

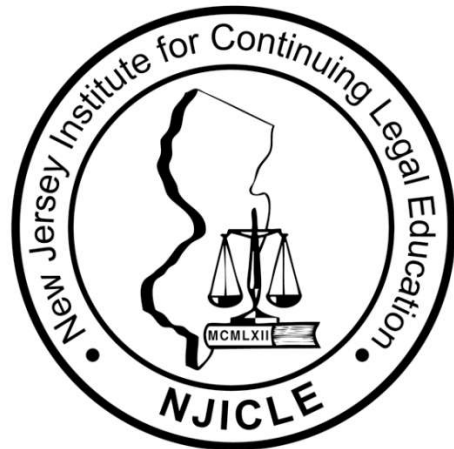
FUNDAMENTALS OF NEW JERSEY WORKERS' COMPENSATION WITH JOHN GEANEY AND KATHERINE GEIST

2021 Seminar Material

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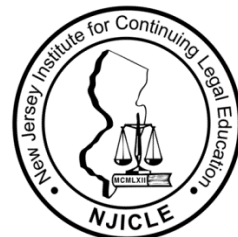
**FUNDAMENTALS OF NEW JERSEY
WORKERS' COMPENSATION WITH
JOHN GEANEY AND
KATHERINE GEIST**

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Essentials of New Jersey Workers' Compensation

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Topic One:

Key Cases to Know from 2019-2021

Hager v. M & K Construction
(2021)

Factual Background:

- Vincent Hager injured his back in 2001 with serious laminectomy syndrome and decades of pain
- Entered medical marijuana program in 2016
- One month after using marijuana, he stopped using opiates

Was Marijuana Reasonable And Necessary?

- Petitioner's expert Dr. Liotta testified it was necessary
- Respondent's expert Dr. Brady, pain physician, said there was no proof of benefit of marijuana

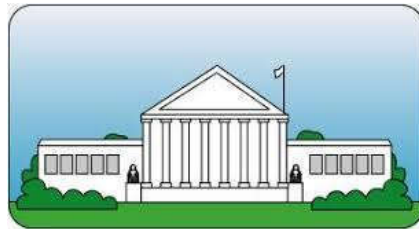


Results In Comp Court: Judge Ordered Carrier To Reimburse Petitioner For Costs Of Marijuana

- Appellate Division affirmed
- Supreme Court accepted certification

Key Findings By Supreme Court

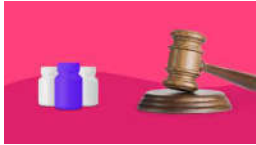
- First, workers' compensation carriers are not health care carriers
- Therefore the health care exemption on reimbursement of patients does not apply



Second, Petitioner Must Prove Cure Or Relieve Standard

- Not enough for petitioner to prove just a personal benefit
- Petitioner must prove that marijuana helped cure or relieve his pain

Third, There Is No Federal Conflict

- Controlled Substance Act does not conflict with NJMMA 
- CSA lists marijuana as schedule one drug
- Congress essentially suspended the CSA as to marijuana under state medical programs

Court Focused On Appropriation Riders

- Congress continues to pass riders prohibiting DOJ from using funds to prevent states from implementing MM laws
- These riders show congressional intent not to interfere with state MM laws
- The riders prevent DOJ from prosecuting individuals who comply with state MM laws

Fourth, The Carrier Is Not Aiding Or Abetting A Crime

- Aiding or abetting requires intent to violate a crime
- There is no criminal intent here: a court is requiring the conduct of the carrier in making reimbursement

Goulding v. NJ Friendship House, Inc.

- Petitioner was a chef
- Volunteered to cook for respondent's "Family Fun Day"
- Fell and injured ankle

Goulding: Facts Continued

- Respondent denied claim
- Motion for medical and/or temporary benefits filed
- Judge of compensation ruled for employer based on *N.J.S.A 34:15-7*



Recreational Activity And Social Events

- *N.J.S.A 34:15-7* –



- Must be a regular incident of employment
- Provide a benefit to employer beyond increasing employee health and morale

Appellate Division Affirmed

Same reasoning as judge of
compensation

New Jersey Supreme Court Reversed



- Issue was whether this case fell under *N.J.S.A. 34:15-7*
- It was noted that petitioner did not participate in activities
- Petitioner was doing the same work she always did: she cooked
- “Family Fun Day” was not a social event for petitioner and this was not a Section 7 case

Fall Back Position

- Court held that even if this was a Section 7 case, the event was more of a business event
- Provided benefit to employer beyond improvement in health and morale
- Served clients and their families
- Fostered goodwill in community
- Employer was celebrating its clients and the community at large

Intangible Benefits Can Meet Improvement of “Health And Morale Test”

- Benefit here was promoting the company and community goodwill

New Jersey Transit Corp. v. Sanchez
457 N.J. Super. 98 (App. Div. 2018),
affd, 242 N.J. 78 (2020)

- Issue: Can employer's subrogation rights be greater than those of the injured worker?

Facts: Mercogliano Was Injured Driving A Vehicle Owned By New Jersey Transit



- Medical benefits: \$6,694
- Temp benefits: \$3,982
- Perm partial benefits: \$22,949

Mercogliano Never Sued Driver Of Other Vehicle

- Petitioner had a verbal threshold policy

New Jersey Transit Filed A Subrogation Action Under *N.J.S.A. 34:15-40 (F)* Against Other Driver

- Trial judge dismissed Transit's suit because Mercogliano could not meet the verbal threshold
- There was no permanent disability as defined by *N.J.S.A. 39:6A-8(a)*

Appellate Division Reversed

- Verbal threshold does not apply to economic losses
- It only applies to non-economic losses (presumably pain and suffering)



Divided Supreme Court (3-3)

- The divided court means affirmance of Appellate Court decision
- Opinion focuses on AICRA's collateral source rule, which provides that workers' comp benefits shall be deducted from PIP benefits collectible under certain situations
- Majority opinion rules that when workers' comp pays economic losses, such losses are not "collectible" through PIP

Rationale Of Supreme Court

- Petitioner never received PIP benefits because all medical and temp benefits were paid by comp
- Court embraced Section 40's policy against double recovery
- AICRA law does not specifically prohibit subrogation where accident arises from work

Dissent View

- Ruling in New Jersey Transit will drive up cost of automobile insurance as an unintended consequence



Kocanowski v. Twp. Of Bridgewater 237 N.J. 3 (2019)

- Facts: Petitioner was a volunteer firefighter
 - She had a full-time job until 2013
 - She stopped working to care for her father in 2014
 - In March 2015 she fell and fractured her fibula while volunteering

Respondent Denied Her Claim For Temporary Disability Benefits

- Respondent contended *N.J.S.A. 34:15-75* did not apply
- That statute provides for max rates for certain public sector volunteers
- Respondent argued *Cunningham* applies

Petitioner Filed Motion For Medical And Temporary Disability Benefits

- Petitioner argued that max rates apply even if petitioner never had any earnings



Judge Of Compensation And Appellate Division Ruled For Respondent

- Both agreed that if there is no real wage loss, Section 75 is not triggered

Supreme Court Reversed

- “We find that NJSA 34:15-75 authorizes all volunteer firefighters injured in the course of performing their duties to receive the max compensation permitted, regardless of their outside employment status at the time of the injury”

Anesthesia Assoc. of Morristown, PA v. Weinstein Supply Corp

- Two cases with similar fact pattern and issue

Jurisdiction In Worker's Compensation Claims



- Contract of hire in New Jersey
- Accident is in New Jersey
- Substantial amount of employment for respondent occurs in New Jersey

Case One: *Anesthesia Associates of Morristown*

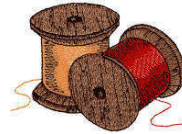
- Accident in Pennsylvania
- Employer based in Pennsylvania
- Claim filed in Pennsylvania
- One procedure performed in New Jersey



Case Two: *Surgicare of Jersey City v. Waldbaum's*

- Accident in New York
- Hired in New York
- Filed claim in New York
- Underwent one surgical procedure in New Jersey

Common Thread



- Claim is based out-of-state, but a single medical procedure performed in New Jersey

Applicant Attorneys Opposed Motion to Dismiss

- New Jersey had interest in the subject matter because the issue involved payment of bills for New Jersey providers
- Workers' compensation court has exclusive jurisdiction over medical provider bills
- Surgicare of NJ argued they would be without remedy if claim dismissed

New Jersey Judges Of Compensation Dismissed The Medical Provider Claims

- "a single contact with the State of New Jersey, namely one day of treatment in New Jersey or the provision of medical supplies to the doctor for that one day of treatment . . . does not rise to the standard of sufficient purposeful minimal contacts requisite to vest this court with personal jurisdiction"
- There is a remedy available to applicant, they just don't like it

Issue On Appeal

- Does Division of Workers' Compensation have broad, exclusive, jurisdiction over medical provider claims even when there is no claim for the underlying accident in New Jersey?
- Is a medical provider claim a separate cause of action rooted in breach of contract?

Appellate Division Affirmed

- Same rationale as workers' compensation judges
- No jurisdiction for the underlying claims
- The breach of contract argument was not discussed as neither provider produced evidence of a contract between the employer and providers



Supreme Court Denied Certification

Open Issue:

- If there is evidence of a contract between employer and worker, could there be jurisdiction in New Jersey?

Marconi v. United Airlines

- Petitioner lived in New Jersey. Hired and injured in Pennsylvania
- Petitioner tried to build up contacts with New Jersey
 - Supervisor reported to Newark Airport
 - Petitioner would call Newark once every few months for advice
 - Trained in various locations
 - Would fly out of Newark when company needed him to travel

Judge Of Compensation Dismissed For Lack Of Jurisdiction

- Reviewed Larson treatise discussing jurisdiction
- Place where the injury occurred;
- Place of making the contract;
- Place where the employment relation exists or is carried out;



Judge Of Compensation Dismissed For Lack Of Jurisdiction

- Place where the industry is localized;
- Place where the employee resides; or
- Place whose statute the parties expressly adopted by contract

Judge Focused On Two Larson Factors

- Place where employee resides (New Jersey)
- Place where the industry is localized
 - Held that United did have a localized presence in New Jersey
 - No connection between that presence and the petitioner's injury

Larson On Localization And Jurisdiction

- State in which a business is localized has a relevant interest in compensable injury
- Burden of payment of benefits will fall most directly on employer and community where the industry is localized



Petitioner Appealed

- Argued that residency combined with respondent's "localized" business in New Jersey confers jurisdiction

Appellate Division Affirmed

- Localization requires an advancement of company interests
- Petitioner's employment did not advance United's interests in New Jersey



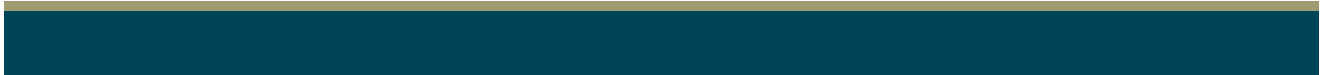
Appellate Division Affirmed

- Petitioner's contacts with New Jersey were primarily to advance his work in Pennsylvania
- Even though United performs business in Newark, New Jersey it does not have a substantial interest in this claim petition

Martin v. Newark Public Schools 461 N.J. Super. 33 (App. Div. 2019)

ISSUE:

- When has the point been reached when worker's pain levels are insufficient to warrant further active treatment?



FACTS: Reopener Of An Award Of 15% Permanent Partial Disability From November 2014

- Respondent stopped paying for Percocet prescriptions years after award
- Petitioner filed motion for medical benefits

Respondent Relied On Treating Physician, Dr. Patricio Grob (Treatment From 2011-2017)

- In June 2016 Dr. Grob wrote that Percocet was controlling petitioner's pain poorly
- "Prolonged narcotic use would not manage his radicular complaints ... and can complicate recovery"
- He said Percocet will not improve petitioner's pain and was not relieving his condition



Petitioner Relied On Dr. Harris Bram As Expert

- Petitioner told Dr. Bram that Percocet was abating pain by 60%
- However, Dr. Bram's also said that Percocet was providing only "small pain relief"
- Lower extremities were neurologically intact and gait was normal

Judge Of Compensation Ruled For Respondent

- There was no evidence that Percocet was improving function
-
- Dr. Grob was entitled to deference as the treating physician



Appellate Division Comments On *Hanrahan*

- Even under *Hanrahan* standard of curing or relieving pain, there may be a point at which “the pain or disability experienced by the worker is insufficient to warrant the expense of active treatment”

*Caraballo v. Jersey City Police
Department - 237 N.J. 255 (2019)*

Issue:

- Does the LAD or ADA apply to denial of treatment in a comp case?

Facts: Petitioner Injured His Hands, Back And Legs In August 1999 During MVA

- Underwent ACL reconstruction left knee
- City doctor said TKR would eventually be needed

Claim Petition Filed In 2001

- Petitioner's attorney requested approval for TKR
- Risk management allegedly in 2006 approved the TKR
- In 2008 petitioner asked for a specific surgeon to do surgery



Retirement In 2011

- Risk management authorized surgeon to evaluate for TKR
- Petitioner allegedly never called the doctor to schedule surgery
- Petitioner settled his comp case on March 4, 2013

Civil Suit Filed After Comp Settlement

- Petitioner alleged in LAD suit that city failed to provide TKR
- Alleged violation of LAD in failing to make reasonable accommodations
- Alleged that he might have been able to avoid retirement had he been accommodated

Trial Court Ruled For City And Appellate Division Reversed In Favor Of Plaintiff

- Appellate Division held plaintiff established a prima facie case to failure to accommodate

Supreme Court Reversed

- Petitioner failed to follow administrative remedies in workers' compensation court
- Petitioner failed to file the necessary motion for med and temp

Rationale Of Court

- “Caraballo’s failure to utilize the Act’s administrative remedies to obtain knee replacement surgery precludes his failure to accommodate claim under the LAD”
- Court held that medical treatment of a TKR does not qualify as a modification to the work environment nor a removal of workplace barriers

Calero v. Target Corp.

- Settled August 23, 2016 for 25% of partial total
- All parties signed the Order
- Stipulated Wage: \$276.17
- Stipulated Rate: \$193.32



Motion For Reconsideration Seeking Correction Of Wages

- Petitioner argued her wages were calculated incorrectly
- Submitted wage statements showing higher wage
- Argued she is entitled to wage reconstruction

Wage Reconstruction

- Reconstruct wages when injury results in permanent impact on capacity to work full time (*Katsoris v. S.J. Publ'g Co.*)
- *Calero*: Petitioner asked court to vacate the Order and asked that wages be reconstructed based on 40 hour week

Judge Of Compensation Granted Motion For Reconsideration

- Rule 4:50-1 (a): relief is allowed when the issue arises out of “...mistake, inadvertent surprise, or excusable neglect”
- Questioned whether the wages were accurately calculated, which would fall under “mistake”
- Vacated wage aspect of the Order
- Hearing to address limited issue of wages



Hearing On Wages

- Petitioner's testimony:
 - Hired full time, but worked only the posted hours
 - Attempted to work after injury, but she could not. Hours were reduced and eventually eliminated
 - Petitioner had not been employed since
- Respondent did not produce any witnesses or evidence to challenge testimony

Judge Of Compensation Reconstructed Petitioner's Wages

- Question under *Katsoris* – was there “...credible evidence in this case of a permanent impact on future full-time wage earning capacity..”
- Yes - Petitioner had not worked full time since the accident
- Reconstructed wage to \$460.00 per week

Respondent Appealed

- Argument One: This application not allowed under *N.J.S.A. 34:15-27*
- Argument Two: Order for reconstruction was erroneous



First Argument: *N.J.S.A. 34:15-27*

- Addresses applications for review and/or modification of an award
- Order may be modified if incapacity of the injured employee has increased or decreased
- Respondent argued that this specific application was not allowed under *N.J.S.A. 34:15-27*

Appellate Division Would Not Address This Argument

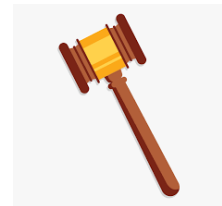
- Not raised at trial level
- Did briefly discuss
 - Would have been harmless error as judge of compensation has authority to open judgment in the interest of justice
 - *N.J.S.A. 34-15-27* was not on point. Change of incapacity not an issue here

Second Argument: Decision Was Erroneous

- Forced to re-litigate claim which compromised ability to defend
- Tangible and significant harm in incurring additional litigation expenses

Appellate Division Affirmed Decision

- Noted that respondent focused only on harm to respondent
- Respondent did not argue that petitioner would not have been entitled to wage reconstruction
- Judge of compensation had weighed the prejudice to each party
- Decision supported by record



Can Terms Of A Consent Order Be Changed?

Yes – Judge has inherent authority to open judgments in the interest of justice

Quiles v. County of Warren

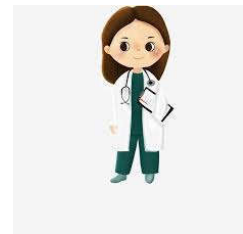
- Addresses idiopathic injuries and what can constitute contribution of employment to an accident

Facts

- Petitioner was a corrections officer
- Climbing stairs at corrections facility to conduct an inmate count
- Felt a pop and pain in the knee
- Wearing 25 lbs. of equipment plus combat boots

Initial Treatment

- County's physician noted tenderness and swelling. Referred to orthopedist
- Respondent denied claim and petitioner presented to his own physician



Initial Treatment

- Unauthorized arthroscopy to determine cause of pain
- Left knee meniscal tear
- Laxity in ACL
- ACL repair

Claim Petition And Motion For Med/Temp Filed

- Respondent denied that claim arose out of and in the course of employment
- Personal Risk/Idiopathic Defense
 - Injury due to personal risk is not compensable as there is no connection to the employment

Full Trial On Motion For Med/Temp

- Testimony of petitioner
 - Showed video of the accident
 - Was able to exercise prior to accident. Now could not
- Petitioner's expert- Treating doctor
 - "ACL tear likely occurred" while petitioner was climbing stairs

Full Trial On Motion For Med/Temp

Respondent's expert

- "Probably" sustained "some knee injury" in accident, but ACL tear not possible



Judge Of Compensation Awarded Medical And Temporary Benefits

- Respondent failed to provide idiopathic injury
- Did not show an alternative cause for the injury
- Petitioner injured knee while “wearing equipment necessitated by employment” and performing work task

Trial On Permanent Disability

Two issues:



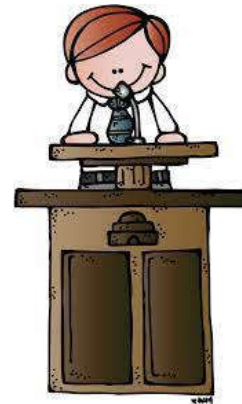
- Was respondent entitled to a credit under *N.J.S.A. 34:15-12(d)*
- Extent of petitioner's permanent disability

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

- Respondent is entitled to a credit against permanency if there is competent evidence of prior functional loss to the same body part

Testimony At Trial

- Petitioner testified and judge incorporated prior testimony
- Petitioner's expert:
 - One mention to reference of knee pain in 2008
 - Maybe 1% of injury pre-existing



Testimony At Trial

- Respondent's expert:
 - Lateral meniscal tear most likely sustained when petitioner was walking up the stairs
 - Prior mention of pain was non-specific



- Judge of compensation held respondent was not entitled to a credit

Respondent Appealed

- Was the injury idiopathic?
- Did the judge err in not awarding respondent a credit for prior functional loss?

Appellate Division Affirmed Judge Of Compensation

- Rejected respondent's argument that injury could have happened anywhere
- Sufficient evidence that injury arose from employment
- Wearing heavy equipment and combat boots
- Respondent did not show injury was solely the result of a prior condition
- Injury was not idiopathic

Judge Of Compensation Did Not Err In Not Awarding Credit

- Insufficient evidence to establish prior knee injury
- County's expert testified there was no pre-existing disability

Surprise Case Of 2021

Lapsley v. Tp. Of Sparta

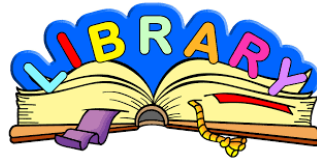


Petitioner Worked As A Librarian At Township Library

- Library located in municipal complex
- Common use parking lot
- Board of Ed offices also there
- General public can also use lot

Accident Date: 2-3-14

- Library closed early due to inclement weather



- Husband of petitioner picked her up
- Town snow plow slammed into petitioner causing serious injuries

Judge Of Compensation Ruling

- Exclusive remedy applies
- Why would petitioner NOT want workers' comp?
- Petitioner had filed civil suit and claim petition was a protective measure

Appellate Division Reverses In Favor Of Petitioner

- Ownership by township not sufficient
- Township made no effort to control lot
- Petitioner did not clock out
- Library employees not instructed on where to park

Appellate Division Rejects Exclusive Remedy

- Key fact for court is the sharing of lot with public and school
- Petitioner was free to park anywhere, including street per court

Will This Decision Stand?

Supreme Court has
accepted certification



Topic Two:

Handling COVID Claim Petitions in New Jersey

Threshold Issue: Is The Petitioner An Essential Employee?

- This is the starting point on every COVID-19 case
- Why? Because we have a shifting burden of proof

The Essential Employee Legislation In New Jersey passed in September 2020

Law is retro to 3/9/2020



Who Are Essential Employees?

- Public safety workers
- Healthcare workers
- Those with physical proximity to members of the public and essential to the public's health, safety and welfare
- Whoever the public authority deems essential

Legislation Attached

- See Attachment O-1 at end of materials.

Presumption Of Compensability

- This law requires the judge to assume COVID-19 is work related for an essential worker
- Presumption can be rebutted



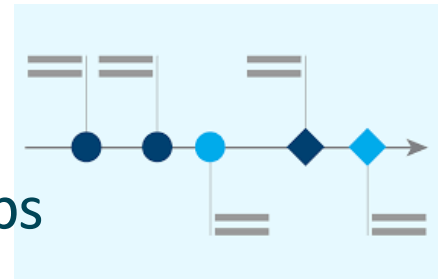
There is No Presumption of Impairment

Key case – *Perez v. Pantasote*

Employee needs objective medical evidence and proof of impact on work/non-work activities

Investigation Of New COVID-19 Claims

- Review hours worked and timeline of symptoms
- Consider information on recent travel or second jobs
- Consider proximity of workers from other workers and public



Common COVID-19 Questions To Determine Compensability

1. Who is your family doctor and what is his or her address?
2. Have you spoken with your family doctor regarding the coronavirus, and if so what date?
3. If you believe you were exposed to the coronavirus at work from a specific person, when did you work with such employee and what contact did you have with this employee?
4. How often did you work with the employee or employees whom you believe exposed you to the coronavirus?

COVID-19 Questions

5. Have you been admitted to any hospital in relation to the coronavirus and if so when?
6. What was the last date that you worked for your employer?
7. When did your COVID-19 symptoms first appear?
8. Do you have any relatives or friends who are COVID-19 positive?
9. How often have you been around this relative or friend in the past two months?



COVID-19 Questions

10. Have you traveled anywhere in the past two months, and if so where?
11. Has anyone visited you from another country in the past two months?
12. Have you gone to church or attended a gathering of friends or family in the past month? If so, when?
13. Have you shopped at any grocery stores in the past month? If yes, what store and how often?
14. Are there any other reasons that you have left your house in the last month prior to diagnosis? If so, where?

COVID-19 Questions

15. Have you spent time with anyone in the past month whom you know was very sick? If so, when and with whom?
16. Have you received a positive COVID-19 test result?
17. When did you take that test and where?
18. What was the date you were diagnosed as COVID positive or negative?
19. What symptoms are you presently having?
20. Do you have any unrelated medical conditions for which you are taking medications? If so, what medications are you taking?



COVID-19 Questions

21. Are you presently in quarantine or in isolation?
22. Whom do you live with and are any other family members in quarantine?
23. Did any of your family members go into quarantine before you did?
24. Do you have any second jobs and if so please identify the employer?

Petitioner Focused Interrogatories

- See Attachment O-2 at end of materials.

What Does The Employer Have To Do To Overcome A Presumption Of Compensability?

- Prove exposure more likely did not occur at work



What Kinds of Medical Discovery Are Important?

- Prior health records
- Review of all treating medical records
- Reports of injuries and hospital treatment following work exposures

Causation Issues Can Arise From Prior Records

- Do prior records show that petitioner has had the same symptoms for years?
- Did petitioner have the symptoms of COVID in January or February 2020?
- Is there objective evidence of worsening of prior symptoms?

Main Defenses To COVID Claims



- There was no potential exposure at work
- The petitioner more likely was exposed at home, recreationally or in travel
- The alleged source individual was not COVID positive
- The timing of alleged exposure is not scientifically possible
- The timing of exposure dovetails with holiday gatherings

Respondents Look for Inconsistencies: How Does Petitioner Claim He Or She Was Exposed?

- Was the alleged source individual even working at the time of alleged exposure?
- Was the petitioner working at the time of the alleged exposure?
- Does testing prove that no one was COVID positive who worked around petitioner?

Consider The Length Of Potential Exposure

- How long was the petitioner around the alleged COVID positive individual?
- Were they together momentarily or more than 15 minutes?



Consider The Use Of Masks At Work And At Home

- Did the employer follow the mask mandate at all times?
- Was the employer subject to the distance exception to the mandate?
- Did the petitioner's home visitors wear masks?

Defense Goal: Obtain Information About Potential Family Exposure

- Did family members test positive for COVID?
- If so, when in relation to the petitioner did they test positive?
- How many family members was petitioner around?
- Was petitioner around young children?
- Masked or unmasked?



Permanency Issues In COVID-19 Claims

- Petitioner retains the burden of proof to show objective medical evidence
- The proofs must also show a substantial impairment of work ability or non-work activities

What Are The Most Common Allegations For Permanency?

- Respiratory
- Cardiac
- Psychological effects
- Anosmia and Ageusia

Role of Testing in Permanency Claim

- Spirometry is critical to perform
- Cardiac testing can clarify whether there is impairment



Possible Credit Issues

- Did petitioner already have baseline respiratory or cardiac issues?
- Should respondent receive Section 12D credits?

Adverse Reactions To COVID Vaccines

- What if an employer requires employees to get a COVID vaccine and the employee gets sick?
- General rule is that the mandatory requirement on an employee to perform any activity renders that activity compensable for workers' comp purposes

Does It Matter If The Vaccine Program Is Voluntary?

- Discussion of *Saintsing* case from 1949
- Sensible view is that adverse reactions to vaccines from voluntary programs are not compensable

Canzanella Law Provides Coverage For Reactions To Vaccines

- Public safety workers are covered for reactions to vaccines in epidemics



S2476 Supplemental Benefits For Dependents Of Essential Employees Signed Into Law April 2021

- The new law provides an annual supplement to dependents



- The law is retroactive to March 9, 2021

Threshold Question: Was The Decedent An Essential Employee?

- The only clear criteria are health care workers and public safety workers
- There will be extensive arguments on categories three and four
- Was the worker in proximity to the public?
- What does “proximity” mean? Six feet, 60 feet?

Office Of Special Compensation Funds Makes Payments



- The office says a court order is needed
- This means that a dependency order is a precondition to eligibility

Office Of Special Compensation Funds Requires Forms To Be Submitted

- At end of case petitioner must complete certain forms
- Petitioner's attorney will then submit those forms to the office

The Goal Is To Create The Same Annual Proportion Relative To Annual Max Rate

- Numerator is the weekly benefit rate



- Denominator is the max rate

Example: Suppose Dependency Rate Is \$484.50 And Max Rate Is \$969

- If the max rate climbs to \$1,000 in 2022, then the weekly benefit rate moves to \$500
- Same thing happens every year

Consequences to Employer on Notice

- Law says that employer must provide notice within 60 days of eligibility
- Failure to provide notice subjects employer to having to pay the supplemental benefit rate until notice is provided
- Office of Special Compensation Funds says notice must be provided by petitioner's attorney
- Forms have to be completed by petitioner

What About All Accepted Dependency Cases That Did Not Go Through Court?



Until there is a dependency award,
there is no eligibility for supplement

Impact Of Law On COVID Practice?

- This will make it hard to settle dependency cases on a Section 20
- Essential employee status impacts not only burden of proof but also annual rate adjustments

Impact of COVID on ADA

- See Guidance on “Long COVID” as a disability under the ADA, Section 504

(Office of Civil Rights, July 26, 2021)

Email jgeaney@capehart.com for a copy of Guidance

Topic Three:

The New Jersey Premises Rule

Premises Rule Replaced “Going and Coming” Rule

- Covered when on work premises
- Not covered when off premises



Main Exception To Rule

- When an employee is required to be away from the employer's place of business, the travel is covered if connected to work

Jump v. City of Ventnor

- Remains the principal case explaining the rule
- Key facts: pumping station operator stopped to get personal mail and was injured in post office parking lot
- Administrator permitted these personal mail pickups



Court In *Jumpp* Confirms Viability Of *Secor v. Penn Serv. Garage*

- Attending to basic human needs is covered (minor deviations)
- Off-premises employees are entitled to same protections as on-premises employees
- Coverage applies if employee is in direct performance of duties

Special Mission Exception Applies To Travel AWAY From Employer's Premises

- Trips to employer's branch offices are not covered
- *Novis v. Rosenbluth Travel*: employee traveling from New Jersey to branch office in Connecticut not covered
 - (Petitioner fell on sidewalk next to parking lot of branch office)

Can Employer Obtain Coverage For Special Mission To Actual Work Premises?

- *Minter v. Mattson* is only case on this
- Petitioner, kitchen worker, called out of work due to heavy snowstorm. The morning bus was not running. Dining director required a co-employee Mattson to pick up Minter and drive him into work. Mattson lost control of car in storm with severe injuries to petitioner



Can Employer Obtain Coverage For Special Mission To Actual Work Premises?

- Appellate Division held that trip to work was compensable because of compulsion combined with a reasonable belief that petitioner would be fired if he did not come in

Parking Lot Cases



Hersh v. Cty of Morris,
217 N.J. 236 (2014)

Facts:

- Ms. Hersh worked for the County as a Senior Clerk of the Board of Elections.

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- She lacked seniority to park in the county parking lot
 - County made available free parking to her and 65 others at Cattano Garage
 - County did not own or maintain garage
 - Petitioner was seriously injured walking from garage to county building



Procedural History

- Judge of Compensation and Appellate Division ruled for petitioner
- NJ Supreme Court reversed in favor of county

Livingstone v. Abraham & Straus Was Distinguished

- In that case anchor tenant required employees to park in distant location of mall lot
- They had to traverse various hazards to get to the store in the mall
- There was a benefit to the Abraham & Straus in making employees park elsewhere

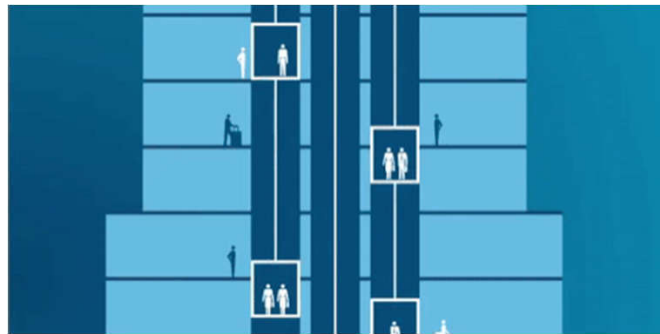


Hersh Rationale

- There was no added hazard to Ms. Hersh in crossing Washington Street
- There was no benefit to the county in having petitioner park at Cattano Garage
- The county did not own or maintain the spaces in Cattano Garage
- This was a perk for certain employees, nothing more
- Petitioner was injured on a public street

Ramos v. M & F Fashions, 154 N.J. 583 (1998)

- Petitioner fell into a freight elevator in a building where his employer rented space



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- Petitioner always arrived very early and waited for business to open
 - He used the freight elevator to get to the floor of his employer
 - The business used this particular elevator frequently to transport fabric

Ruling of Supreme Court

- Continuous use of the freight elevator was akin to control
- There is no clock in rule in New Jersey
- Employer benefited by petitioner's arriving early to work

Premises Rule Can Come Down to Measurement



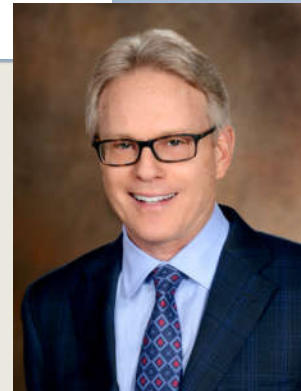
Cannuscio v. Claridge Hotel,
319 N.J. Super. 342
(App Div. 1999)

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- Petitioner left the casino to get her paycheck and was assaulted just outside the employer's property
 - Employer did not control the sidewalk or the public street where assault occurred
 - Court rejected argument that assault would not have happened but for casino's designation of location to pick up paycheck


Thank you.

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**CHAPTER 84
(CORRECTED COPY)**

AN ACT concerning essential employees contracting coronavirus disease 2019 and supplementing Title 34 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

C.34:15-31.11 Definitions relative to essential employees contracting COVID-19.

1. As used in this act:

“Essential employee” means an employee in the public or private sector who, during a state of emergency:

(1) is a public safety worker or first responder, including any fire, police or other emergency responders;

(2) is involved in providing medical and other healthcare services, emergency transportation, social services, and other care services, including services provided in health care facilities, residential facilities, or homes;

(3) performs functions which involve physical proximity to members of the public and are essential to the public’s health, safety, and welfare, including transportation services, hotel and other residential services, financial services, and the production, preparation, storage, sale, and distribution of essential goods such as food, beverages, medicine, fuel, and supplies for conducting essential business and work at home; or

(4) is any other employee deemed an essential employee by the public authority declaring the state of emergency.

An employee who is an employee of the State who is offered the option of working at home but has refused that option shall not be regarded as an essential employee. “Health care facility” means any non-federal institution, building or agency, or portion thereof, whether public or private, for profit or nonprofit, that is used, operated or designed to provide health services, medical or dental treatment or nursing, rehabilitative, or preventive care to any person. Health care facility includes, but is not limited to: an ambulatory surgical facility, home health agency, hospice, hospital, infirmary, intermediate care facility, dialysis center, long-term care facility, medical assistance facility, mental health center, paid and volunteer emergency medical services, outpatient facility, public health center, rehabilitation facility, residential treatment facility, skilled nursing facility, and adult day care center. Health care facility also includes, but is not limited to, the following related property when used for or in connection with the foregoing: a laboratory, research facility, pharmacy, laundry facility, health personnel training and lodging facility, patient, guest and health personnel food service facility, and the portion of an office or office building used by persons engaged in health care professions or services.

“Health care worker” means an individual employed by a health care facility.

“Public safety worker” includes a member, employee, or officer of a paid, partially-paid, or volunteer fire or police department, force, company or district, including the State Police, a Community Emergency Response Team approved by the New Jersey Office of Emergency Management, or a correctional facility, or a basic or advanced medical technician of a first aid or rescue squad, or any other nurse, basic or advanced medical technician.

C.34:15-31.12 Rebuttable presumption that contraction of the disease is work-related and compensable.

2. If, during the public health emergency declared by an executive order of the Governor and any extension of the order, an individual contracts coronavirus disease 2019 during a

time period in which the individual is working in a place of employment other than the individual's own residence as a health care worker, public safety worker, or other essential employee, there shall be a rebuttable presumption that the contraction of the disease is work-related and fully compensable for the purposes of benefits provided under R.S.34:15-1 et seq., ordinary and accidental disability retirement, and any other benefits provided by law to individuals suffering injury or illness through the course of their employment. This prima facie presumption may be rebutted by a preponderance of the evidence showing that the worker was not exposed to the disease while working in the place of employment other than the individual's own residence.

C.34:15-31.13 Payment of compensation not considered factor in certain calculations.

3. Any workers' compensation claims paid according to section 2 of this act shall not be considered in calculating an employer's Experience Modification Factor, pursuant to the New Jersey Workers' Compensation and Employers Liability and Insurance Manual administered by the Compensation Rating and Inspection Bureau established by section 2 of P.L.1995, c.393 (C.34:15-89.1) and section 1 of P.L.2008, c.97 (C.34:15-90.1).

C.34:15-31.14 Construction of act.

4. This act is intended to affirm certain rights of essential employees under the circumstances specified in this act, and shall not be construed as reducing, limiting or curtailing any rights of any worker or employee to benefits provided by law.

5. This act shall take effect immediately and shall be retroactive to March 9, 2020.

Approved September 14, 2020.

SAMPLE COVID-19 INTERROGATORIES FOR PETITIONER

1. Provide the date upon which petitioner began work for respondent and the date employment was terminated, if applicable.
2. Provide a complete list of each job classification held by petitioner from March 9, 2020 through [alleged last date of exposure], the dates for which petitioner worked in each role, and a job description for each job classification during this period.
3. Confirm whether respondent, or outside entity on behalf of respondent, conducted COVID-19 tracing at any time from March 9, 2020 through the present. If so, please provide such contact tracing information.
4. If you contend petitioner was not an essential employee, please explain the basis of your opinion.
5. Was there any training provided to employees regarding COVID-19 procedures. If so, please provide the date of said training and copies of all written materials associated with same.
6. Were social distancing measures ever instituted? If so, please provide a description of all social distancing measures implemented by respondent and the date each measure was implemented.
7. Was PPE provided to employees and supply the date/s same was provided?
8. If respondent maintains that petitioner was exposed to COVID-19 in a manner unrelated to his/her employment, please provide all information in respondent's possession regarding the alleged exposure including any evidence supporting same.
9. Did petitioner work in physical proximity to other employees who tested positive for COVID-19?
10. Please confirm whether respondent kept documentation confirming the number of employees, if any, who contracted COVID-19 from March 9, 2020 through the present.
11. Were any employees required to quarantine who worked in physical proximity to petitioner?

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About the Panelists...

John H. Geaney is Co-Chair of the Workers' Compensation Practice of Capehart & Scatchard, P.A. in Mt. Laurel, New Jersey. He concentrates his practice in the representation of employers, self-insured companies, third party administrators and insurance carriers in Workers' Compensation cases and cases related to the *Americans with Disabilities Act* and the *Family and Medical Leave Act*. He also conducts training sessions on Workers' Compensation, ADA and FMLA issues.

Admitted to practice in New Jersey, Mr. Geaney is a Board member of the New Jersey Public Risk Management Association and a member of the American and Burlington County Bar Associations, the National Council of Self-Insurers and the Membership and Program Committees of the New Jersey Self Insurers Association. A Fellow of the College of Workers' Compensation Attorneys, he is Past Chair of the Burlington County Bar Association Workers' Compensation Section and New Jersey Designee, National Workers' Compensation Defense Network. He also serves as Workers' Compensation Litigation Coordinator for the Central Jersey Joint Insurance Fund and the Garden State Municipal Joint Insurance Fund.

Mr. Geaney is the author of *Geaney's New Jersey Workers' Compensation Manual for Practitioners, Adjusters, and Employers* (2003 and semi-annual updates, ICLE) and the 2004 and 2006 editions of ICLE's *Guide to Employment Issues under the ADA and FMLA for Practitioners and Employers*. He is the author of articles which have appeared in *New Jersey Municipalities* and other publications, and has lectured on Workers' Compensation topics to professional and community organizations.

Mr. Geaney attended Durham University in Durham, England, before receiving his B.A., *summa cum laude*, from Holy Cross College. He received his J.D. from Boston College Law School.

Katherine Hellander Geist is a Shareholder in the Mt. Laurel office of Capehart Schatchard P.A., where she focuses her practice in the representation of employers, self-insured companies and insurance carriers in Workers' Compensation defense matters.

Admitted to practice in New Jersey, Ms. Geist serves as Vice President of the Central Jersey Claims Association. She has lectured for the Central Jersey Claims Association and is the author of "Proof a Petitioner Would Be Working But for a Compensable Accident is Prerequisite to the Receipt of Temporary Disability Benefits" (*Capehart Scatchard Newsletter*, December 2015).

Ms. Geist received her B.A., *magna cum laude*, from LaSalle University, where she was elected to *Alpha Pi Sigma*, and her J.D. from Roger Williams University School of Law. Prior to joining the firm, she served as a law clerk to The Honorable Nan S. Famular, J.S.C.

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