

The Evaluation of Reconstruction of Wages under Katsoris and the Timing of the Argument

In the case of *Calero v. Target Corporation* (decided June 10, 2020), the Appellate Court affirmed the Worker Compensation Judge's (WCJ) decision to reconstruct the petitioner's wages and award. The matter was resolved initially on August 23, 2016, with the petitioner's award reduced due to a capped permanency rate. In July 2018, Calero filed a Motion for Reconsideration, asking the court to reconstruct wages and the award established in the 2016 order. The Judge held a hearing and, in 2019, entered an Order reconstructing the wages. Target filed an appeal. The Appellate Court denied the appeal and affirmed the WCJ decision.

After the matter initially resolved in 2016, Calero obtained new counsel. In December 2016, the petitioner filed a Motion for Reconsideration, alleging that the wages should have been reconstructed under Katsoris based upon a permanent injury, which prevented her from working full time. Calero specifically asked that her wages be reconstructed based on a forty-hour week. *Katsoris v. S. Jersey Publ'g Co.*, 131 N.J. 535 (1993).

Calero testified her hours varied even though she was hired to work full time. She worked the hours posted for her and filled in for other employees. She confirmed she was always available to work forty hours per week. Target provided no witness testimony.

The WCJ addressed the holding in Katsoris and evaluated the question before him as to whether "there [was] credible evidence in this case of a permanent impact on future full-time wage earning capacity in order to reconstruct . . . wages." He found reconstruction applicable and reconstructed the petitioner's wages based on working 40 hours.

As noted, Target filed an appeal arguing that "doctrines concerning fairness and public policy require" this action be dismissed. In the alternative, Target argued the 2019 Order "was erroneous and . . . contrary to statutory and case law" and should be reversed.

N.J.S.A. 34:15-27 discusses the modification of an agreement including the review of the award, determination, the rule for judgment or order approving the settlement. Essentially, it advise as to when a modification can occur but does not give any set time limit beyond the two-year re-opener rights. It also does not address how the 45 day appeal's period impacts this section. The Appellate Court would not consider evaluating whether N.J.S.A. 34:15-27 barred Calero's application because Target did not argue that point before the WCJ. However, the court added that even though they would not consider the

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argument, the Motion for Reconsideration should have been granted because the WCJ has the inherent authority to open judgments or orders in the interest of justice absent an abuse of discretion.

The Appellate Court then discussed the two-step process to evaluate reconstruction. The decision states: "First, the judge must determine if a petitioner work[ed] fewer than the customary number of days constituting an ordinary week in the character of the work involved at the time the injuries were sustained." Katsoris. Id. at 545. Then, the Judge must consider whether the petitioner's disability "represents a 'loss of earning capacity, i.e., a diminution of future earning power,' or . . . whether the disability 'reaches into the future' and affects 'probable future earning capacity' or has an 'impact on probable future earnings.'" They specifically noted the critical inquiry is whether the petitioner has demonstrated the injuries will disable her earning capacity in contemporary or future full-time employment." Id. at 548.

The Appellate Court discussed that Target offered absolutely no evidence to refute Calero's proofs related to reconstruction or to establish the alleged substantial prejudice Target suffered outweighed that which Calero experienced by not having her award adequately determined.

Comment: This case again explores the steps to evaluate whether an employee can make a valid argument for reconstruction under Katsoris. What was somewhat concerning was the comments related to the Motion for Reconsideration being allowed after the 45 day appeals period following the initial settlement Order. The Appellate Court is highlighting that the WCJ has the inherent authority to open Orders in the interest of justice absent an abuse of discretion essentially means that no Order is final. They do not discuss the timing of a Motion for Reconsideration, but merely that the Judge can consider as long as they provide a reasoned argument for granting.

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