landscape Construction, L.L.C.\*](#) 421 N.J. Super. 480 (App. Div. 2011) The Appellate Division reviewed and clarified the Williams – Sherwood ancillary jurisdiction doctrine (discussed in Larson's treatise) as it applies to the question of whether the NJ Division of Workers' Compensation can exercise concurrent jurisdiction over a carrier's motion for a declaratory judgment seeking rescission on the basis of a fraud alleged to have been committed by the petitioner in his role as a member of the respondent L.L.C. The appellate panel decided that the Division is an appropriate forum for litigation of this fraud defense along with hearing the underlying compensation claim and upheld the Law Division order transferring the case to the Division for such proceedings

*Stancil v. ACE USA*, [418 N.J. Super. 79](#) [Shepardize](#) (App. Div. 2011). After exhausting administrative remedies in the compensation court, the petitioner filed a complaint in the Superior Court seeking damages for a carrier's willful noncompliance with an order of the workers' compensation court. The Law Division judge, however, dismissed that complaint for failure to state a claim upon which relief can be granted. Afterward, the Appellate Division affirmed, holding that the remedies currently contained in the Workers' Compensation Act and related Division regulations constitute the exclusive remedy available to an aggrieved petitioner arising out of willful noncompliance by an employer or its insurer with an order of the compensation court.

*International Schools Services, Inc. v. NJ Dept. of Labor & Workforce Development* [408 N.J. Super. 198](#) [Shepardize](#) (App. Div. 2009). The Appellate Division reversed and remanded the declaratory judgment of the Superior Court judge who held that the petitioner must obtain workers' compensation insurance coverage for its overseas employees despite the fact that they work entirely overseas and never work in New Jersey. The Appellate court directed the trial court to expand the factual record and apply a Connolly/Larson analysis to determine whether the overseas employees had sufficient contacts with New Jersey to justify application of New Jersey's workers' compensation coverage laws.

*Frappier v. Eastern Logistics, Inc.*, [400 N.J. Super. 410](#) [Shepardize](#) (App. Div. 2008). The Appellate Division reversed the decision of the workers' compensation judge and held that it is improper for a court to issue an interlocutory order estopping a carrier from denying insurance coverage without first addressing: (1) the validity of the carrier's claim that it actually did reserve its right to disclaim coverage when it filed an answer that raised defenses against the claim petition; and/or (2) whether the petitioner was an employee of respondent (i.e., the carrier's client).

*Morella v. Grand Union/New Jersey Self-Insures Guaranty Association*, [193 N.J. 350](#) [Shepardize](#) (2008). The New Jersey Self-Insurers Guaranty Association argued that: (1) the Division of Workers' Compensation did not have jurisdiction to decide whether the Association improperly denied payment of petitioner's compensation benefits under [N.J.S.A. 34:15-120.18a](#); and (2) the petitioner, whose injury occurred before her self-insured employer's insolvency, was required to file a proof of claim in her employer's bankruptcy proceeding before she qualified for workers' compensation benefits under [N.J.S.A. 34:15-120.18a](#). However, the Appellate Division disagreed, concluding that: (1) the Division clearly has jurisdiction to decide this issue under [N.J.S.A. 34:15-49](#); and (2) the statutory requirement of filing such proof of claim applies only to claimants injured after the employer's insolvency and does not apply to claimants injured before the insolvency occurred. The New Jersey Supreme Court affirmed substantially for the reasons expressed by the Appellate Division.

*Flick v. PMA Ins. Co. and Kathleen Reed, Ind.*, [394 N.J. Super. 605](#) [Shepardize](#) (App. Div. 2007). The Appellate Division affirmed the decision of the Superior Court judge and held that the plaintiff, who alleged that the mechanisms available in the Division of Workers' Compensation for enforcing its orders are inadequate, was barred by N.J.S.A. 34:15-8 from pursuing a civil action against the defendants until after he exhausted the panoply of administrative remedies available to him in the Division.

*Morella v. Grand Union/New Jersey Self-Insures Guaranty Association*, [391 N.J. Super. 231](#) [Shepardize](#) (App. Div. 2007). The New Jersey Self-Insurers Guaranty Association argued that: (1) the Division of Workers' Compensation did not have jurisdiction to decide whether the Association improperly denied payment of petitioner's compensation benefits under N.J.S.A. 34:15-120.18a; and (2) the petitioner, whose injury occurred before her self-insured employer's insolvency, was required to file a proof of claim in her employer's bankruptcy proceeding before she qualified for benefits under N.J.S.A. 34:15-120.18a. However, the Appellate Division disagreed, concluding that: (1) the Division clearly has jurisdiction to decide this issue under N.J.S.A. 34:15-49; and (2) the statutory requirement of filing such proof of claim applies only to claimants injured after the employer's insolvency and does not apply to claimants injured before the insolvency occurred.

*Williams v. Port Auth. of N.Y. and N.J.*, [175 N.J. 82](#) [Shepardize](#) (2003). In order for New Jersey to exercise jurisdiction in extraterritorial occupational disease cases, the petitioner must show either that (1) there was a period of work exposure in New Jersey that was not insubstantial, (2) the materials were highly toxic, or (3) the disease was obvious or disclosed while working in New Jersey. In this case, the petitioner was a resident of New York whose contract of employment with the Port Authority arose in New York. His 28 years of employment were in New York except for an early period of four months in New Jersey. This four month exposure was not sufficient to confer subject matter jurisdiction.

*Sheffield v. Schering Plough Corp.*, [146 N.J. 442](#) [Shepardize](#) (1996). Petitioner notified respondent that she suffered a work connected injury. Petitioner received private plan benefits and medical benefits from her employer. When the private plan raised the issue of work related injury, the employer informed the medical insurer that the back condition was not work related. When an employer undertakes to advise an injured employee to apply for certain disability or medical benefits that are authorized by the employer, the employer assumes an obligation not to divert the employee from the remedies available under the Act and may be precluded from asserting the statutory bar by reason of its conduct. See CHAPTER ELEVEN: MEDICAL TREATMENT.

*Panzino v. Continental Can Co.*, [71 N.J. 298](#) [Shepardize](#) (1976). Claim petition was filed in 1972 when the claimant first discovered his hearing loss was work-related. This filing was six years after the date of claimant's retirement and the date of his last possible exposure to noise at work. On the date the claim was filed, it was

barred by the requirements of the *N.J.S.A.* 34:15-34 then in effect (i.e., that a claim be filed within five years from the date of the last occupational exposure). However, while the petitioner's claim was still pending and prior to a determination by the compensation court, the statute was revised to permit such a claim (i.e., now a claim needed to be filed within two years of the date the claimant first knew of the occupational disease and its relation to work). The New Jersey Supreme Court held that the claim was not time barred under retroactive application of the revised statute and that retroactive application did not deprive employer of its vested right to take advantage of the statutory time limit in effect when the claim was filed. The Court stated that the revised statute did not revive expired claims, but merely enlarged the jurisdiction of the Division of Workers' Compensation. *Note: Frequently cited in subsequent cases.*

*Williams v. Bituminous Casualty Corp.*, [51 N.J. 146](#) [Shepardize](#) (1968). The Division has jurisdiction to determine coverage although in this case since the carrier was not a party to the proceeding, the court's decision was not *res adjudicata* to that carrier's responsibility to pay the award. A carrier is estopped to deny coverage in a case which it has undertaken to defend. (A carrier's contractual right to defend presupposes that if the defense fails, the carrier will pay.)

*Oleyar v. Swift & Co.*, [51 N.J. 470](#) [Shepardize](#) (1968). Where no claim had been filed for an accident and where widow's claim filed more than two years after the date on which the accident occurred, her claim was time barred even though the claim was filed within two years of death.

*Boyle v. G & K Trucking Co.*, [37 N.J. 104](#) [Shepardize](#) (1962). Where injury occurred in New Jersey, jurisdiction was proper in New Jersey even though contract of employment was executed in another state.

*Sherwood v. E.H. Johnson*, [246 N.J. Super. 530](#) [Shepardize](#) (App. Div. 1991). The Division of Workers' compensation does not have jurisdiction to adjudicate a common-law dispute regarding liability of an insurance broker for its alleged negligent failure to provide workers' compensation coverage requested by an employer. However, this case cites *Williams v. Bituminous Casualty Corp.*, [51 N.J. 146](#) [Shepardize](#) (1968) but notes that in that case the entire discussion concerned the Workers' Compensation policy. The opinion also cites 2 *Larson Workers' Compensation Law Section 92.40* as to the general rule that "...when it is ancillary to the determination of the employee's right, the compensation commission has authority to pass upon a question relating to the policy, cancellation, existence or validity of an insurance contract, coverage of the policy at the time of the injury, and construction of extent of coverage."

*Cortes v. Interboro Mut. Indem. Ins. Co.*, [232 N.J. Super. 519](#) [Shepardize](#) (App. Div. 1988), *aff'd o.b.*, [115 N.J. 190](#) [Shepardize](#) (1989). Exclusive remedy for action of injured worker against insurer for refusal to offer diagnostic test was in Division of Workers' Compensation rather than Law Division.

*Hajnas v. Engelhard Mineral & Chem. Co.*, [231 N.J. Super. 353](#) [Shepardize](#) (App. Div. 1989). Respondent may seek recovery for the overpayment of workers' compensation benefits. The claim for overpayment must be resolved upon settled principles of unjust enrichment. The Division's decision may then be the basis of an enforcement proceeding in the Law Division of the Superior Court.

*Andrejcek v. Elmore Bake Shop*, [182 N.J. Super. 567](#) [Shepardize](#) (App. Div. 1982). Time from which an injured worker may file an Application for Review or Modification of an Award runs from the date when compensation would have been paid if worker had not recovered from a third party.

*Parks v. Johnson Motor Lines*, [156 N.J. Super. 177](#) [Shepardize](#) (App. Div. 1978). New Jersey residence of injured worker and substantial part of employment carried on in New Jersey sufficient for New Jersey jurisdiction even though accident occurred in Pennsylvania and contract of employment provided that North Carolina's law would govern.

#### ***Port Authority of New York and New Jersey***

*Connolly v. Port Auth. of N.Y. and N.J.*, [317 N.J. Super. 315](#) [Shepardize](#) (App. Div. 1998). The bi-state nature of the Port Authority of New York and New Jersey does not confer subject matter jurisdiction where the petitioner has no contact with New Jersey either in terms of his employment relationship with the Port Authority, his location of employment, or his residency.

#### ***Statute of Limitations***

*Brunell v. Wildwood Crest Police Dept.*, [176 N.J. 225](#) [Shepardize](#) (2003). Posttraumatic stress disorder may be either an occupational disease, if the result of recurrent traumatic events to which the claimant is exposed as a regular condition of employment, or as an accident if caused by a single unexpected traumatic event. If an unexpected traumatic event (an accident) has occurred and the injury it generated was latent or insidiously progressive, an accident for Workers' Compensation filing purposes has not taken place until the signs and symptoms are such that they would alert a reasonable person that he or she had sustained a compensable injury. *Note: The lengthy opinion outlines the history of the Workers' Compensation Act, the justification for a liberal construction of the statute, and an exhaustive description of Posttraumatic Stress Disorder.*

*Earl v. Johnson & Johnson*, [158 N.J. 155](#) [Shepardize](#) (1999). Knowledge of the "nature" of a disability includes knowledge that the injury is compensable. Although petitioner's respiratory problems began in 1989 she was not aware that the condition had deteriorated into a permanent disability until undergoing pulmonary function tests in 1993 and it is from that time that the statute of limitations runs. Although there has been no judicial

determination that continued exposure tolls the statute of limitation that is the administrative understanding of the Division. The Division may continue to apply that understanding until the issue is squarely presented to a court and the court explicitly addresses that administrative interpretation. This often-cited decision reviews the history of occupational disease.

*Adams v. New York Giants*, [362 N.J. Super. 101](#) [Shepardize](#) (App. Div.), *certif. denied*, [178 N.J. 33](#) [Shepardize](#) (2003). George Adams, a former National Football League running back for the New York Giants and the New England Patriots, injured his entire left side in August 1986 and was treated for a hip flexor. Although he continued to play during the pre-season, he missed the entire regular season. He passed a pre-season physical in 1987 and played that year as well as in 1988 and 1989. His hip got neither better nor worse. He signed with the Patriots in 1990 and signed a waiver with that team releasing any liability for further injury to that hip. He played the full 1990 season but was released after the first full season game in 1991 and retired to Texas. By 1995, having abandoned the strict treatment regimen practiced as a professional football player, his hip became significantly worse and he underwent an unsuccessful total hip replacement. He filed a claim on July 25, 1996. His claim was dismissed based upon the accident statute of limitations. His injury was determined not to be an occupational disease nor an accident that resulted in a latent or insidiously progressive disease as defined in *Brunell v. Wildwood Crest Police Dept.*, [176 N.J. 225](#) [Shepardize](#) (2003).

*Milos v. Exxon U.S.A.*, [281 N.J. Super. 194](#) [Shepardize](#) (App. Div. 1995), *aff'd o.b.*, [143 N.J. 333](#) [Shepardize](#) (1996). Participation in an employer funded voluntary program to monitor existence or progression of asbestos related diseases extended jurisdictional limitations period for an application to review or modify a prior award.

*Bucuk v. Edward A. Zusi Brass Foundry*, [49 N.J. Super. 187](#) [Shepardize](#) (App. Div.), *certif. denied*, [27 N.J. 398](#) [Shepardize](#) (1958). Knowledge of an occupational disease connotes knowledge of the characteristics of the disease sufficient to bring home substantial realization of its extent and seriousness. *Note: Frequently cited in subsequent cases.*

### ***Election Out of the Workers' Compensation Act***

*Peck v. Newark Morning Ledger Co.*, [344 N.J. Super. 169](#) [Shepardize](#) (App. Div. 2001). Sets forth the criteria to elect out of the coverage of the Workers' Compensation Act.

### ***The Exclusive Remedy-The Intentional Wrong***

*Kibler v. Roxbury Bd. of Educ.*, [392 N.J. Super. 45](#) [Shepardize](#) (App. Div 2007)

The Appellate Division affirmed the decision of the Superior Court trial judge and held that the plaintiff, who was injured at work as a result of an altercation between two students, was barred from pursuing a civil action for damages as to these defendants. The appellate court held that the facts alleged in the plaintiff's complaint failed to raise any genuine issue of material fact as to whether her injuries came within the purview of conditions the New Jersey Legislature intended to exempt from the exclusive remedy provisions of Workers' Compensation Act. Accordingly, the plaintiff's exclusive remedy was held to remain with the Division of Workers' Compensation for her work-related accident.

*Crippen v. Central Jersey Concrete Pipe Co.*, [176 N.J. 397](#) [Shepardize](#) (2003). The employee, who fell into a sand hopper and suffocated, was required to walk on a single two-inch by ten-inch wooden plank and stand on a six-foot-high unsecured ladder that rested on that wooden plank, to accomplish his assigned job. Prior to the employee's death, OSHA had issued a citation for violations. The violations were not corrected. Fraudulent misrepresentations were made to OSHA that corrections had been made. Whether such conduct was sufficient to give rise to an intentional wrong as defined in *Millison* was a question for the jury.

*Mull v. Zeta Consumer Products*, [176 N.J. 385](#) [Shepardize](#) (2003). Employee was injured in a machine on which a safety device had been removed by the employer. Prior to the injury, OSHA had cited employer for failing to provide "lockout-tag out" procedures. Also, prior to the accident, another employee had suffered a similar injury. Such conduct sufficient to give rise to a jury question of an intentional wrong.

*Tomeo v. Thomas Whitesell Constr. Co.*, [176 N.J. 366](#) [Shepardize](#) (2003). Although the employer had taped down a safety lever on a snow-blower and employee had been injured while removing snow stuck from that blower, the facts did not rise to the level of an intentional tort. The snow-blower was a commercial product that contained printed warnings.

*Laidlow v. Harlton Mach. Co.*, [170 N.J. 602](#) [Shepardize](#) (2002). The removal of a safety guard from a machine can meet the intentional wrong standard, destroying the exclusivity provision of the Worker's Compensation Act. Such a determination requires a case by case analysis. The court points out that *Millison* utilizes the view of Prosser and the Restatement (Second) of Torts, for its definition of intent. The Court also instructs that it is for the jury to determine if the employer acted with knowledge that it was substantially certain that a worker would suffer injury and for the court to determine the context prong, that is, do the facts demonstrate a simple fact of industrial life or are they outside the purview of the conditions the Legislature could have intended to immunize under the Workers' Compensation bar.

*Millison v. E.I. Dupont de Nemours & Co.*, [101 N.J. 161](#) [Shepardize](#) (1985). In this landmark case the Supreme Court of New Jersey held that some acts of an employer can be so egregious as to constitute an "intentional wrong" and thus bar the exclusivity-remedy defense of the Workers' Compensation Act to a common law

tort action. Workers alleged that the employer and its physicians intentionally exposed the employees to asbestos in the workplace, deliberately concealed from the employees the risks of exposure to asbestos, and fraudulently concealed specific medical information obtained during employee physical examinations that revealed diseases already contracted by workers. The essential question became “what level of risk exposure is so egregious as to constitute an “intentional wrong.” The mere knowledge and appreciation of a risk – something short of substantial certainty – is not intent. There must be evidence that the acts of the employer must be “substantially certain” to inflict harm. [The level of risk-exposure that satisfies the “intentional wrong” must be examined not only from the point of view of the conduct of the employer but also in the context in which that conduct takes place; may the resulting injury or death, and the circumstances in which it is inflicted on the workers, fairly be viewed as a fact of life of industrial employment, or is it rather plainly beyond anything the legislature could have contemplated as entitling the employee to recover only under the Compensation Act?] (Following remand and trial, recovery for workers was sustained at [226 N.J. Super. 572](#) [Shepardize](#) (App. Div. 1988) and [115 N.J. 252](#) [Shepardize](#) (1989).

## CHAPTER FOURTEEN: NOTICE & KNOWLEDGE

### STATUTORY PROVISIONS

*N.J.S.A. 34:15-17* (Notification of employer) provides:

Unless the employer shall have actual knowledge of the occurrence of the injury, or unless the employee, or some one on his behalf, or some of the dependents, or some one on their behalf, shall give notice thereof to the employer within fourteen days of the occurrence of the injury, then no compensation shall be due until such notice is given or knowledge obtained. If the notice is given, or the knowledge obtained within thirty days from the occurrence of the injury, no want, failure, or inaccuracy of a notice shall be a bar to obtaining compensation, unless the employer shall show that he was prejudiced by such want, defect or inaccuracy, and then only to the extent of such prejudice. If the notice is given, or the knowledge obtained within ninety days, and if the employee, or other beneficiary, shall show that his failure to give prior notice was due to his mistake, inadvertence, ignorance of fact or law, or inability, or to the fraud, misrepresentation or deceit of another person, or to any other reasonable cause or excuse, then compensation may be allowed, unless, and then to the extent only that the employer shall show that he was prejudiced by failure to receive such notice. Unless knowledge be obtained, or notice given, within ninety days after the occurrence of the injury, no compensation shall be allowed.

*N.J.S.A. 34:15-12(c)23* (Notice of traumatic hernia) provides:

Where there is a traumatic hernia, compensation will be allowed if notice thereof is given by the claimant to the employer within 48 hours after the occurrence of the hernia, but any Sunday, Saturday or holiday shall be excluded from this 48-hour period.

### COMMENT

This Chapter should be read in conjunction with CHAPTER 13: JURISDICTION. The statutory requirement for notice is considered to be jurisdictional.

In accidental injury notice must be given within fourteen days of the occurrence of the injury, or within thirty days, unless the failure or inaccuracy of the notice prejudices the employer and then the petitioner is only barred to the extent of the prejudice or ninety days if due to mistake, inadvertence, ignorance of fact or law, inability, or due to fraud, misrepresentation or deceit of another, or any other reasonable cause or excuse and then petitioner is barred only to the prejudice to the employer. Unless knowledge be obtained, or notice given, within ninety days, no compensation shall be allowed. (Emphasis added)

The occupational disease notice statute (*N.J.S.A.* 34:15-33) was repealed in its entirety, effective January 14, 2004. This legislative action negates the holding in *Brock v. Public Service Electric & Gas Co.*, [149 N.J. 378](#) [Shepardize](#) (1997).

The two primary objectives of the notification requirement are (1) to afford the employer a timely opportunity to investigate the claim when the facts remain accessible; (2) to enable the employer to provide medical care to minimize the employee's injury.

Our courts have been rather lenient in finding compliance with either the notice or knowledge requirement. For example, the actual knowledge requirement was fulfilled by employer's observation during employment that employee manifested unmistakable symptoms of chronic lead poisoning; notice from an examining physician to employer regarding disability from occupational disease satisfied notice requirement; employee's report of disability to foreman sufficient to satisfy statutory requirement of actual knowledge by employer; discussion of dermatological condition with employer during course of employment satisfied statutory actual knowledge requirement.

"The employee knew or ought to have known the nature of his disability and its relation to his employment" has been pragmatically applied by the courts. When a claim petition against the last employer was dismissed for lack of exposure at that employment the Appellate Division held that was the effective date for notice against prior employers because that dismissal was the event that put the petitioner and his counsel on notice that a prior employer might be liable for his occupational disease. The petitioner may not know the relationship between disability and employment until consultation with counsel. Notice ought to be construed in light of the petitioner's particular background, intelligence, experience and the character of the disability. When the happening of a minor occurrence is followed by a significant period of time before the extent of an injury is manifest then the period for notice runs from when that injury becomes known.

When an employer has knowledge of facts that should raise in its mind the possibility of a work connected condition, that knowledge satisfies the notice requirement. The test is whether a reasonably conscience employer has grounds to suspect the possibility of a potential compensation claim.

## **TABLE OF CASES**

*Brunell v. Wildwood Crest Police Dep't.*, [176 N.J. 225](#) [Shepardize](#) (2003). When petitioners were exposed to a single traumatic event that resulted in an injury that was latent or insidiously progressive, causing petitioner's notice to be untimely, limitations period did not begin to run until symptoms became manifest.

*Salerno v. McGraw-Edison Indus.*, [59 N.J. 129](#) [Shepardize](#) (1971). Worker's failure to report hernia to employer within 48 hours of work-related strain as required by statute specific to hernia claims did not bar claim since worker had no knowledge or reason to know of a compensable injury until a later examination by the employer's physician.

*Bollerer v. Elenberger*, [50 N.J. 428](#) [Shepardize](#) (1967). Where an employer has knowledge of facts that should have raised in its mind the possibility of a work-connected condition, such knowledge satisfies notice requirements. The test is whether a reasonable conscientious employer had grounds to suspect the possibility of a potential compensation claim.

*Goldstein v. Continental Baking Co.* [16 N.J. 8](#) [Shepardize](#) (1954). A note provided to employer within 90 days by the petitioner's treating doctor satisfied petitioner's notice requirement.

*Panchak v. Simmons Co.*, [15 N.J. 13](#) [Shepardize](#) (1954). Employer had timely notice when injured petitioner felt a fleeting pain in his back while lifting, saw the company nurse, left work but returned the next day, and then months later was diagnosed with a herniated disc.

## CHAPTER FIFTEEN: UNINSURED EMPLOYER'S FUND

### STATUTORY PROVISIONS

New Jersey employers are required to maintain workers' compensation coverage for their employees either through private insurance or, when authorized, as a self-insured. Where an employer fails to meet this obligation and further refuses to provide workers' compensation benefits, an injured worker may request medical treatment and/or temporary disability payments from the Uninsured Employers' Fund (UEF). This Fund, established in May of 1988, does not provide payments for permanent disability or dependency awards except in limited asbestos-related injury situations discussed below. The UEF may provide for medical care to assist the petitioner until he or she has reached maximum medical improvement (*N.J.A.C. 12:235-7.4*) and may reimburse certain government agencies only for benefits paid conditionally to or on behalf of the petitioner pursuant to federal or New Jersey law (*see N.J.A.C. 12:235-7.6*). In all cases where the UEF has provided benefits, it retains subrogation rights against the employer and certain principal officers of a corporate employer for any monies paid by the UEF.

#### 1. Statutory coverage requirement and penalties/assessments for failure to protect

*N.J.S.A. 34:15-71* (Employer's obligation to insure) provides in part:

Every employer, except the state or a municipality, county or school district, who is now or hereafter becomes subject to the provisions of article 2 of this chapter ( 34:15-7 et seq.), as therein provided, shall forthwith make sufficient provision for the complete payment of any obligation which he may incur to an injured employee, or his dependents under the provisions of said article 2, by one of the methods hereinafter set forth in sections 34:15-77 and 34:15-78 of this title.

*N.J.S.A. 34:15-79* (Penalty and/or assessments for failure to provide protection and persons liable) provides in part:

An employer who fails to provide the protection prescribed in this article shall be guilty of a disorderly persons offense and shall be guilty of a crime of the fourth degree if such failure is willful. In cases where a workers' compensation award in the Division of Workers' Compensation of New Jersey against the defendant is not paid at the time of the sentence, the court may suspend sentence upon that defendant and place him on probation for any period with an order to pay the delinquent compensation award to the claimant through the probation office of the county. Where the employer is a corporation, the president, secretary, and the treasurer thereof who are actively engaged in the corporate business shall be liable for failure to secure the protection prescribed by this article. Any contractor placing work with a subcontractor shall, in the event of the subcontractor's failing to carry workers' compensation insurance as required by this article, become liable for any compensation which may be due an employee or the dependents of a deceased employee of a subcontractor. The contractor shall then have a right of action against the subcontractor for reimbursement.

*N.J.S.A.* 34:15-81 (Notice required for cancellation of compensation insurance) provides:

Any contract of insurance issued by a stock company or mutual association against liability arising under this chapter may be canceled by either the employer or the insurance carrier within the time limited by such contract for its expiration. No such policy shall be deemed to be canceled until:

- a. At least ten days' notice in writing of the election to terminate such contract is given by registered mail by the party seeking cancellation thereof to the other party thereto; and
- b. Until like notice shall be filed in the office of the commissioner of banking and insurance, together with a certified statement that the notice provided for by paragraph "a" of this section has been given:
- c. Until ten days have elapsed after the filing required by paragraph "b" of this section has been made.

The provisions "b" and "c" of this section shall not apply where the employer has replaced the contract to be canceled by other insurance, and notice of such replacement has been filed with the Commissioner of Banking and Insurance. In such event the notice required by provision "a" may, if given by the insurance carrier, recite as the termination date the effective date of the other insurance and the contract shall be terminated retroactively as of that date. No notice of cancellation of any such contract need be filed in the office of the Commissioner of Banking and Insurance where the employer is not required by any law of this State to effect such insurance.

## 2. Creation and administration of UEF; benefits generally payable

*N.J.S.A.* 34:15-120.1 (Creation and operation of UEF) provides in part:

There is hereby created a fund which shall be known as the "uninsured employer's fund" to provide for the payment of awards against uninsured defaulting employers who fail to provide compensation to employees or their beneficiaries in accordance with the provisions of the workers' compensation law, [R.S. 34:15-1](#) et seq.

*N.J.S.A.* 34:15-120.2 (Benefits generally payable by UEF) provides in part:

- b. Benefit payments from the "uninsured employer's fund" may include:
  - (1) Compensation for reasonable medical expenses covered by the workers' compensation law, *R.S.* 34:15-1 et seq.; and
  - (2) Compensation for temporary disability as provided in subsection a. of [R.S. 34:15-12](#).
- c. Benefit payments from the "uninsured employer's fund" shall not include:
  - (1) Any compensation not included in the award or judgment upon which a claim against the fund is made;
  - (2) Extra compensation or death benefits pursuant to [R.S. 34:15-10](#).

d. Temporary disability benefits paid from the "uninsured employer's fund" shall be offset or reduced by an amount equal to the amount of disability benefits received by the claimant pursuant to the federal "Old-Age, Survivors' and Disability Insurance Act" ([42 U.S.C. § 401](#) <sup>Shepardize</sup> et al.).

e. Benefits shall be paid to a claimant from the "uninsured employer's fund" only if the claimant: (1) was, at the time of the injury or death, an employee performing service for an employer outside of casual employment as defined in [R.S. 34:15-36](#); and (2) did not recover full compensation for reasonable medical expenses and temporary disability benefits from the uninsured defaulting employer.

*N.J.S.A. 34:15-120.3* (Judgments against and/or defaults by uninsured employers) provides:

In case of default by an uninsured employer in the payment of any compensation due under an award for a period of 45 days after payment is due and payable and the uninsured employer fails or refuses to deposit with the director within 10 days after demand the commuted or estimated value of the compensation payable under the award as security for prompt and convenient payment of such compensation periodically as it accrues, or in case of failure by an employer, within 20 days after it is due to pay any assessment imposed by the director pursuant to section 34:15-79 of the Revised Statutes or section 38 of this act, the director in any such case may file with the Clerk of the Superior Court, (1) a statement containing the findings of fact, conclusions of law, award and judgment of the officer making the award which is in default together with a certified copy of the demand for deposit of security, or (2) a certified copy of the director's order imposing, and the demand for payment of, such assessment, and, thereupon, shall have the same effect and may be collected and docketed in the same manner as judgments rendered in causes tried in the Superior Court. The court shall vacate or modify such judgment to conform to any later award or decision by any authorized officer of the division upon presentation of a statement thereof as provided for above. The award may be compromised by the Commissioner of Labor and Industry as in his discretion may best serve the interest of the persons entitled to receive the compensation or benefits.

*N.J.S.A. 34:15-120.4* (Payments by UEF upon application to Commissioner) provides in part:

a. After an award has been entered against an employer for compensation under any provision of the workers' compensation law, [R.S. 34:15-1](#) et seq., and the Director of the Division of Workers' Compensation has filed an order for payment of compensation and assessments with the Clerk of the Superior Court pursuant to section 12 of P.L. 1966, c. 126 (C. 34:15-120.3) as a result of the employer's failure to provide lawful compensation, the claimant may apply to the Commissioner of Labor for compensation from the "uninsured employer's fund" in accordance with the procedures established by the Commissioner of Labor pursuant to section 16 of P.L. 1966,c.126(C.34:15-120.7).

b. The Commissioner of Labor is charged with the conservation of the assets of the "uninsured employer's fund." Notwithstanding the provisions of any other section of this act, no payments shall be made from the fund except upon application to and approval by the commissioner. Review of

any decision by the commissioner shall be in accordance with [R.S. 34:15-66](#).

c. The Commissioner of Labor shall have the authority to establish rules for the review of claims against the "uninsured employer's fund" and hire and reimburse medical and other expert witnesses that are necessary to a proper conservation and defense of the moneys in the fund.

d. Upon being notified by the Commissioner of Labor that a decision of the commissioner regarding claims against the "uninsured employer's fund" is being appealed pursuant to [R.S. 34:15-66](#), the Attorney General, or his designee, shall defend the fund.

### 3. Special UEF benefits payable in certain asbestosis or asbestos-related cancer cases

N.J.S.A. 34:15-33.3 provides in part:

a. In the case of a claim for compensation for an occupational disease resulting in injury or death from an exposure to asbestos, if after due diligence, the standards for which shall be set forth by the Director of the Division of Workers' Compensation: (1) the workers' compensation insurer of an employer, the employer, or the principals of the employer where the claimant was last exposed cannot be located; or (2) the employee making the claim worked for more than one employer, during which time the exposure to as asbestos may reasonably be deemed to have taken place but the employer or employers where the petitioner was last exposed cannot reasonably be identified, an application shall be made to the uninsured employers' fund ... and any award by a judge of compensation shall be payable from the fund. For the purposes of this section "occupational disease resulting in injury or death from an exposure to asbestos" means asbestosis or any asbestos-induced cancer, including mesothelioma.

b. In the case of any claim paid by the uninsured employers' fund pursuant to this section, the fund shall have the right of subrogation against (1) any insurer or employer identified as liable as set forth under the provisions of subsection a. of this section; or (2) against the stock workers' compensation security fund, or the mutual worker's compensation security fund ... if an insolvent insurer is determined to be liable; or (3) against the New Jersey Self-Insurers Guaranty Association if an insolvent self-insurer is determined to be liable.

c. The fund shall have a lien pursuant to N.J.S.A. 34:15-40 against any award received by the claimant from a third party resulting from the exposure to asbestos.

d. Compensation shall be based on the last date of exposure, if known, or if the last date of exposure cannot be known, the judge shall establish an appropriate date.

## COMMENT

### 1. Coverage issues

Under New Jersey law, the provision for payment of workers' compensation benefits through insurance or self-insurance is mandatory. As a result, issues sometimes arise when an employer claims that it maintained workers' compensation insurance coverage but a carrier alleges that the workers' compensation insurance policy was properly cancelled or was not renewed. When such issues arise, the insurance carrier has the burden of proving that it properly cancelled the policy or sent the required renewal notice to the employer.

In cases where proper cancellation is at issue, a carrier must show that it strictly complied with all of the cancellation notice provisions set forth in *N.J.S.A. 34:15-81* (i.e., it sent a cancellation notice to the insured/employer at least ten days prior to the effective date of cancellation by registered mail, it filed like notice to the Compensation Rating and Inspection Bureau, and a period of at least ten days has elapsed since both notices were made). *Bright v. T & W Suffolk*, [268 N.J. Super. 220](#) [Shepardize](#) (App. Div. 1993). The carrier's cancellation notice must contain all required information, including: date sent; effective date of cancellation; past due premium, and statement that if the carrier receives the past due premium prior to date of cancellation the policy will not be cancelled. If the effective cancellation date passes and the insured/employer has still failed to pay past premiums due the carrier, the carrier must file such final cancellation data with the Compensation Rating and Inspection Bureau (but should wait until at least ten days have elapsed after the mailing and filing of the carrier's original notices of intent to cancel).

In cases where proper notice of renewal is at issue, the carrier must prove that it mailed the employer sufficient notice of renewal (i.e., notice that clearly warns the employer of any impending nonrenewal of coverage). In *Romanny v. Stanley Baldino Constr.*, [142 N.J. 576](#) [Shepardize](#) (1995), the New Jersey Supreme Court held that a renewal notice must be sent at least thirty days prior to the expiration of the policy, but no more than ninety days prior to the expiration of the policy. The notice must contain all required information, including the date of the expiration of the policy; date notice was sent; and the premium amount due and owing. (*Note: Unlike cancellation notices, New Jersey law does not require that renewal notices be sent by certified or registered mail.*)

If, after hearing arguments on a coverage issue, the compensation judge reaches the conclusion that the employer did not maintain worker's compensation coverage on the date of accident or exposure, the UEF may become joined in the case.

## 2. Seeking benefits from the UEF

Specific procedures to be followed by a petitioner in order to join the UEF when proceeding with an uninsured employer case are set forth in *N.J.A.C. 12:235-7.1* to *7.7*. The petitioner or petitioner's attorney must contact the Compensation Rating and Inspection Bureau for coverage information in writing within thirty days after the petitioner or the petitioner's attorney knew or should have known that the employer was

uninsured or has received confirmation that the employer was uninsured on the date of the accident or occupational exposure alleged in the claim petition. If the petitioner desires to seek benefits from the UEF, the petitioner or petitioner's attorney must notify the UEF in writing within thirty days after the petitioner or petitioner's attorney knew or should have known that the employer was uninsured on the date of the accident or occupational exposure or has received information from the Compensation Rating and Inspection Bureau showing that the employer was uninsured on the date alleged. The petitioner or petitioner's attorney must then file a motion to join the Uninsured Employers' Fund. A detailed certification must be included with the motion to join the UEF. *N.J.A.C. 12:235-7.3* requires the certification to contain the following items of specific information if known:

1. The date of hire immediately preceding the date of the accident, injury or occupational exposure;
2. The length of employment: If not continuous, list all dates of employment;
3. Copies of petitioner's W-2 forms for all dates of employment during the year in which the accident occurred;
4. Pay stubs for or other documentation in support of all wages received from respondent for the six months immediately preceding the date of the accident or occupational exposure;
5. The total wages received from respondent for 12 months immediately preceding the accident, which includes salary, gratuities, services, in lieu of wages, meals or lodging;
6. The name, address (business and personal) and phone number of the respondent and any corporate officer or manager of the company;
7. Any documents relating to the employer/employee relationship or lack thereof;
8. A statement of facts which establish the employer-employee relationship;
9. The name, address and phone number of all persons with knowledge of the existence of an employer/employee relationship between petitioner and respondent;
10. The address and/or other identifying information about where the injury occurred, including the name of the owner of the property and the reason why the employee was at the location where the injury occurred;
11. The name, address and phone number of all witnesses to the accident, and whereabouts of respondent when the accident occurred;
12. The name, address and phone number of all persons with any knowledge of the accident;

13. The date on which a medical provider was first contacted concerning injuries sustained in the accident or occupational condition;

14. The name and address of all treating physicians and the name and address of any hospital, laboratory or other facility where treatment was received;

15. Copies of all medical reports from the hospitals and treating physicians;

16. Medical insurance coverage for employee and/or spouse, and if available, the name and address of the company and the policy number;

17. A detailed listing of medical expenses which have been paid, the dates the medical services were provided, the names of individuals and entities providing such services, and the sources and amounts of such payments; and

18. Whether or not the petitioner is receiving or has applied for Social Security, unemployment compensation, temporary disability insurance, disability insurance, pensions or any other wage-related benefits.

If any required item of information is not known or is not available, then the petitioner must later supplement the certification when such information becomes known or available.

The petitioner's motion to join the UEF, as well as the claim petition and necessary attachments, must be served personally upon the respondent(s). If these items cannot be served personally upon a respondent, the petitioner's attorney must file a motion for substituted service by publication. Such motion must be supported by convincing evidence that the petitioner has made all reasonable attempts to serve respondent.

Once involved in a case, the UEF will have the opportunity to review all medical bills and charges to determine if the costs and charges are reasonable and necessary. Medical bills submitted to the UEF for payment must be itemized (collection notices are unacceptable). The UEF will also have the opportunity to review all medical records related to the medical bills submitted by the petitioner for UEF payment.

If the petitioner seeks medical treatment authorized by the UEF, the UEF may order an independent medical examination of the petitioner to determine the need for additional treatment. The independent medical evaluator will be requested to offer an opinion on the appropriateness of the petitioner's current medical treatment; the prognosis for the petitioner; the period of temporary disability benefits and/or the petitioner's ability to return to work; and whether the petitioner requires additional medical treatment and the nature thereof.

It is important to note that, even though the UEF is considered a party when joined in a case, neither judgments nor orders to pay benefits may be entered against the UEF itself: judgments or orders are entered

against respondents and may possibly be paid by the UEF if the respondent defaults in paying for the benefits ordered and all other statutory and regulatory requirements allowing the UEF to pay benefits are met. In cases where the UEF pays benefits on behalf of a petitioner and the petitioner receives a third-party award or settlement in connection to the compensable disability, the UEF becomes entitled to a right to reimbursement based on the benefits it paid pursuant to *N.J.S.A. 34:15-40*. See *N.J.S.A. 34:15-120.5*.

In reviewing claims for payment from the UEF, the Commissioner of Labor and Workforce Development or his or her designee may consider the extent of petitioner's delay in notifying the UEF after he or she knew (or reasonable should have known) the respondent was uninsured.

### 3. Special UEF benefits payable in certain asbestosis or asbestos-related cancer cases

On January 14, 2004, a statute went into effect that requires the UEF to pay benefits when an employee or his/her dependents cannot, after due diligence, identify or locate the workers' compensation insurance carrier(s) of the employer(s), the employer(s), or the principals of the employer(s) where the employer was last exposed to asbestos. In order to qualify for such benefits, the worker's occupational exposure to asbestos must result in asbestosis or an asbestos-induced cancer such as mesothelioma. See *N.J.S.A. 34:15-33.3*.

"Due diligence" is defined by regulation as a reasonable effort on the part of the petitioner or the petitioner's attorney, given the particular facts and circumstances of the case, to determine the identities of the carrier of the employer, the employer, and/or the principals of the employer where the employee was last exposed to asbestos, as well as the identities of any other carriers, employers, and/or principals of other employers that may be liable for benefits. *N.J.A.C. 12:235-7.8(b)*.

Hence, in asbestos-related UEF cases, the petitioner or the petitioner's attorney must provide a supplemental certification to show what efforts were made to identify and locate all employers, principals of employers, and compensation carriers where the employer had been exposed to asbestos, in addition to other information pertinent in such cases, including:

1. Identification of all third-party actions or latent disease claims filed by or on behalf of the employee based upon exposure(s) to asbestos, including the names of the defendants and the courts in which such actions are pending or were concluded;
2. Date of manifestation of the employee's asbestosis or asbestos-induced cancer;
3. Date of discovery, disclosure or diagnosis of the employee's asbestosis or asbestos-induced cancer and its relation to the ability of the employee to work;

4. Rate of progression of the employee's asbestosis or asbestos-induced cancer;
5. Date(s) the employee was impaired or unable to work as a result of the asbestosis or asbestos-induced cancer;
6. Date(s) of any lost time for medical treatments related to asbestosis or asbestos-induced cancer;
7. Nature of pre-existing pulmonary conditions, cancer-related conditions, exposure to any other chemicals, and/or smoking history;
8. Medical basis for concluding that there is a causal relationship between the employee's work and the employee's asbestosis or asbestos-induced cancer;
9. Medical conditions pre-existing the alleged exposure(s) to asbestos, including the nature of the pre-existing condition(s), the date(s) and type(s) or medical treatment received, and the names and addresses of all medical practitioners and providers involved in the diagnosis and treatment of such condition(s);
10. Details of efforts made under the provisions of N.J.A.C. 12:235-7.8 (b);
11. Dates and nature of employment during which the employee was exposed to asbestos or during which the employee was exposed to conditions which aggravated or contributed to the asbestosis or asbestos-induced cancer. Such information should include but not be limited to any environmental information and data giving evidence of the level of exposure to asbestos and how such levels exceeded those encountered in the general environment; and
12. Nature and extent of any future treatment for the employee's asbestosis or asbestos-induced cancer. [N.J.A.C. 12:235-7.9(a)(1)-(12)]

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*Sroczyński v. John Milek*, [197 N.J. 36](#) [Shepardize](#) (2008). The NJ Supreme Court affirmed the Appellate Division in holding that there is no legally effective policy cancellation where a carrier fails to prove that it strictly complied with all of the requirements for cancelling a workers' compensation insurance policy. The NJ Legislature established clear and unambiguous requirements in the cancellation statute, which include the requirement that a carrier file with the Compensation Rating and Inspection Bureau the certified statement required in N.J.S.A. 34:15-81(b). However, the Court also held that only parties that have raised this particular filing issue can be granted relief from improper cancellations - past cancellations that were never challenged on this ground will stand because the policyholders waived their right to challenge them.

*Carreon v. Hospitality Linen Services of NJ*, [386 N.J. Super. 504](#) [Shepardize](#) (App. Div. 2006). The Appellate Division reversed the decision of the workers' compensation judge and held that if an employer/insured

enters into a contract that expressly empowers a premium finance company to act as its attorney-in-fact, and subsequently, that premium finance company acts in accord with N.J.S.A. 17:16D-13 to request that the employer's workers' compensation insurance carrier cancel the employer's policy, then such carrier is not required to send the employer/insured the notice of cancellation required by N.J.S.A. 34:15-81(a) to effect cancellation of the workers' compensation insurance policy. Under such circumstances, the provisions of N.J.S.A. 17:16D-13 are controlling in regard to the procedural requirements for an effective cancellation of a workers' compensation insurance policy.

*Ongaro v. Country Flooring Enterprises*, [382 N.J. Super. 359](#) [Shepardize](#). The workers' compensation judge found that an alleged cancellation of a workers' compensation insurance policy was not effective because of errors concerning the effective cancellation date in the notice was filed by the carrier with the Compensation Rating and Inspection Bureau. In reversing the workers' compensation judge's decision and in holding that there was an effective policy cancellation, the Appellate Division found that the carrier's errors were merely clerical in nature and the dates provided were still sufficiently prior to the date of the accident at issue such that the cancellation was effective.

*In re Downey*, [261 B.R. 124](#) [Shepardize](#) (Bankr. D. N.J. 2001). A judgment involving the Uninsured Employers' Fund was entered against an uninsured employer. Penalties pursuant to N.J.S.A. 34:15-120.1(c) were docketed along with the judgment. The uninsured employer filed a voluntary petition under Chapter 7 of the Bankruptcy Code and moved to discharge the UEF lien in the Bankruptcy Court. The UEF opposed the discharge, arguing that its lien was statutory in nature and, therefore, could not be discharged. The Bankruptcy Court disagreed and held that the UEF's lien arises from a judicial proceeding and is, therefore, a judgment lien. When such a judgment lien is not levied upon and remains unperfected, the bankruptcy trustee may avoid it under 11 U.S.C.A. § 544(a)(1).

*Romanny v. Stanley Baldino Constr.*, [142 N.J. 576](#) [Shepardize](#) (1995). Insurance coverage ceases unless policies are renewed. Hence, to prevent lapses in coverage resulting from oversights by insured employers, a significant statutory and regulatory responsibility has been imposed upon workers' compensation insurance carriers to afford timely notice to insureds about a policy's expiration and the prerequisites to renewal of that policy. Before workers' compensation insurance coverage can be deemed not renewed, a carrier must give proper and timely notice to the insured that the policy is about to end but that coverage will continue if the premium is paid by a certain date (a renewal offer), or that the policy period is about to end and the insurer does not intend to renew the policy (a notice of nonrenewal). If the premium is paid on time, the renewal policy must be issued without lapse. If the premium is late, but paid within sixty days of the prior policy's expiration, the renewal policy must be issued not later than 12:01 a.m. on the day after payment is received. If the renewal premium is not paid within the aforesaid sixty days, the carrier that provided a proper and timely notice of renewal is not obligated to renew the policy

*Calderon v. Jimenez*, [356 N.J. Super. 513](#) [Shepardize](#) (App. Div. 2003). An insurance carrier must follow the statutory requirements established by *N.J.S.A. 34:15-81* to cancel a worker's compensation policy it issued or such policy remains in effect, even if the carrier has not yet received any premium payment from the employer.

*Macysyn v. Hensler*, [329 N.J. Super. 476](#) [Shepardize](#) (App. Div. 2000). Under *N.J.S.A. 34:15-79*, personal liability will be imposed only on those officers specified in the statute who are actively engaged in running the corporate business at the time of an employee's work-related injury.

*Williams v. A & L Packing and Storage*, [314 N.J. Super. 460](#) [Shepardize](#) (App. Div. 1998). Receiving a compensation award in Pennsylvania does not bar a New Jersey claim petition in cases where New Jersey provides benefits under its workers' compensation statute that Pennsylvania does not provide (e.g., rights under *N.J.S.A. 34:15-79* pertaining to general contractor liability that Pennsylvania does not offer). As a matter of fairness, an employee should receive the highest available amount of compensation to which he is entitled, so long as credit is given for payments already received. Payment of anything less than the employee's full due is repugnant to the policy of our law. In addition, the Appellate Division held that a determination of employment status by a Pennsylvania court does not preclude a New Jersey court's determination of the same issue where New Jersey's legal definition of a general contractor differs from Pennsylvania's definition of a general contractor.

*Bashir v. Commissioner of the Dep't of Ins.*, [313 N.J. Super. 1](#) [Shepardize](#) (App. Div. 1998), *aff'd o.b.*, [158 N.J. 15](#) [Shepardize](#) (1999). An injured employee can receive Unsatisfied Claim and Judgment Fund (UCJF) benefits that exceed the benefits the employee is entitled to receive from the UEF.

*West Jersey Health Sys. v. Croneberger*, [275 N.J. Super. 303](#) [Shepardize](#) (App. Div. 1994), *overruled in part by University of Mass. Med. Ctr., Inc. v. Christodoulou*, [180 N.J. 334](#) [Shepardize](#) (2004). The Law Division has jurisdiction to determine whether an injured worker is personally liable in contract to repay a medical provider for medical services related to a compensable injury when no other source of payment is available (e.g., payment from the UEF is not available). However, as the New Jersey Supreme Court held in *Christodoulou*, a medical provider does not have to wait until a judgment of non-compensability is rendered by the compensation court before it can file a common law collection action with the Law Division. The Law Division can transfer a medical provider's claim to the Division of Workers' Compensation when a petitioner has a related workers' compensation claim already pending there.

*Bright v. T & W Suffolk*, [268 N.J. Super. 220](#) [Shepardize](#) (App. Div. 1993). Insurance carriers must strictly comply with all of the statutory requirements set forth in *N.J.S.A. 34:15-81* to effect cancellation of a

workers' compensation insurance policy. Continuation of workers' compensation coverage is favored as a matter of public policy - a court should find such coverage exists unless it would be unreasonable to do so.

*Cardinale v. Mecca*, [175 N.J. Super. 8](#) [Shepardize](#) (App. Div. 1980). *N.J.S.A.* 34:15-81 permits a cancellation notice to be mailed by certified mail, as certified mail is a form of registered mail. Proof of mailing via certified mail does not require a return receipt - an insurance carrier only has to mail the cancellation notice to the address stated in the policy and it need not investigate the whereabouts of the insured if such mailing is returned for non-delivery.

## CHAPTER SIXTEEN: SECOND INJURY FUND

The purpose of the Second Injury Fund is to encourage employers to hire handicapped or partially disabled people, secure in the knowledge that if total permanent disability occurs as the result of the workers' preexisting disability together with a work related injury the employer will only have to provide compensation benefits for that portion of the total disability attributable to the work connected injury.

### STATUTORY PROVISIONS

#### *Definition of Second Injury Fund*

*N.J.S.A. 34:15-95* provides, in pertinent parts, that:

The sums collected under R.S. 34:15-94 shall constitute a fund, to be known as the Second Injury Fund, out of which a sum shall be set aside each year by the Commissioner of Labor from which compensation payments in accordance with the provisions of paragraph (b) of R.S. 34:15-12 shall be made to persons totally disabled, as a result of experiencing a subsequent permanent injury under conditions entitling such persons to compensation therefor, when such persons had previously been permanently and partially disabled from some other cause; provided, however, that, notwithstanding the time limit fixed therein, the provisions of paragraph (b) of R.S. 34:25-12 relative to extension of compensation payments beyond 400 or 450 weeks, as the case may be, shall, with respect to payments from the Second Injury Fund, apply to any accident occurring since June 27, 1923, and in no case shall be less than \$5.00 per week ....

#### *Defenses*

[N]o person shall be eligible to receive payments from the Second Injury Fund:

(a) If the disability resulting from the injury caused by the person's last compensable accident in itself and irrespective of any previous condition or disability constitutes total and permanent disability within the meaning of this Title.

(b) (Deleted by amendment.)

(c) If the disease or condition existing prior to the last compensable accident is progressive and by reason of such progression subsequent to the last compensable accident

renders the person totally disabled with the meaning of this title.

(d) If a person who is rendered permanently partially disabled by the last compensable injury subsequently becomes permanently totally disabled by reason of progressive physical deterioration or preexisting condition or disease.

Nothing in the provisions of said paragraphs (a), (c) and (d) however, shall be construed to deny the benefits provided by this section to any person who has been previously disabled by reason of total loss of, or total and permanent loss of use of, a hand or arm or foot or leg or eye, when the total disability is due to the total loss of or total and permanent loss of use of, two or more of said major members of the body, or to any person who in successive accidents has suffered compensable injuries, each of which, severally, causes permanent partial disability, but which in conjunction result in permanent total disability. Nor shall anything in paragraphs (a), (c) and (d) aforesaid apply to the case of any person who is now receiving or who has heretofore received payments from the Second Injury Fund.

### ***Payment of Benefits***

Upon the approval of an application for benefits, the compensation payable from the Second Injury Fund shall be made from the date when the final payment of compensation by the employer is or was payable for the injury or injuries sustained in the employment wherein the employee became totally and permanently disabled; provided that no payment from the Second Injury Fund shall be made for any period prior to the date of filing of application therefor; provided, however, that a person who has received compensation payments from the Second Injury Fund and who is reinstated or ordered placed on said fund shall receive payments from the date of last payment from the Second Injury Fund, save only in the case of a person to whom payments have been made and then discontinued or suspended because of the rehabilitation of such person in accordance with the provisions of paragraph (b) of R.S. 34:15-12, or actual employment for any reason whatsoever, in which case payments from the Second Injury Fund shall be made from the date of filing application for reinstatement. Payments to such totally disabled employees shall be made from said fund by the State Treasurer upon warrants of the Commissioner of Labor. This section shall be applicable to any accident occurring since June 27, 1923, insofar as the eligibility of and benefits payable to such employees of this class is concerned; provided, however, that nothing contained herein shall limit or deprive those persons now receiving or who have received the benefits under this section from participating in the Second Injury Fund. All payments from the Second Injury Fund shall be made by biweekly installment payments. From the Fund

herein created the Commissioner of Labor may use in any one fiscal year a sum not to exceed the sum of \$12,500.00 for the cost of administration of the fund including personnel, printing, professional fees, and expenses incurred by the Commissioner of Labor in the prosecution of defenses in the Division of Workers' Compensation, and of appeals and proceedings for review of decisions on applications for benefits from the Second Injury Fund. No costs or counsel fee for the applicant shall be allowed against the fund.

### ***Payments after 450 weeks***

*N.J.S.A.* 34:15-12(b) provides in part:

For disability total in character and permanent in quality, 70% of the weekly wages received at the time of injury, subject to a maximum and a minimum compensation as stated in subsection a. of this section. This compensation shall be paid for a period of 450 weeks, at which time compensation payments shall cease unless the employee shall have submitted to such physical or educational rehabilitation as may have been ordered by the rehabilitation commission, and can show that because of such disability it is impossible for the employee to obtain wages or earnings equal to those earned at the time of the accident, in which case further weekly payments shall be made during the period of such disability, the amount thereof to be the previous weekly compensation payment diminished by that portion thereof that the wage, or earnings, the employee is then able to earn, bears to the wages received at the time of the accident. If the employee's wages or earnings equal or exceed wages received at the time of the accident, then the compensation rate shall be reduced to \$5.00. In calculating compensation for this extension beyond 450 weeks the above minimum provision shall not apply. This extension of compensation payments beyond 450 weeks shall be subject to such periodic reconsiderations and extensions as the case may require, and shall apply only to disability total in character and permanent in quality, and shall not apply to any accident occurring prior to July 4, 1923.

### **COMMENT**

The New Jersey Second Injury Fund law (*N.J.S.A.* 34:15-94 et. seq.) was enacted into law in 1923 and was intended to provide "funds from which to complete compensation payments to persons totally disabled as the result of two separate accidents" L.1923(c) 81 Section 1, Section 2. Subsequent amendments expanded the Act to apply to an employee totally and permanently disabled from a compensable injury superimposed upon a prior disability, regardless of whether it was compensable. *In re Glennon*, [18 N.J. Misc. 196, 197](#) [Shepardize](#) (Cty. Ct., 1940).

Fund benefits are only payable when the petitioner is totally and permanently disabled overall, from a combination of a partially disabling pre-existing disability, compensable or not compensable, and a partially disabling compensable disability. [A finding of partial total overall precludes Fund eligibility.]

The statute was amended in 1980, and one of the Fund's main defenses (that of aggravation of a preexisting condition) was eliminated.

Fund benefits are not payable when the last compensable accident or exposure in and of itself caused the petitioner to become 100% totally and permanently disabled, irrespective of any previous disabilities (*N.J.S.A. 34:15-95(a)*). Fund eligibility is also denied if the pre-existing condition or disease is progressive and worsens after the last compensable accident and that progression results in a petitioner becoming totally disabled. *N.J.S.A. 34:15-95(c) (d)*.

Fund benefits end upon the petitioner's death. Fund benefits do not vest, and therefore, the Fund does not pay benefits to any dependents. *N.J.S.A. 34:15-95.2*. Medical bills are not the responsibility of the Fund, and the petitioner must seek payment of related bills from the respondent. The Fund does not pay attorneys fees, costs, or penalties.

Fund benefits are payable at the total permanent disability rate for the year of the last compensable accident or injury. *N.J.S.A. 34:15-95*. That rate is seventy percent of the worker's weekly wage up to the maximum rate for the year in which the accident occurred. That rate remains fixed for the entire period of disability, and is paid by both the respondent and the Second Injury Fund.

Workers whose total disability occurred prior to 1980 are entitled to a special adjustment benefit payment. *N.J.S.A. 34:15-95.4*.

Fund payments are subject to a Social Security disability offset. The Fund is entitled to the same offset benefits as is the respondent, and depends upon the petitioner's (and auxiliaries) initial Social Security benefit amount and 80% Average Current Earnings (ACE). This offset is available until petitioner turns 62 years of age. *N.J.S.A. 34:15-95*.

The Fund is entitled to exercise third-party lien credits against any monies received from lawsuits arising out of the last compensable accident or exposure. *N.J.S.A. 34:15-40*.

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*Lewicki v. New Jersey Art Foundry*, [88 N.J. 75](#) [Shepardize](#) (1981). Not every prior disability claimed to concur in causing total permanent disability must meet the rigorous standard of "fixed, measurable, and arrested" but some evidence of preexisting disability must be offered beyond the mere statement of the petitioner. If progressive physical deterioration subsequent to the last compensable injury results in total permanent disability there is no Fund liability. The Fund has the right of cross examination.

*Katz v. Township of Howell*, [67 N.J. 51](#) [Shepardize](#) (1971), *appeal after remand* [68 N.J. 125](#) [Shepardize](#) (1975). In *Katz 1*, the Court set forth the requirement of credible proof of a preexisting disabling condition, the extent of that disability, and its causal relationship to total permanent disability. In *Katz 2*, the Court held that liability of the Fund requires: (1) the worker must be permanently and totally disabled, (2) the prior disability must be partial and permanent, and (3) the prior condition and the subsequent employment connected injury must "in conjunction" result in total permanent disability. There is no Fund liability if the compensable condition in and of itself caused the total permanent disability regardless of preexisting disability.

*Paul v. Baltimore Upholstering Co.*, [66 N.J. 111](#) [Shepardize](#) (1974). Respondent's credit for prior payment of partial total disability, when total permanent disability is found, shall be for dollars paid, not the number of weeks previously awarded.

*Bello v. Commissioner of the Dep't. of Labor and Indus.*, [56 N.J. 41](#) [Shepardize](#) (1970). The Second Injury Fund is entitled to be fully reimbursed under *N.J.S.A. 34:15-40* for credits from a third party action arising from the last compensable injury, regardless of the percentage of disability attributable to the injury.

*Belth v. Anthony Ferrante & Son, Inc.*, [47 N.J. 38](#) [Shepardize](#) (1966). This case was decided prior to and superseded by the 1979 amendments to the statute, but the opinion by Justice Francis is an excellent exposition of the philosophy of a Second Injury Fund.

*Ort v. Taylor-Wharton Co.*, [47 N.J. 198](#) [Shepardize](#) (1966). When a petitioner is permanently and totally disabled from two successive periods of exposure with the same employer, the first giving rise to permanent partial disability and not contributing to the successive disability, the Fund can be liable. (The Fund was not a party to the original determination, so the matter was remanded to make the Fund a party and to permit it to present evidence.) The burden of proof of Fund liability is for respondent. The Fund is not required to demonstrate non-liability.

*Walsh v. RCA*, [334 N.J. Super. 1](#) [Shepardize](#) (App. Div. 2000). Petitioner suffered two cardiac incidents in the 1970's, but returned to work in a lighter job. He retired on a service based non-disability retirement in 1984 due to increased physical demands of his job. He manifested asbestosis in 1991 as the result of asbestos exposure during that employment. It was determined that he was totally disabled in 1995 as the result of his partially disabling cardiac condition in conjunction with his asbestosis. Petitioner was entitled to Second Injury Fund benefits even though he was not in the employment market when he became permanently and totally disabled.

*Zabita v. Chatham Shop Rite, Inc.*, [208 N.J. Super. 215](#) [Shepardize](#) (App. Div. 1986). When a compensable injury aggravates, activates or accelerates a pre-existing condition the employer is responsible for the all disability flowing from the injury including the aggravation, activation or acceleration. The Fund is then responsible for the difference between the amount paid by the respondent and total permanent disability.

*Shepley v. Johns-Manville Prods. Corp.*, [141 N.J. Super. 387](#) [Shepardize](#) (App. Div. 1976). When a series of disabilities arise from one exposure there is no Fund liability.



## CHAPTER SEVENTEEN: MISCELLANEOUS

The following is a listing of cases presenting issues that do not generate sufficient statutory or case discussion to be categorized in any of the individual chapters of this publication.

### TABLE OF CASES

*Bellino v. Verizon Wireless* 435 [N.J. Super. 85](#) (App. Div. 2014) Respondent appealed from an order granting temporary disability and medical benefits to petitioner by arguing that the judge of compensation erred in finding: (1) testimony of petitioner and her physicians credible; (2) petitioner was entitled to such benefits; and (3) petitioners statements and omissions did not amount to fraud in violation of [N.J.S.A. 34:15-57.4](#). The Appellate Division, however, disagreed with respondent and affirmed the decision of the judge of compensation essentially because the respondent failed to prove that the petitioner possessed the state of mind or intent necessary to commit fraud as that offense is defined in [N.J.S.A. 34: 15-57.4](#) where petitioner only omitted/misstated certain information in her statements to doctors when she went to them for evaluation and treatment.

*Greene v. AIG Casualty Company* 433 [N.J. Super 59](#) (App. Div. 2013) The Appellate Division reversed a determination of law made by the workers' compensation judge and held that where a respondent has paid workers' compensation benefits it becomes entitled under [N.J.S.A. 34:15-40](#) to a lien against the petitioner's third-party proceeds even where that petitioner's injuries are ultimately deemed to be noncompensable. The appellate court concluded that there is nothing in the workers' compensation statutes which conditions such reimbursement on whether the benefits paid were actually owed in the first place: Section 40 applies regardless of compensability to prevent double-recoveries and allow recovery of voluntary benefit payments

*Alvarado v. J & J Snack Foods Corp.* [397 N.J. Super. 418](#) [Shepardize](#) (App. Div. 2008). The Appellate Division reversed and remanded for reconsideration that part of a workers' compensation judge's order that set only a \$50.00 counsel fee where a tender had been made. In order for a tender to be bona fide and thus not subject to a petitioner attorney counsel fee, the court found that under [N.J.S.A. 34:15-64 \(c\)](#) there must be: (1) an unconditional and unqualified offer to pay compensation; (2) express terms that leave no room for misunderstanding; and (3) the offer must be made within a reasonable time after notice of the injury and extent of disability, prior to any hearing and prior to the expiration of the twenty-six week period allowed in statute.

*Menichetti v. Palermo Supply Co.* [396 N.J. Super. 118](#) [Shepardize](#) (App. Div. 2007). The Appellate Division reversed the decision of the workers' compensation judge and held that, pursuant to [N.J.S.A. 34:15-64\(c\)](#),

an employer is entitled to benefit from a statutory reduction in the attorney's fee even if it offers to pay compensation benefits before its medical expert examines the petitioner. The employer is entitled to such reduction as long as: (1) its offer was made within a reasonable time prior to any hearing and was stated in clear, specific, unconditional and unqualified terms; and (2) it voluntarily tendered the amount then due to the petitioner within the twenty-six week period allowed by the statute.

*Charles Beseler Company v. O'Gorman & Young, Inc.* [188 N.J. 542](#) [Shepardize](#) (and companion case *New Jersey Manufacturers Ins. Co. v. Delta Plastics Corp.*) [188 N.J. 582](#) [Shepardize](#) (2006). The New Jersey Supreme Court affirmed the decisions of the Appellate Division and held that insurance carriers for employers will not be relieved of their duty to defend an employer in a common law action filed by an injured employee under the "intentional wrong" exception created in N.J.S.A. 34:15-8 where exclusions in their standard Workers' Compensation and Employers Liability Insurance Policy do not expressly exclude coverage for unintended injuries caused by intentional wrongs.

*Fitzgerald v. Tom Coddington Stables*, [186 N.J. 21](#) [Shepardize](#) (2006). Reversing the Appellate Division, the New Jersey Supreme Court held that Tom Coddington Stables, rather than the Horse Racing Injury Compensation Board, was responsible for paying workers' compensation benefits due to the petitioner. The Court held that the petitioner does not fall within the statutory definition of a "horse racing industry employee" and the New Jersey Legislature never intended that the Board provide blanket coverage for every person employed in the horse racing industry.

*Carreon v. Hospitality Linen Services of NJ*, [386 N.J. Super. 504](#) [Shepardize](#) (App. Div. 2006). The Appellate Division reversed the decision of the workers' compensation judge and held that if an employer/insured enters into a contract that expressly empowers a premium finance company to act as its attorney-in-fact, and subsequently, that premium finance company acts in accord with N.J.S.A. 17:16D-13 to request that the employer's workers' compensation insurance carrier cancel the employer's policy, then such carrier is not required to send the employer/insured the notice of cancellation required by N.J.S.A. 34:15-81(a) to effect cancellation of the workers' compensation insurance policy. Under such circumstances, the provisions of N.J.S.A. 17:16D-13 are controlling in regard to the procedural requirements for an effective cancellation of a workers' compensation insurance policy.

*Ongaro v. Country Flooring Enterprises*, [382 N.J. Super. 359](#) [Shepardize](#) (App. Div. 2006). The workers' compensation judge found that an alleged cancellation of a workers' compensation insurance policy was not effective because of errors concerning the effective cancellation date in the notice was filed by the carrier with the Compensation Rating and Inspection Bureau. In reversing the workers' compensation judge's decision and in holding that there was an effective policy cancellation, the Appellate Division

found that the carrier's errors were merely clerical in nature and the dates provided were still sufficiently prior to the date of the accident at issue such that the cancellation was effective.

*University of Massachusetts Memorial Medical Ctr., Inc. v. Christodoulou*, [180 N.J. 334](#) <sup>Shepardize</sup> (2004). The New Jersey Supreme Court reversed the decision of the Appellate Division and held that settlements made pursuant to N.J.S.A. 34:15-20 only resolve issues between those who were parties to that agreement. Hence, where a medical provider was not a party to the Section 20 settlement, it is not bound by that agreement and may pursue an action in the Law Division to enforce its contractual rights to payment for the medical services it provided to the petitioner.

*Warnig v. Prudential Property & Casualty Ins. Co.*, [363 N.J. Super. 563](#) <sup>Shepardize</sup> (App. Div. 2003). The Appellate Division affirmed the decision of the workers' compensation judge and held that N.J.S.A. 39:6A-6 does not apply to the Med-Pay portion of an automobile insurance policy. Hence, the insurance carrier that paid Med-Pay benefits as a result of a vehicular accident injuring the petitioner was not entitled to assert a statutory right of reimbursement against the workers' compensation benefits the petitioner received from the same accident.

*Daniel Avila v. Retailers & Manufacturers Distribution*, [355 N.J. Super. 350](#) <sup>Shepardize</sup> (App. Div. 2002). The Appellate Division affirmed the judge of compensation's decision not to stay her opinion and order pending appeal since the grant or denial of a stay was within the judge's discretion. The court also upheld the judge's permanent disability award.

*Francesca Lombardo v. Revlon, Inc.*, [328 N.J. Super 484](#) <sup>Shepardize</sup> (App. Div. 2000). The appellate court reversed the workers' compensation judge who applied N.J.S.A. 34:15-57.4, an act concerning workers' compensation fraud, retroactively to the case and dismissed petitioner's workers' compensation claim. The appellate court determined that all of the evidence relied upon by the workers' compensation judge occurred prior to the effective date of the statute and therefore, the statute was not to be applied under these circumstances.