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Weber Gallagher

## New Jersey Workers' Compensation Update - March 2012

**STATUTE OF LIMITATIONS**

In *Graff vs. Mitchell Park Flooring and S&A Wood Floors, Inc*., (12/19/2011, Unpublished Superior Court Appellate Division Decision at Docket No. A-1775-10T1), the Appellate Division affirmed the Decision of Judge Fader denying petitioner's claim petition for occupationally induced low back disability as well as a specific traumatic event. The significance of the case is the Judge's decision followed the reasoning of the recent decision in *Huntoon vs. Borough of Clementon*,1 concluding that the two year statute of limitations in an occupational disease claim begins to run from the date the petitioner knew of his condition and its relationship to his work and is not tolled when the exposure ends.

In this case, the petitioner testified that he was employed as a laborer specializing in refinishing wood floors. His job duties require that he remove pieces of heavy equipment from the employer's van and carry them up one or more flights of stairs to reach an area where the work was to be performed. He operated a 230 pound sander and a 50 pound edging machine along with a radiator sander. Petitioner worked for one of the respondents, S&A, from July 1, 1990 through July 15, 1999. Petitioner testified that he began to see a chiropractor in July 1999. When asked by the Judge if he was seen by the chiropractor as a result of the nature of his work, he responded, "Yes". He also testified that the chiropractors advised him that he had "disc problems, back problems". Petitioner did not file his claim until 2004. The Judge dismissed the claim holding that the occupational claim is barred by the two year statute of limitations pursuant to N.J.S.A. 34:15-34 and N.J.S.A. 34:15-51. Despite petitioner's argument that his claim was not tolled until he ceased working in 2002, the Judge maintained that petitioner knew of a work-related low back condition in 1999 and was required to file a claim within 2 years and failed to do so. Following Huntoon, this decision once again confirms that the petitioner can not rely upon ongoing exposure to suspend the statute of limitations.

The claim against Mitchell was also denied but for distinct evidentiary reasons. Although petitioner testified that he was involved in a minor event at home in December 2002 when assisting his wife in taking Christmas decorations down from the attic, the medical records belied his testimony. Rather, the medical records indicated that petitioner lifted heavy boxes (contrary to his testimony where the boxes were very light) at home causing a low back injury. His state disability application indicated that he was moving boxes from his attic when he threw his back out and could not work as a result. Based upon these facts, the Judge rejected petitioner's testimony and that of petitioner's medical expert witness.

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**EMPLOYER/EMPLOYEE RELATIONSHIP**

In *Johantgen vs. Brandywine Senior Care Center*, the Appellate Division affirmed the finding of the WCJ that the petitioner was an employee of respondent when she fell from a chair and fractured her wrist while hanging Christmas decorations in the area of the nursing home designated by the employer for petitioner to provide hairstyling services to the residents. (Decided 10/31/2011; Docket No. A-4883-09T1).

The facts reveal that respondent owned and operated a long term care nursing home. Once per week, the petitioner provided hairstyling and other personal grooming services to the residents of the nursing home. Following petitioner's fall, the respondent contested the claim on the grounds that the petitioner was an independent contractor and not an employee.

Petitioner was a licensed hair dresser and had worked at the respondent's location since 1992. She worked

at the respondent's location once a week beginning at about 9:30 am and worked throughout the day until completing all scheduled appointments. The employer provided the room for the beauty salon along with chairs, hairdryers, a sink and a cabinet for supplies. Petitioner provided the majority of her own supplies since many of them were only sold to licensed hairdressers. She did use medicated shampoos provided by the nursing staff when required. Appointments with the petitioner were arranged directly by the nursing home. The employer transported residents to the petitioner in the salon and when necessary petitioner served the residents in their rooms.

Petitioner would provide a list of the residents and the services performed at the end of each day and received 85% of the billing, based upon the price for that service as set by the respondent.

Petitioner had a similar arrangement at Liberty Royal Care Center where she also reported once per week and was provided a room in order to provide her beauty salon services. She was paid 100% of the fees paid by the residents for services. However, the residents did not make appointments with the petitioner through Liberty, but rather petitioner provided services to anyone who simply attended during the one day that she was there.

The only other work petitioner performed was washing hair on Saturday's at a friend's salon.

With respect to the respondent, petitioner was required to receive all immunizations required of other employees. She had to provide the respondent with proof that she had seen a physician for a physical. She was not required to prove that she had workers' compensation insurance coverage, but simply a personal liability policy. Petitioner received a 1099 from the respondent and for the year of the accident the petitioner's compensation was $7,795.07.

On the day of the accident, the petitioner was hanging Christmas decorations that were given to her by the respondent's activities department in order to make the work environment, "more festive for the holidays".

In determining whether the petitioner was an employee of the respondent, the Court first considered the control test but felt that the control test was not appropriate in this circumstance. In New Jersey, the control test is not the focus of the Court's decision when the type of work being performed by the petitioner, such as a beautician, would not be subject to supervision. The Court felt that the control exercised by the employer including petitioner's hours, appointments, and the location of the appointments was sufficient.

The Court went on to apply the Relative Nature of the Work Test which is the primary test in New Jersey to determine an employment relationship. The Relative Nature of the Work Test requires that the employee demonstrate the following:

1. A substantial economic dependence on the employer;
2. That there is a functional integration of the parties' respective operations.

The Court felt that economic dependence was present since the respondent was responsible for making all the petitioner's appointments and supplied all of her customers. Petitioner was not free to select her customers and had little control over the timing of her work. Although petitioner provided some of her supplies, the respondent provided all of the essential hardware to run the salon. Her compensation was based upon a percentage of the fees paid by the customers/residents.

The Court did not discuss at any great length how the evidence demonstrated that there was a "functional integration" of the parties' respective operations. The Court did find it significant that petitioner was putting up holiday decorations and as such was performing an incidental function for the employer. The Court relied heavily upon the decision in *Brower vs. Rossny*, 63 NJ Super. 395 (App. Div. 1860), Cert Denied 34 NJ 65 (1961) wherein the petitioner was found to be an employee under similar circumstances where she

was a facial operator working in the respondent's salon in a house owned and renovated by the respondent. Frankly, the comparison seems extremely weak in light of the fact that the petitioner in *Brower* was performing facials in a beauty salon where the integration of the services seems clear. Here, petitioner is performing services (hair and beauty) in a retirement community where the functional integration is much more attenuated.

**ORTHOPEDIC OCCUPATIONAL DISEASE CLAIMS**

The Decision in *Carey vs. Jersey Central Power & Light Co. and GPU Energy*, the Appellate Division was faced with the frequent scenario of adjudicating whether a petitioner's ongoing job duties caused a shift or sharing of responsibility for orthopedic disability due to occupational exposure/job duties as opposed to a specific traumatic event. Petitioner initially injured his neck in 2000 and obtained an award of 45% of partial/total as a result of a herniated disc at C5-6 and bulging discs from C2 through C5. Petitioner continued to work for JCP&L after his March 2000 injury up through 2005 as a line man and a trouble man. He testified about heavy physical labor throughout this timeframe. The symptoms began to worsen in the Spring of 2003. In January 2004, JCP&L became self-insured. Petitioner requested additional medical treatment in 2004 and underwent additional treatment including an updated MRI in February 2004 revealing an additional herniated disc at C3-4 and C4-5.

The Judge apportioned an additional 15% increase equally between JCP&L as insured prior to 2004 and 7-1/2% against JCP&L as self-insured subsequent to 2004. Both parties appealed the Judge's Decision, however, the Appellate Division affirmed the Judge's ruling. It is important to note the standard of evidence when faced with the issue of whether subsequent occupational exposure can result in an allocation of or responsibility for additional benefits and permanent disability. The standard is as follows:

1. When assessing the apportionment between successive employers or insurers, the critical question is whether a progressive occupational disease was due in a material degree to causes, characteristics of the successive occupation.

*Peterson vs. Hermann Forwarding Co.*, 267 N.J. Super. 493, 503 (App. Div. 1993). A material degree is defined as an appreciable degree or a degree substantially greater than de minimus. Perez, supra., 95 N.J. at 116.

The self-insured JCP&L argued that under the landmark *Supreme Court Decision of Bond vs. Rose Ribbon & Carbon Manufacturing Co*., 42 N.J. 308, 311 (1964), a successive insurer or employer can not be held liable for occupational disease or a condition unless it is manifested during their period of coverage. They argued that petitioner's condition manifested itself in 2003 prior to JCP&L becoming self-insured. The Appellate Division pointed out that Bond does not require that the petitioner point to a specific incident triggering the liability of a successive employer. Rather, a successive employer insurer may be held liable when an undetected progression of an occupational disease is disclosed during the time of coverage of that employer or insurer. Disclosure can occur through medical examination, working capacity, or manifest loss of function. Here, the Court pointed out that the February 2004 MRI demonstrated a progression of the condition of petitioner's cervical spine while the symptoms manifested in 2003 thus justifying the allocation.

Cases such as the Carey Decision do provide a framework or map for employers and carriers to assess whether they have or can shift exposure for benefits in a scenario where the petitioner's occupational job duties continue through multiple employers or carriers.

**GOING AND COMING RULE**

In a recent decision enhancing the employer's ability to defend injuries sustained while merely commuting

and undercutting a self-employed respondent from expanding his own course of employment, the Appellate Division in Donne vs. Shiki Japanese Steak House of Middletown, (Decided 10/18/2011, Docket No.: A-1919-10T1), rejected petitioner's claim for benefits in connection with a motor vehicle accident. The facts revealed that the petitioner was the owner of a corporation that employed himself as president of the respondent's restaurant. Petitioner was injured in a motor vehicle accident when he was traveling to the restaurant earlier than usual in order to attend an important business meeting. Petitioner testified that he left for the restaurant approximately two hours earlier than his regular time since he scheduled the meeting to occur at 10:00 am before the employees arrived. Petitioner presented a witness who testified that the petitioner was at an increased risk for being involved in an accident as the result of traveling on Interstate 287 during rush hour as opposed to normally travelling after rush hour. Respondent presented an expert witness who testified that the circumstances giving rise to petitioner's accident were no more or less likely to have occurred before or after rush hour.

The Judge denied the claim concluding that petitioner's injuries did not arise out of and in the course of employment and required by Section 34:15-36. The Judge rejected the petitioner's argument that he was on a "special mission" exception to the Going and Coming Rule. A special mission requires that the petitioner prove that the petitioner is required by the employer to be away from the employer's place of employment and engaged in the direct performance of his job duties. The Appellate Division and the Judge rejected petitioner's arguments concluding that he did not face a heightened risk of a motor vehicle accident simply by traveling early to work. The Court concluded that since the petitioner set his own hours merely traveling to work somewhat earlier did not cause petitioner to face special hazard sufficiently substantial to be viewed as an integral part of the service he was performing. The court rejected petitioner's argument that petitioner's self-directed early meeting somehow resulted in a heightened risk of an accident. Such an exception, the Court noted, would render the Going and Coming Rule meaningless as employers direct employees to appear for work at appointed times frequently. Second, the special mission exception did not apply since petitioner was on his way to his usual work place.

While the Decision of the Court in this matter appeared to be one which could easily be predicted, it is still nonetheless a victory for respondents and a blow to those claims filed by self-employed respondents who contend that they can single handily expanding the course of their employment.

**STATUTE OF LIMITATIONS TO RE-OPEN A CLAIM**

In *Zito vs. AIC*, (Appellate Division decided September 16, 2011; No. A-1070-10T2), the Appellate Division affirmed the Judge's Decision dismissing a Claim Petition as a claim for compensation since it was filed more than two years after the last receipt of benefits.

The facts revealed that the petitioner as injured on June 18, 2004 while lifting manhole covers resulting in a lumbar injury. Petitioner received a voluntary award of 7-1/2% of partial/total disability with the last check being received and cashed by the petitioner on April 20, 2005.

Petitioner sustained a new injury to his back on December 18, 2006 with another employer, Hertz. When seen in an IME in April 2007, the physician noted that petitioner's back pain was due to the 2004 injury. Petitioner filed a claim relative to his 2006 injury on August 20, 2007. He filed a claim for his 2004 injury on March 5, 2008, almost three years after petitioner received his last check from the employer relative to the voluntary tender offer of 7-1/2% of partial/total.

In response to the employer's argument that the claim should be dismissed for violation of the two year statute of limitations, the petitioner contended that he suffered form Dyslexia and that he was confused by letters received from the workers' compensation carrier. The petitioner alleged that the Statute of

Limitations should be tolled based upon his condition and a letter received from the workers' compensation carrier including an improperly dated letter (February 21, 2004 vs. February 21, 2005). The Court was not impressed with the petitioner's argument stating that the Statute of Limitations contained in Section 27 of the Statute did not provide the petitioner with a "safe harbor" from the consequences of his failure to file a timely petition.

**PENALTY PROVISIONS OF THE NEW JERSEY WORKERS' COMPENSATION ACT**

The Decision in *Ferguson vs. Trenton Board of Education*, (Decided 2/03/12; A-3053-10T4), emphasizes the fact that Court Orders for the payment of temporary total disability benefits or other benefits can not be ignored without filing prompt appeals and taking all steps necessary to seek a stay of the Court Order. In this case, the petitioner sustained significant injuries to her cervical spine and underwent several surgical procedures. Following an award of permanent disability benefits, the petitioner had a recurrence of her disability as a result of a new injury. On April 17, 2009, the Judge of Compensation awarded ongoing temporary total disability benefits pursuant to a Motion for Medical and Temporary Benefits filed on behalf of the petitioner. Subsequent to the award, the petitioner received an award of Social Security Disability. The Decision stated specifically that medial improvement was to be expected with appropriate treatment. As a result, there was no finding in any medical records of maximum medical improvement. The respondent did not appeal from Judge Cox' Order for continuing temporary total disability benefits. Subsequent Motions were filed to enforce the Judge's Order and eventually the respondent paid the back due temporary disability benefits.

Nevertheless, Judge Geist granted a Motion to Enforce filed on behalf of the petitioner and imposed penalties authorized by N.J.S.A. 34:15-28.1 and N.J.S.A. 34:15-20.2. The penalties included counsel fees in the amount of $8,310.00; a 25% penalty on all past due temporary disability benefits totaling $4,269.00 and interest on the delinquent temporary disability payments. Respondents must be reminded that Court Orders must be complied with in a timely fashion or appealed from in an equally timely fashion or face similar sanctions and penalties.