

## There are Defenses to the Entitlement to Wage Loss Benefits, But You Must Know Your Facts

While the recent decision in *Kochanowski v. Township of Bridgewater* (decided December 11, 2017) focused on the entitlement of wage loss benefits for a volunteer firefighter, the Court's discussion and analysis provided an excellent summary of the defenses employers have to the demands for temporary disability.

In this case, the petitioner was a volunteer firefighter who sustained multiple fractures on March 6, 2015, when responding to a multi-alarm fire. There is no doubt that her injuries arose out of and during the course of her duties as a volunteer firefighter. In fact, she received medical treatment and a permanency award without dispute. The issue is whether she was entitled to temporary total disability benefits.

The injuries clearly rendered the firefighter temporarily totally disabled. The question was whether she was entitled to wage replacement benefits when at the time of the accident she was not employed in any other capacity. In fact, she had stopped working in 2013 to help her ailing father who has since deceased. She had not looked for any type of work from the time her father passed away until the accident in March 2015. She had been employed as a nanny and certified home health aide in the past, but her license lapsed when her father became ill. Certainly, the facts of the case were extremely sympathetic for this laudable individual. However, the question of the entitlement to temporary total disability benefits is a legal one.

The woman testified that she had been unable to work since the time of her injury. She could not return as a volunteer firefighter and also felt she could not go back to being a nanny or a home health aide due to the nature of her injuries. She pointed out that the statute certainly treats volunteer firefighters with greater deference. For example, regardless of the wages an individual receives at a fulltime job, he or she is entitled to the maximum weekly benefit amount for the year of the injury. Additionally, the statute waives any requirement for the seven-day waiting period for volunteer firefighters. The petitioner argued that to require concurrent employment is contrary to public policy as well as the intent of the legislature.

Both the Workers' Compensation Judge (WCJ) and the Appellate Court recognized that the Workers' Compensation Act is remedial legislation which is to be liberally construed. Nevertheless, the statute did not call for the payment of wage loss benefits to volunteer firefighters under these circumstances. While there are certainly favorable provisions in the statute for volunteer firefighters, neither the WCJ nor the Appellate Court felt that the basic requirement that there must be wages to replace income was also waived. The Court reviewed the statute and case law noting a number of decisions eliminating the entitlement to wage loss benefits in cases where: the employee had voluntarily terminated their employment; the employee was a 10-month salary teacher who did not work during the summer months; where the petitioner is a college student enrolled in fulltime classes; where the petitioner was not earning wages at the time of a recurrence of disability and had no evidence or proof of the prospects of employment at that time.

**Comment:** Ordinarily, the aspect of remedial legislation liberally construed to benefit injured workers would result in a favorable decision for the petitioner, especially in a case involving a volunteer firefighter. However, the Court was careful to delineate those provisions specifically designed to be more favorable to firefighters from other sections of the statute and case law, making it clear that temporary disability benefits are not due if there are no actual wages to replace income. While the case focused on a very finite sector of the employment population in New Jersey, the decision itself was wide-ranging and an excellent summary of various scenarios where temporary total disability benefits were denied despite the fact that the individual did remain disabled from employment.

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