

## Application of reconstruction for part-time employees with subsequent full-time employment at a higher wage rate

In *Dunkley v. Costco Wholesale Corporation* the New Jersey Appellate Division determined that a Workers' Compensation Judge incorrectly denied an employee's request for reconstruction of her part-time work week to a full-time work week on the basis that the employee became employed in a full-time position at an increased hourly rate.

The Appellate Division concluded that the Judge failed to apply the standards set forth in *Katsoris v. S. Jersey Publ'g Co.*, 131 N.J. 535 (1993). In addition, the Division determined that the Judge exercised proper discretion in denying a request for an award of expert witness fees in excess of those required pursuant to N.J.S.A. 34:15-64.

In *Dunkley*, a part-time employee working in the food court at Costco Wholesale Corporation was involved in work related accidents and sustained injuries to the neck and right shoulder. The employee had a prior work history as a certified nurse's aide and as a licensed home health aide where her job duties included washing, bathing, dressing, lifting and moving patients. The employee testified that her injuries precluded her from lifting items and performing tasks requiring repetitive use of her right shoulder and that she was unable to perform the duties required of a certified nurse's aide and home health aide. According to the employee, she eventually became a full-time employee for Costco in 2011. She asserted that she was unable to perform the duties required in various full-time higher paying positions available with Costco.

Pursuant to the standards set forth in *Katsoris*, one of the factors that a Workers' Compensation Judge must consider is whether an employee's disability represents a loss of earning capacity, including a reduction of future earning power. The Judge must also consider whether the disability reaches into the future and affects probable future earning capacity or has an impact on probable future earnings. In *Katsoris*, the Court had previously recognized application of reconstruction for part-time employees holding concurrent full-time employment.

Ultimately, the Appellate Division in *Dunkley* determined that the employee's subsequent full-time employment at the higher hourly wage rate was relevant to her future earning capacity but it was not dispositive. The Division further rejected the employee's assertion that reconstruction should be based upon a higher hourly rate rather than the wage the employee was earning at the time of the respective work related accidents.

**Comment:** In addressing the appropriateness of reconstruction, the Appellate Division in *Dunkley* took into consideration the complete nature and extent of the injured employee's restrictions and/or limitations in determining a loss of earning capacity and future earning power. Although the employee was subsequently employed on a full-time basis at a higher wage rate, she would not have been able to perform her prior full-time work related activities in another job profession. The *Dunkley* decision is yet another example of the liberal construction of our worker's compensation law in order to extend the maximum benefits to an injured worker.