CUNNINGHAM HYPO I

Petitioner worked as a grain operator and injured his left hand, left elbow, left shoulder, and neck in the course of his employment on February 27, 2020 when a 45 ft shipping container door closed onto the hand and wrist during a wind storm with 40+mph winds. It was an admitted accident and treatment was provided. On the date of accident, he was given the following work restrictions, "may lift up to 5 lbs. occasionally, may push/pull up to 5 lbs. occasionally, may not drive company vehicle due to function limitations, unable to use power/impact/vibratory tool with left upper extremity and wear splint/brace on left upper extremity constantly". The employer advised that light duty was available. However, he was in so much pain that he reported to his local ER the next day and was "excused from work for 3 days". Petitioner had difficulty putting on his socks and shoes and due to the extreme pain, he did not believe it was safe for him to drive his personal car to work. Petitioner's commute to work is approximately an hour and required that he drive on the NJ Turnpike. He called his supervisor twice on the date of accident, twice the following day and early in the morning on March 2. None of his called were answered or returned and he was unable to leave a message as the voicemail box was full. He did not report to work. He received an email from the employer terminating him on March 3, 2020 for 3'no call/no shows' and insubordination. Respondent refused to pay TTD. Thereafter, Petitioner applied for unemployment however, the employer contested the claim. Only treatment to the left hand was authorized. Requests for treatment to the left elbow, left shoulder and neck were refused. Thereafter a series of motions ensued resulting in authorized treatment. Petitioner was taken out of work on November 10, 2021 pending surgical consultation. Despite the fact that the physician that put him out of work was in the same group as the authorized doctors (one for his shoulder and another for his neck), respondent denied that that doctor was authorized and refused to pay TTD.

On November 30, 2020, petitioner obtained a written job offer. However, due to work restrictions he was unable to pass the physical exam required and was not able to start the job. A second written job offer on September 7, 2021 with a start date of September 13, 2021.

1. Is petitioner entitled to temp starting February 27, 2020?
2. Is there a difference if he was fired rather than quit his job?
3. What arguments would you make for or against his entitlement to temp?
4. Is petitioner entitled to temp starting November 30, 2020?
5. Is petitioner entitled to temp starting September 13, 2021?
6. Is petitioner entitled to temp starting November 10, 2021?
7. Are there any distinguishing factors between this claim and Cunningham?

CUNNINGHAM HYPO II

Petitioner worked as a CNA and suffered injuries to her neck and left shoulder while moving a patient from wheelchair to bed in the course of her employment on December 17, 2017. She received authorized medical treatment including surgery and was discharged from treatment on November 14, 2018 with a permanent restriction of no lifting more than 10 lbs. Due to the restrictions, she was terminated from her employment as a CNA. Several months later, and before permanency exams had taken place, petitioner requested a return visit to the original authorized doctor due to continued complaints of pain. Her request was granted and after an MRI it was determined that additional surgery was required and it was scheduled for October 8, 2019. Respondent denied temp on the basis that she had not returned to work and could not demonstrate loss of earnings. Petitioner asserted that after her termination, she looked for alternate work, but had not been successful. She applied for sedentary jobs, but all required computer skills that she did not have or lifting more than her restriction. A motion for temp was filed.

1. Was petitioner terminated for cause?
2. Did she otherwise remove herself from the workforce?
3. Did petitioner demonstrate that she was ready, willing, and able to work?
4. What is the likely outcome of the motion?
5. If she applied for unemployment does that help/harm her case for temp?

TEMP AND VOLUNTEERS

Is a volunteer FF or EMT entitled to temp and if so, at what rate…

1. If they had a regular FT job and because of the accident in their volunteer position are unable to work either as a volunteer or their FT employment.
2. Assume the FT job is sedentary and the injured worker returns to their full time employment, but is still unable to volunteer.
3. If they a are full-time student and able to attend school due to their volunteer position?
4. If they are a part-time student and unable to attend school?
5. If they were laid off from their full-time job and have not yet found work and are collecting unemployment?
6. If they have no other employment.

901 A.2d 956 (2006)
386 N.J. Super. 423

Dennis CUNNINGHAM, Petitioner-Respondent,
v.
ATLANTIC STATES CAST IRON PIPE CO., Respondent-Appellant.

Superior Court of New Jersey, Appellate Division.

Argued March 28, 2006.
Decided June 26, 2006.

Wendy Johnson Lario, Florham Park, argued the cause for appellant (Pitney Hardin, attorneys; Ms. Lario and Frank A. Romano, on the brief).

Brian A. Roemersma, Phillipsburg, argued the cause for respondent (Winegar, Wilhelm, Glynn & Roemersma, attorneys; Mr. Roemersma, on the brief).

Before Judges COBURN, COLLESTER and LISA.

The opinion of the court is delivered by

LISA, J.A.D.

This is a workers' compensation case. The petitioner, Dennis Cunningham, suffered a compensable injury, returned to full duty work, and was later terminated *957 for cause. Before he obtained other employment, his injury disabled him from the ability to work. The judge of compensation determined that temporary disability benefits were available because, notwithstanding his termination, Cunningham was incapacitated and had not taken himself out of the labor market. We agree that an employee is not precluded from receiving temporary disability benefits under these circumstances. However, because temporary disability benefits constitute replacement for actual wage loss, the employee must prove that but for the disability he would have been employed. The record is lacking in this regard. Therefore, we reverse and remand for further proceedings.

Cunningham worked as a machine operator for respondent, Atlantic States Cast Iron Pipe Co. (Atlantic States), since 2001. On October 21, 2003, he was injured at work. He suffered a torn medial meniscus to his left knee. Atlantic States' designated physician, Dr. Karl Helmold, treated Cunningham and performed an arthroscopic surgical repair on December 9, 2003.

An Atlantic States policy provided that an employee would be terminated who inexcusably failed to report to work for three consecutive days. In November 2003, Cunningham failed to report for three consecutive days due to incarceration. He was terminated pursuant to the company policy, but through the efforts of his union, he was reinstated under a "last chance" agreement. The agreement provided that he could keep his job if he had no unauthorized absences for one year. He returned to work under the agreement on January 5, 2004.

Initially, Cunningham was assigned light duty, but Helmold cleared him for full duty as of January 23, 2004. Working without restrictions, he successfully completed his last chance agreement on January 5, 2005. In mid-January 2005, because of an outstanding traffic warrant, Cunningham was again incarcerated. He

called his employer from jail and was informed he would be terminated if he did not return to work within three days. He arrived at work on the third day between 11:00 a.m. and noon, but his scheduled shift was 7:00 a.m. to 3:00 p.m. Atlantic States deemed this a violation of the three-day policy and terminated him. He refused to leave, and the employer called the police to remove him.

The union negotiated another last chance agreement similar to the previous one, and Cunningham was scheduled to return to work on February 2, 2005. Because he had to make childcare arrangements, he requested and was given a one-day extension. He reported at 7:00 a.m. on February 3, 2005, but in less than an hour received a call, which he said was from the childcare provider advising that new arrangements needed to be made immediately. He said he had not paid the provider and there was a misunderstanding about payment arrangements. Cunningham testified that he asked Atlantic States' human resources manager, James Surca, for permission to leave temporarily so he could attempt to place the children in the care of a relative or friend. He said Surca told him if he left he would be terminated. He left work and was terminated. He made no further efforts to be reinstated.

Surca gave a different version of the discussion with Cunningham. He said Cunningham came into his office, informed him he could not live up to his agreement because of the childcare problem, said he was leaving, and left. Surca denied telling Cunningham he would be terminated if he left. The judge of compensation accepted Cunningham's version, a finding supported by the record and to which we defer. *958 *Close v. Kordulak Bros.*, 44 N.J. 589, 599, *958 210 A.2d 753 (1965). For reasons we will discuss, the outcome would be the same under either scenario.

On February 11, 2005, just eight days after his termination, Cunningham went on his own accord to Helmold, who examined him and issued a note stating that he was unable to work because of his knee injury. Helmold estimated that Cunningham would not be able to return to work until August 1, 2005. On May 5, 2005, Cunningham filed a motion for temporary disability and medical benefits. Atlantic States did not contest the request for medical benefits, nor does it dispute that Cunningham is entitled to a permanent disability award, for which a claim is pending. Atlantic States' opposition to the claim for temporary disability was not medically grounded. Atlantic States did not dispute the opinion of its designated physician that Cunningham was unable to work because of the injury. Instead, Atlantic States argued that Cunningham suffered no wage loss because he had been performing full duty work and required no medical treatment for about a year, he voluntarily abandoned his employment, and he was unemployed.

The judge of compensation reasoned that Cunningham did not intend to remove himself from the labor market and, to the contrary, "he was extremely distressed at losing his employment and very much wanted to retain his job." She concluded:

> Our statute requires respondents to pay temporary disability so long as petitioners are incapacitated due to work-related injury and have not reached maximum benefit of treatment. This obligation continues after they leave the employment irrespective of whether they left voluntarily. . . . I am aware of no authority requiring a petitioner to continue in a position to remain eligible for temporary disability benefits and no one has called any to my attention.

She therefore entered an order on July 21, 2005, directing Atlantic States to pay Cunningham temporary disability benefits "beginning as of February 11, 2005 and until such time as petitioner reaches maximum medical improvement or returns to work, whichever occurs first."[1] This appeal followed.

Temporary disability benefits are payable during the period of disability, not to exceed 400 weeks, *N.J.S.A.* 34:15-12a, from the day the employee is first unable to work because of the injury until the employee "is able to resume work and continue permanently thereat," *N.J.S.A.* 34:15-38. "Generally, temporary disability continues 'until the employee is able to resume work and continue permanently thereat' or until he [or she] 'is as far restored as the permanent character of the injuries will permit,' whichever happens first." *Monaco v. Albert Maund, Inc.*, 17 *N.J.Super.* 425, 431, 86 *A.*2d 279 (App. Div.1952). Actual absence from work is a prerequisite to a temporary disability award. *Calabria v. Liberty Mut. Ins. Co.*, 4 *N.J.* 64, 68, 71 *A.*2d 550 (1950). An injured worker who resumes work after a period of disability who later experiences a relapse may later recover for intermittent or recurrent intervals of temporary disability. *Colbert v. Consol. Laundry*, 31 *N.J.Super.* 588, 596, 107 *A.*2d 521 (App. Div.1954).

959 The purpose of temporary disability benefits is to provide an individual who *959 suffers a work-related injury with a "partial substitute for loss of current wages." *Ort v. Taylor-Wharton Co.*, 47 *N.J.* 198, 208, 219 *A.*2d 866 (1966). Application of this well-settled principle is at the heart of the dispute in this case. Atlantic States does not dispute that as of February 11, 2005, Cunningham was unable to work because of his work-related injury. Had Cunningham continued to be in its employ on that date (or, conversely, had he gone to Helmold two weeks earlier with the same result), a current wage loss would have resulted and a recurrent disability period would have plainly begun, during which temporary benefits would have been payable. But, because Cunningham was not employed when the new disability period began, Atlantic States argues there was no current wage loss and no entitlement to temporary disability benefits.

This brings us to the circumstances of Cunningham's separation from employment. In *Electronic Associates, Inc. v. Heisinger*, 111 *N.J.Super.* 15, 20, 266 *A.*2d 601 (App.Div.), *certif. denied*, 57 *N.J.* 139, 270 *A.*2d 42 (1970), we held that an employee who retired from employment because of her pregnancy was not entitled to a temporary disability award for an injury that occurred during her employment but did not manifest itself until after her retirement because "she suffered no current wage loss as a result of an ailment attributable to her occupation. Rather, her loss of wages was the direct result of the voluntary termination of her employment." The reason for her separation was totally unrelated to her employment. *Ibid.*

Atlantic States argues that Cunningham knowingly and voluntarily violated a condition of his employment, of which he was on notice, and therefore it was his own affirmative act that caused his separation. Thus, like the employee in *Heisinger*, Atlantic States argues that Cunningham is barred from recovery of temporary disability because, knowing that the consequences of leaving work on February 3, 2005, without authorization would be his termination, he, in effect, voluntarily chose to end the employment relationship. In further support of its argument, Atlantic States directs us to the rule laid down by the courts in Ohio. *See State ex rel. La.-Pac. Corp. v. Indus. Comm'n of Ohio*, 72 *Ohio St.*3d 401, 650 *N.E.*2d 469 (1995) (employee who violated three-day absence rule, which the company handbook defined as a dischargeable offense, voluntarily left employment and was barred from receiving temporary disability benefits).

Cunningham argues that his separation from employment was not voluntary. He contends that he was fired and, as the judge of compensation found, he did not want to lose his job. For the purposes of our analysis, the distinction drawn by the parties places form over substance. We see no material difference between termination for cause, with prior knowledge by the employee that violation of a work rule would result in termination, and voluntary departure. There has been no allegation that Atlantic States fired Cunningham because of disability or to avoid payment of temporary disability benefits. *See N.J.S.A.* 34:15-39.1 (making it unlawful for an employer to discriminate against an employee because the employee has claimed or attempted to claim compensation benefits, and which authorizes sanctions against the employer). Under

the circumstances that existed on February 3, 2005, Atlantic States had no reason to anticipate a temporary disability claim. The purpose of temporary disability benefits is to provide an employee with partial wage loss replacement during a period of disability caused by a work-related injury. The reason for separation from employment, if unrelated to the employment or disability, is not dispositive of the overriding
960 *960 issue — did the employee suffer a current wage loss?

As we have stated, a current wage loss need not be continuous from the initial onset of the disability period, *Colbert, supra*, 31 *N.J. Super.* at 596, 107 *A.2d* 521, nor must it derive from wages lost from the job on which the injury occurred, *Outland v. Monmouth-Ocean Educ. Serv. Comm'n*, 154 *N.J.* 531, 540, 713 *A.2d* 460 (1998). Had Cunningham commenced other employment prior to February 11, 2005, and then had to stop working because of this injury, he would have experienced a current wage loss, and we see no reason why he would not have been entitled to receive temporary disability benefits until he was able to return to work or reached maximum medical improvement.

The courts of other states have reached different results as to whether an employee who causes his own unemployment after resuming employment following a work-related injury should be permitted to receive temporary disability benefits. An employee may cause his or her own unemployment by either misbehaving, causing the employer to terminate or demote the employee, or the employee may quit his or her job voluntarily. Arthur Larson, *Larson's Workers' Compensation Law* § 84.04 (2005).

Some courts subscribe to the rule that an employee who causes his or her own unemployment forfeits the right to seek temporary disability benefits if after being terminated or quitting a doctor orders the employee to temporarily cease working because of the work-related injury. *See, e.g.*, *State ex rel. La.-Pac. Corp. v. Indus. Comm'n, supra*, 72 *Ohio St.*3d 401, 650 *N.E.*2d 469 (holding that termination caused by misconduct reaps the same repercussions as voluntarily quitting such that the employee will be denied temporary disability benefits); *Ucci v. Hathaway Bakeries, Inc.*, 75 *R.I.* 341, 66 *A.*2d 433 (1949) (holding an employee could not receive temporary disability benefits where he had returned to his prior supervisory position after injury, but was later demoted for misconduct to a position where he was unable to perform the duties required because of his prior injury); *Richfood, Inc. v. Williams*, 20 *Va.App.* 404, 457 *S.E.*2d 417 (1995) (holding a termination of benefits was proper where after injury and before being permitted to return to light duty work, the employee failed a required drug test). The rationale applied by these courts is that the employee's unemployment was not due to the injury but to his or her own actions.

Other courts have held that when an employee voluntarily quits or is terminated because of misconduct, it is possible to obtain temporary disability benefits. *See, e.g.*, *Betancourt v. Sears Roebuck & Co.*, 693 *So.*2d 680 (Fla.Dist.Ct.App.1997) (holding an employee can obtain temporary disability benefits for a work-related injury who can demonstrate that his or her condition after being terminated precluded the employee from earning the same wage as before being terminated); *Diamond Rug & Carpet Mills v. Moses*, 221 *Ga.App.* 807, 472 *S.E.*2d 565, 567 (1996) (holding an employee may obtain temporary disability benefits for a work-related injury who can establish by a preponderance of the evidence that "he or she suffered a loss of earning power as a result of a compensable work-related injury; continues to suffer physical limitations attributable to that injury; and has made a diligent, but unsuccessful effort to secure suitable employment following termination"); *In re Peng Kim v. Cmty. Living Corp.*, 253 *A.D.*2d 911, 677 *N.Y.S.*2d 818, 819 (App.Div.1998) (commenting that obtaining benefits remains possible where an employee is terminated for
961 misconduct if the employee *961 demonstrates "by substantial evidence that the limitations on his employment due to his disability were a cause of his subsequent inability to obtain employment"), *appeal denied*, 93 *N.Y.*2d 802, 687 *N.Y.S.*2d 626, 710 *N.E.*2d 273 (1999). The rationale employed by these courts focuses on the casual connection between wage loss and the injury, reasoning that if the employee can

prove that his or her unemployed status was proximately caused by the injury, workers' compensation temporary disability benefits should be awarded.

Dean Larson notes the conundrum where an employee is unemployed by his own actions, but is unable to obtain employment elsewhere because of his or her temporary disability caused by work-related injury. Larson, *supra*, § 84.04. He suggests that instead of denying the employees all compensation rights, perhaps legislatures should construct a system similar to unemployment compensation legislation, by setting a penalty of a limited number of weeks during which compensation benefits would be unavailable. *Ibid.* Of course, our Workers' Compensation Act contains no such provision. We interpret the provisions the Act does contain, mindful of its remedial and beneficent purposes. In doing so, we adopt the more flexible approach that allows temporary disability benefits in these circumstances upon a proper showing of causation.

We find unpersuasive Atlantic States' reliance on *Heisinger*. There, the employee retired, removing herself from the workforce. *Heisinger, supra*, 111 *N.J.Super.* at 21, 266 *A.2d* 601. Thus, for her, a temporary disability award would have been impermissibly based on "a fictitious wage-earning status" during the period of her disability. *Ibid.*; *see also Tamecki v. Johns-Manville Prod. Corp.*, 125 *N.J.Super.* 355, 359, 311 *A.2d* 20 (App.Div.1973) (finding that a full-time college student injured during a summer job was precluded from receiving temporary disability benefits after he resumed school in September, noting that he was "able but unavailable to work because of his college program") *certif. denied*, 64 *N.J.* 495, 317 *A.2d* 707 (1974).

Cunningham did not remove himself from the workforce by the events of February 3, 2005. The judge of compensation's finding in that regard is amply supported by the record. *Close v. Kordulak Bros., supra*, 44 *N.J.* at 599, 210 *A.2d* 753. That circumstance, however, is not sufficient to entitle Cunningham to temporary disability benefits. The claimant has the burden of proving not only that he was available and willing to work, but that he would have been working if not for the disability. We know, for example, that for the first day Cunningham was awarded temporary disability, February 11, 2005, he was not employed. Thus, the benefit for that day was replacement for nothing more than a theoretical or fictitious wage loss. There is nothing in the record to suggest that he had any promise or prospect of employment to begin in the days following February 11, 2005 that he had to forgo because of the disability. Thus the supposed wage loss replacement for those days was not for actual lost wages.

In *Outland*, the Court considered the plight of a teacher injured during her ten-month school contract, whose disability continued into the summer recess. The Court distinguished between those teachers who planned to work during the summer and were prevented from doing so because of a work-related injury, and those who planned to take the summer off. *Outland, supra*, 154 *N.J.* at 542, 713 *A.2d* 460. Payment of temporary disability benefits to the former would provide replacement for income actually lost, but for the
962 latter would constitute an improper windfall. *Id.* *962 at 542-43, 713 *A.2d* 460. That the lost income was from a job different than the teaching job on which the injury occurred was no impediment to the claim. *Id.* at 540, 713 *A.2d* 460. The Workers' Compensation Act is not "tied to a particular occupation" and "[t]he injured teacher should be entitled to workers' compensation temporary disability benefits during the summer if she can prove that she is unable to resume whatever type of work she otherwise would have had." *Id.* at 538-39, 713 *A.2d* 460. The Court remanded to the Division of Workers' Compensation to afford the teacher an opportunity to prove that she would have worked and therefore actually lost income during the summer. *Id.* at 543, 713 *A.2d* 460.

These principles guide our determination here. If Cunningham can prove that he actually lost income on or after February 11, 2005, because of his disability, he is entitled to receive temporary disability benefits to

that extent. To allow any more or any less would contravene *N.J.S.A.* 34:15-38 (temporary disability payable during time employee is "unable to continue at work *by reason of the accident*" (emphasis added)), and the *Outland* holding. In our view, on the record before us, the judge of compensation's order bestowed upon Cunningham a windfall. Because of the novelty of the issue, we follow the Court's approach in *Outland* and remand to the Division of Workers' Compensation to afford Cunningham an opportunity to prove actual wage loss.

We recognize that in a factual complex such as this the proofs will likely be more difficult than in the case of teachers. Because a teacher's situation involves a recurring cycle, he or she might well be able to demonstrate a pattern of summer employment over a number of years or an actual promise of employment for the upcoming summer. A teacher knows in advance of his or her availability for summer work and would be expected to plan to arrange it. Cunningham's separation from employment, on the other hand, was not planned in advance.

Nevertheless, until his last day of work with Atlantic States, Cunningham was working full duty, as he had been for about a year, and without the need for medical treatment. We do not know whether he made any efforts to seek employment before his visit with Helmold. Once advised by Helmold that he could not work for about six months, he might not reasonably be expected to have sought employment. But he left his job (whether characterized as voluntarily or as a termination for cause in violation of a company policy he knew would result in termination), and, without new employment secured, he did so at his peril. His leaving was not related in any way to his disability.

Perhaps the testimony of an occupational expert, considering the totality of the circumstances, including Cunningham's background, skills, education, prior work history, and the like, as well as the area job market, could provide evidence as to how long it would have likely taken for him to secure employment had he not been disabled. We do not suggest that expert testimony is a necessary element of proof. The potential difficulties in proofs and the elusiveness of a precise result do not dissuade us from requiring that this construct be followed. It will assure that our State's workers' compensation scheme is faithfully implemented and is fair to both employer and employee.

Reversed and remanded for further proceedings.

[1] The order also required payment of medical benefits, which have never been disputed. On September 22, 2005, the judge of compensation denied Atlantic States' motion for a stay pending appeal, but ordered that temporary disability benefits paid to petitioner shall be deducted from any permanency award should the Appellate Division reverse or modify the order under review.

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NEW JERSEY DEPARTMENT OF LABOR
AND WORKFORCE DEVELOPMENT
DIVISION OF WORKERS' COMPENSATION

BRETT BORDEN, *Petitioner* vs. T & M AUTO, INC., *Respondent*	: CLAIM PETITION NO.: 2010-30620 : DISTRICT OFFICE: Mount Arlington : DECISION on MOTION for : TEMPORARY DISABILITY BENEFITS

The instant matter comes before the Court for trial in order to determine whether the Respondent should be required to provide Temporary Disability Benefits to the Petitioner under the circumstances presented.

PROCEDURAL HISTORY

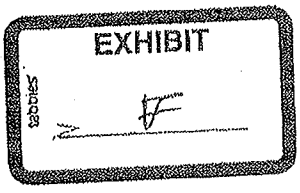
On November 29, 2010 the Petitioner filed Claim Petition 2010-30620, wherein it is alleged that he was injured on June 14, 2010 while in the employ of the Respondent.

On March 18, 2011 the Petitioner filed a Motion to Enter Default due to the failure to Answer the claim.

On April 14, 2011 present counsel for Petitioner filed a substitution of Attorney and on April 15, 2011 filed a Motion for Temporary and Medical Benefits seeking physical therapy as recommended by the authorized treating physician following surgery performed March 8, 2011 and Temporary Disability benefits as specified.

On April 27, 2011 the Respondent filed an Answer to the Claim Petition admitting employment and that the Petitioner suffered a "left elbow injury" and that the injury arose out of and in the course of employment.

On May 4, 2011 the Respondent filed an Answer to the Motion denying that the Petitioner was entitled to temporary disability benefits beyond that already paid, asserting that "Petitioner cannot presently demonstrate actual lost income due to his current disability" relying upon *Cunnigham v. Atlantic States, 286 N.J. Super. 423, 427-28* (App.Div. 2006), and asserting that the treatment sought was authorized April 6, 2011.



Following a conference concerning the Motion the parties entered into a stipulation of pertinent facts and presented legal argument concerning the application of the law to those facts.

STIPULATIONS

The parties have agreed that:

1. Petitioner was in the employment of T & M Auto, Inc. on June 14, 2010, when he suffered a compensable injury to his left elbow while using an impact slide hammer.
2. Petitioner was earning $850 per week, giving rise to a compensation rate of $560 per week. The Hartford Insurance Company acknowledged the claim on June 17, 2010 by letter of Erik Saladin, Claims Professional.
3. By November 10, 2010, Petitioner completed his physical therapy, but remained under the care of Dr. Teja and was released to return to work full duty without restrictions. The Respondent terminated his employment shortly after the Petitioner returned to work. The reason given for Petitioner's termination was a slow down in business. Petitioner applied for unemployment insurance and certified that he was actively seeking work and able to work. Petitioner applied for jobs at the Knotty Pine Pub, Midas of Kenvil, and Shop Rite, most recently seeking employment at reduced duty, due to his ongoing limitations.
4. By February 2, 2011, the Petitioner requested additional treatment and Respondent authorized further visits. Dr. Teja examined the Petitioner in February, 2011, placed the Petitioner on light duty on February 16, 2011 and scheduled surgery for March 4, 2011.
5. Respondent has issued no temporary total disability benefits from November 10, 2010 through the present date. Petitioner remains disabled and under active care after his elbow surgery.

ARGUMENT

Petitioner argues that at the point he was returned to medical treatment for his work related injury and was unable to work as a consequence of that injury/treatment he was entitled to temporary disability benefits. He relies upon *N.J.S.A.* 34:15-38, which provides

> To calculate the number of weeks and fraction thereof that compensation is payable for temporary disability, determine the number of calendar days of disability from and including as a full day the day that the employee is first unable to continue at work by reason of the accident, including also Saturdays, Sundays and holidays, up to the first working day that the employee is able to resume work and continue permanently thereat; subtract from this number the waiting period and any days and fraction thereof the employee was able to work during this time, and divide the remainder by 7.

He further argues, relying upon *Harbatuk v. S & S Furniture Systems Insulation*, 211 *N.J. Super.* 614 (App Div 1986), that once Dr. Teja placed the petitioner on "light duty" he was entitled to temporary disability benefits absent a showing that Respondent offered such light duty work. He claims entitlement to benefits from February 16, 2011 until he is determined to have reached maximum medical benefit of treatment or he is able to resume work.

Respondent contends that the Petitioner has received Unemployment Benefits from November of 2011 (presumably from the point he was "laid off" by the Respondent) and acknowledges a return to treatment February 16, 2011. Relying upon *Cunningham v. Atlantic States*, 386 *N.J. Super.* 423 (App Div 2006) it is asserted that Petitioner is not entitled to Temporary Disability benefits because he was not employed at the time of his return to treatment. Respondent interprets the Appellate Courts ruling in *Cunningham* as providing "on similar facts" that "the Petitioner was not permitted to receive subsequent temporary disability benefits for a period of subsequent disability" in order to justify the refusal to pay here.

FINDINGS

Respondent misconstrues both the decision of the Appellate Court in *Cunnigham* and the facts upon which it is based. Unlike the instant matter, the Petitioner in *Cunnigham* was characterized as "an employee who causes his own unemployment after resuming employment following a work related injury." *Supra.* at 430. The Court specifically recited "[w]e see no material difference between termination for cause, with prior knowledge by the employee that violation of a work rule would result in termination, and voluntary departure." *Supra.* at 429. In the course of its' analysis the Court refers to the circumstances "when an employee voluntarily quits or is terminated

because of misconduct" and "where an employee is unemployed by his own actions but is unable to obtain employment elsewhere because of his or her temporary disability caused by work-related injury." *Supra.* at 431. It is clear that the *Cunnigham* Court was addressing circumstances in no way similar to those which abide in the instant matter, where it is specifically stipulated that the employee was "laid off" due to a "slow down in business." I therefore determine that *Cunnigham* is inapplicable based upon a comparison of the facts of the matters.

It is also clear that the *Cunnigham* Court did not rule that the Petitioner there was "not permitted to receive subsequent temporary disability benefits." Rather, the Court specifically adopted "the more flexible approach that allows temporary disability benefits in these circumstances upon a proper showing of causation." *Supra.* at 432. The Court thereupon remanded the matter to allow that Petitioner to "prove that he actually lost income...because of his disability." *Supra.* at 433. Thus, even were we to find the principles in *Cunnigham* applicable to the instant circumstances, we would need further argument and factual findings to resolve entitlement to benefits. A review of the law on the issue, however, leads us to conclude that no such proceeding is necessary.

A review of the case law concerning temporary disability benefits reveals that New Jersey has denied those benefits in circumstances where the Petitioner had returned to his status as a full time student. *Tamecki v. Johns-Manville Products Corporation,* 125 *N.J. Super.* 355 (App Div 1973). Benefits were also denied where the Petitioner left employment due to her pregnancy, which was characterized as a "voluntary termination of her employment." *Electronic Associates, Inc. v Helsinger,* 111 *N.J.Super.* 15 (App Div 1970) at 20. Where a Petitioner lost time from a ten month teaching position the determination of entitlement to benefits for the remaining two months was dependent upon the voluntary determination of the Petitioner to work or vacation during that period. *Outland v. Monmouth-Ocean Education Service Commission,* 154 *N.J.* 531 (1998). Clearly New Jersey Courts have consistently attached importance to termination of employment at the volition of the employee but have not taken the direction urged by the Respondent in the absence of a volitional act. There is no reason to deviate from that direction here.

A review of the manner in which the issue is treated in other jurisdictions provides further support for the determination here that Petitioner is entitled to temporary disability benefits. A number of jurisdictions are in accord with the *Cunnigham* position that termination for cause is treated as a volitional act sufficient to allow the employer to avoid temporary benefits but fail to address any opportunity to show that subsequent inability to work is consequent to the work related disability. A Rhode Island court held that an injured worker discharged for fighting was not entitled to temporary benefits, where he claimed an inability to perform the duties of a lesser position he was offered, since the "respondent was not required to provide the petitioner with another job after it had removed him for cause from the one he had been filling." *Ucci v. Hathaway Bakeries, Inc.*, 66 *A.2d* 433 (1949) 437. Similarly, in a matter where the injured worker failed to pass a drug screening, a Virginia Court held that his "wage loss was due to...[his] wrongful act rather than his disability" and declined to require disability benefits. *Richfood, Inc. v. Williams*, 457 *S.E.2d* 417 (Ct. App. 1995). In a case, where the employee failed to report for work and was terminated for cause, an Ohio court denied temporary benefits and asserted, "we find it difficult to characterize as 'involuntary' a termination generated by the violation of a written work rule...[and] an employee must be presumed to intend the consequences of his or her voluntary acts." *The State ex rel. Louisiana-Pacific Corporation v. Industrial Commission of Ohio* 650 *N.E.2d* 469 (1995) 471. *Cunnigham* is more in accord with a Georgia court ruling where an employee terminated for cause was "entitled to benefits if...[the work] injury prevents them from finding further employment...[but] the employee carries the burden of demonstrating that their inability to find employment was proximately caused by their job-related injury." *Diamond Rug & Carpet Mills v. Moses*, 472 *S.E.2d* 565 (Ct App. 1996) 567. Similarly, a Florida court remarked that, despite a termination for insubordination, "a claimant may still be entitled to benefits if the compensable injury left the claimant in a condition which precludes employment." *Betancourt v. Sears Roebuck & Co.* 693 *So.2d* 680 (Ct App 1997) 684. In New York an employee terminated "due solely to his misconduct...had the burden of establishing by substantial evidence that the limitations on his employment due to his disability were a cause of his subsequent inability to obtain employment." *In the matter of the claim of Peng Kim v. Community*

Living Corp. 253 *A.D.2d* 911 (1998) 912. In a determination contrary to *Tamecki* an Arkansas Court held that a disabled worker still "in his healing period" would not be denied temporary disability simply because he resumed status as a full time student. *International Paper Company v. McGoogan,* 504 *S.W.2d* 739 (1974) 741. In contrast, a Montana Court held that an injured worker failed to establish that he was prevented from work due to his disability where "[h]is choice not to work was purely voluntary because he decided instead to continue his college education." *Hofferber v. Plago Mining, Inc.*, 848 *P.*2d 468 (1992) 470. An employee who voluntarily left post injury employment was held by an Arizona Court to be entitled to Temporary Disability benefits where he found himself unable to perform that employment due to his work related cardiac condition. *Continental Casualty Company v. The Industrial Commission,* 521 *P.2d* 1019 (Ct. App 1974). An Ohio court held that a worker who took a disability retirement from his job and started his own business was not entitled to benefits where the record did not show that the claimant ever conducted a job search. *The State ex rel. Cash v. Industrial Commission of Ohio,* 725 *N.E.2d* 657 (2000). A South Carolina court considered whether a woman who became pregnant while out of work due to her work injury was entitled to temporary disability and responded in the affirmative, holding that her pregnancy "does not change the fact that her injury, not her pregnancy rendered her unable to work." *Orr v. Elastromeric Products,* 474 *S.E.*2d 448 (ct. App. 1996) 449. Referencing *Orr* the Vermont court asserted "[w]e do not disqualify a worker on the theory that incapacity to work is caused by the workers limited education, irrespective of the disabling condition, and we should treat pregnancy similarly." *Wood v. Fletcher Allen Health Care,* 739 *A.2d* 1201 (1999) 1205. An Arkansas Court went so far as to rule that an incarcerated worker was entitled to temporary disability benefits "during the healing period" despite his incarceration and restrictions on his ability to work consequent thereto. *Wheeler Construction Company v. Armstrong,* 41 *S.W.3d* 822 (Ct App 2001) 826. No case was found where a Court went as far as the Respondent argues we should go here, to place a burden of establishing actual loss on an admittedly disabled employee who was out of work as a consequence of employer initiated termination due to no voluntary action by the employee. New Jersey's Workers Compensation Act

clearly does not contemplate such an extreme departure from the mainstream of Compensation law.

Let us be clear where the Respondent's interpretation of *Cunningham* would take us. The Respondent concedes that Petitioner's employment was not terminated due to any action by the Petitioner, agreeing that the stated reason was "a slowdown in business. The Respondent concedes that the Petitioner is currently disabled and under doctor's care due to the work related injury. The Respondent concedes that the Petitioner actively sought employment prior to his return to authorized medical treatment and surgery. Respondent would nevertheless require the Petitioner to "demonstrate actual lost income." Under this severe interpretation of New Jersey law and expansion of *Cunnigham* an injured worker would be required to make an affirmative showing of loss of income every time the injured worker is not *in the course of employment* at the time of disability. Under the Respondent's version of the law an employer need merely rehire an employee and immediately fire him for any reason not related to the compensable injury in order to place that worker in a position where he must bear the burden of establishing "actual lost income." No Compensation case has been found, in any jurisdiction, which goes so far. Clearly such a burden was never contemplated under the New Jersey Act and cannot be justified in the circumstances here. This Court declines to adopt the Respondent's interpretation of *Cunningham* and determines that the petitioner in these circumstances is entitled to Temporary Disability Benefits without any requirement to make a further showing.

The Respondent shall immediately pay the Petitioner the sum of $16,800, representing Temporary Disability benefits from February 16, 2011 to September 13, 2011 at the rate of $560 weekly. The respondent shall be entitled to a credit for any Unemployment Benefits received by the Petitioner during that same period, but the Respondent shall repay the State of New Jersey in full for all Unemployment benefits received by the petitioner during the aforesaid period. Effective immediately, and until the petitioner is deemed to be capable of returning to work or at maximum medical improvement, the Respondent shall continue to pay the Petitioner Temporary Disability Benefits at the aforesaid rate and the Petitioner shall cease to accept Unemployment benefits. In addition, the Respondent shall pay to the Petitioner the sum of $4,200,

representing 25% of the benefits unpaid to date, as provided for under N.J.S.A. 34:15-28.1, based upon this Court's determination and finding that the Respondent's denial of benefits here was unreasonable and unwarranted. Counsel for Petitioner shall make appropriate application for counsel fees as provided under *Quereshi v Cintas Corporation,* 413 *N.J. Super.* 492 (App Div 2010) within five (5) days of the date hereof and Respondent shall have five (5) days thereafter to respond. Counsel for petitioner shall also draft and submit an appropriate Order reflecting the determination herein.

September 12, 2011

Kenneth A. Kovalcik, JWC

CP# 2009-21068 Cherry v. Edmund's Direct Mail

STATE OF NEW JERSEY
NEW JERSEY DEPARTMENT OF LABOR & WORKFORCE DEVELOPMENT
DIVISION OF WORKER'S COMPENSATION
ATLANTIC COUNTY C.P. 2009-21068

Jo Ann Cherry,

Petitioner

v.

Edmund's Direct Mail,

Respondent

DECISION ON
PETITIONER'S MOTION
FOR MEDICAL AND/OR
TEMPORARY DISABILITY
BENEFITS

BEFORE: HONORABLE CARMINE J. TAGLIALATELLA

JUDGE OF COMPENSATION

APPEARANCES:

Henry J. Kowalski, III, Esquire

37 Cannon Range Road
Milmay, NJ 08340

Attorney for the Petitioner

Robert L. Fraley, Esquire

Kennedy, Campbell, et. al.
303 Lippincott Dr., Ste 310
Marlton, NJ 08053

Attorney for Respondent



This case comes before the Court to determine if Jo Ann Cherry (hereinafter "Petitioner") is entitled to Medical and/or Temporary Disability benefits as defined by N.J.S.A. 34:15-7 et seq.; and if that is related to her accident of December 31, 2008.

Petitioner filed a Motion for Medical and/or Temporary Disability benefits with the Division on August 19, 2010. It was scheduled for a pre-trial conference on September 26, 2010 at which time the attorney for Edmund's Direct Mail (hereinafter "Respondent") advised the Court that they were accepting responsibility to provide additional medical treatment but not temporary disability benefits. A hearing date was scheduled and Petitioner testified on October 18, 2010. As there were no other witnesses both parties submitted briefs to the Court to rule solely on the issue of Petitioner's entitlement to further temporary disability benefits as defined by the Workers' Compensation Act and case law.

As part of their briefs both parties agreed to a set of stipulations: The Petitioner met with a compensable accident on December 31, 2008 when her left foot was run over by a forklift. She received a course of authorized treatment and temporary disability benefits until she was released from care sometime in August of 2009. However, she was given permanent restrictions by the authorized treating physician, including a limit to the amount of time that she could stand during the course of a workday. Respondent was unable to meet these restrictions so Petitioner was terminated and began to collect Unemployment Benefits on a continual basis from September 2009 up through September 16, 2010. Petitioner has received no monetary benefits since this date.

In her Motion, Petitioner claimed a need for further treatment for her foot wound. The medical benefits are being provided. Respondent has authorized Dr. James Herrington to conduct a repeat surgical procedure and this was accomplished at Shore Memorial Hospital on September 16, 2010. Petitioner has provided a letter from Dr. Herrington dated October 4, 2010 in which he states that Petitioner "has an open wound and is unable to work." This is not disputed. Neither is it disputed that the Petitioner was anything but candid and credible during her testimony.

Petitioner continues to claim that the Respondent is responsible to restore her temporary disability benefits as she is under the care of an authorized treating physician who has stated that she is currently unable to work. She relies on N.J.S.A. 34:15-12a as well as Section 14 which deal with the schedule of payments and the proscription for the "waiting period." The Statute also expresses a person's right to these benefits as continuing from the first date of inability to work due to the accident until they are "able to resume work and continue permanently thereat." N.J.S.A. 34:15-38; and citing Monaco v. Albert Maund, Inc., 17 N.J. Super. 425 (App. Div. 1951, 21 N.J. Super. 443 (App. Div. 1952).

Petitioner in her brief states simply that she is entitled to her benefits because the authorized treating physician, Dr. Herrington, has performed an authorized surgery the result of which has temporarily incapacitated her. She goes on to refute Respondent's reliance on Cunningham v. Atlantic States Cast Iron Pipe Co., 386 N.J. Super. 423 (App. Div.),certif.. denied, 188 N.J. 492 (2006) by distinguishing the facts between the cases.

In its brief the Respondent does rely on Cunningham to make its points. Mr. Cunningham was an employee of Atlantic States Cast Iron Pipe Co. (Atlantic States) who had an admittedly compensable work injury for which he received benefits and was returned to work. Subsequently he was terminated for cause. Afterward, he claimed entitlement to temporary disability benefits due to his return to the care of an authorized doctor and determination that he was unfit to work as a result of his compensable injury. Respondent argues that the Cunningham court held that the Petitioner must demonstrate that she was either employed (earning wages) or had the "promise of employment" before being entitled to receive temporary disability benefits. There is more to the decision of the Appellate Division in theCunningham case then is contemplated in the Respondent's brief.

Respondent espouses the application of a rigid rule derived from Cunningham which does not exist. While there is language in Cunningham regarding Petitioner's burden to prove a loss of wages,

Respondent's focus on the "promise of employment" as the sole test of that loss is incorrect. The Cunningham court was "mindful of [the] remedial and beneficent purposes [of the Act]" when they adopted a "more flexible approach [...]." This approach requires a court to determine if the Petitioner would gain a windfall by receipt of temporary disability benefits; conversely, would this visit a harm on the Respondent.

A brief review of some of the cases which deal with provision of temporary disability benefits is necessary in order to clarify the instant issue. In doing so we must consider the general philosophy of these benefits and the difficulty for the courts to balance provision of same with the rights of the employers of the state. The court in Cunningham did consider these cases in coming to its decision and this Court is guided by them.

During the almost 100 year history of the Act it has become axiomatic to state that Workers' Compensation is social legislation intended for the benefit of the injured worker. Brower v. ICT Group, 164 N.J. 367 (2000) (among many cases cited for this proposition). However, there is also a trade off of rights and responsibilities. The employee is afforded swift and sure medical treatment and pay for lost wages in exchange for the right to sue his employer for negligence. Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 174 (1985). It is this *quid pro quo* that is examined in this case.

The Cunningham court goes on to note the following: Payment of temporary disability benefits is a "partial substitute for loss of current wages." Citing Ort v. Taylor-Wharton Co., 47 N.J. 198, 208 (1966). Removal from employment due to pregnancy disqualified an employee from receiving temporary disability benefits. Electronic Associates, Inc. v. Heisinger, 111 N.J. Super. 15, 20 (App. Div.), certif. denied, 57 N.J. 139 (1970). A full-time college student was not entitled to provision of temporary benefits once he resumed school in September. Tamecki v. Johns-Manville, 125 N.J. Super. 355, 359 (App. Div. 1973), certif. denied 64 N.J. 495 (1974). And finally, that an injured teacher is only entitled to receive temporary disability benefits during the summer months if she can prove that she would have worked and therefore lost income. Outland v. Monmouth-Ocean Educ. Serv. Comm'n, 154 N.J. 531, 543 (1998).

All of this suggests that payment of temporary disability benefits is not as simple as Petitioner would like the Court to believe. Nor is it as 'straightforward' as the language of Section 38. It is part of the exchange of rights, responsibilities and benefits that have been at the heart of the Act for nearly a century.

In consideration of all of the above some mention must be made of the actual circumstances which come before the Court. Ms. Cherry was separated from her employment with Respondent. She did not choose this, but that is not wholly relevant. However, the Court cannot ignore that her termination was the result of her inability to perform her job with Respondent *due to her work related injury*. Ms. Cherry began receiving Unemployment Benefits for approximately one year and fulfilled the requirement of searching for a job throughout that time. In short, she demonstrated that she was ready, willing and able to work. Furthermore, the Court is also mindful of the economic circumstances into which she was released. In the last several years the country and state have been experiencing some of the highest levels of persistent unemployment (and unemployability) since the Great Depression. Finally, she became ineligible for continuing Unemployment Benefits on September 16, 2010 when she was no longer "able" to work due to her surgery and recovery.

The Court also considers the nature of Ms. Cherry's Unemployment Benefits. If the Respondent is correct, then these benefits are not wage replacement and merely some form of social welfare. If that were the case then why does the Federal Tax Code hold these benefits taxable? 26 U.S.C. 85(a) (General rule in the case of an individual, gross income includes unemployment compensation.) It is apparent to this Court that these benefits are wage replacement, which Petitioner has to forfeit because she is not currently able to work. This constitutes a 'wage loss' sufficient for the Respondent to provide temporary disability benefits. To hold otherwise would be to harm the Petitioner.

It is for all of these reasons that this Court finds that Ms. Jo Ann Cherry is entitled to the restoration of her temporary disability benefits effective from September 16, 2010 and continuing until such time as she is released from authorized care. An Order consistent with this decision shall be drafted by the Petitioner's attorney and circulated within 5 days. Respondent shall pay a stenographic fee to Jersey Shore Reporting Service of $150. All other fees and costs shall abide until a final hearing in this matter.

November 29, 2010

HON. CARMINE J. TAGLIALATELLA, JWC

TOP

CHAPTER TEN: TEMPORARY DISABILITY

STATUTORY PROVISIONS

N.J.S.A. 34:15-12(a) provides in part:

> For injury producing temporary disability, 70% of the worker's weekly wages received at the time of injury, subject to a maximum compensation of 75% of the average weekly wages earned by all employees covered by the "unemployment compensation law" (R.S. 43:21-1 et seq.) and a minimum of 20% of such average weekly wages a week. This compensation shall be paid during the period of such disability, not however, beyond 400 weeks.

N.J.S.A. 34:15-14 provides:

> Except as provided pursuant to R.S. 34:15-75, no compensation other than medical aid shall accrue and be payable until the employee has been disabled 7 days, whether the days of disability immediately follow the accident, or whether they be consecutive or not. These days shall be termed the waiting period. The day that the employee is unable to continue at work by reason of his accident, whether it be the day of the accident or later, shall count as one whole day of the waiting period. Should the total period of disability extend beyond 7 days, additional compensation shall at once become payable covering the above prescribed waiting period.

N.J.S.A. 34:15-38 provides:

> To calculate the number of weeks and fraction thereof that compensation is payable for temporary disability, determine the number of calendar days of disability from and including as a full day the day that the employee is first unable to continue at work by reason of the accident, including also Saturdays, Sundays and holidays, up to the first working day that the employee is able to resume work and continue permanently thereat; subtract from this number the waiting period and any days and fraction thereof the employee was able to work during this time, and divide the remainder by 7. If, however, the total period of disability extends beyond 7 days, the waiting period shall not be subtracted from the number indicated above. The resulting whole number and sevenths will be the required period for which compensation is payable on account of temporary disability.

N.J.S.A. 34:15-37 provides in part:

> [I]f the employee worked less than the customary number of working days constituting an ordinary week in the character of the work involved, the weekly wage for the purposes of compensation under provisions of R.S. 34:15-12a only shall be found by multiplying the hourly rate by the number of hours of work regularly performed by that employee in the character of the work involved.

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N.J.S.A. 34:15-28.1 states:

> If a self-insured or uninsured employer or employer's insurance carrier, having actual knowledge of the occurrence of the injury, or having received notice thereof such that temporary disability compensation is due pursuant to R.S. 34:15-17, unreasonably or negligently delays or refuses to pay temporary disability compensation, or unreasonably or negligently delays denial of a claim, it shall be liable to the petitioner for an additional amount of 25% of the amounts then due plus any reasonable legal fees incurred by the petitioner as a result of and in relation to such delays or refusals. A delay of 30 days or more shall give rise to a rebuttable presumption of unreasonable and negligent conduct on the part of a self-insured or uninsured employer or an employer's insurance carrier.

COMMENT

Temporary disability payments of 70% of the injured workers' wages for the year in which the injury occurred or his/her occupational disease became manifest, subject to the annual maximum and minimum, are payable until the worker is able to return to work and continue permanently thereafter, or is as far restored as the permanent character of his injuries will permit. These payments continue even if the contract of hire has expired. Therefore a school teacher is entitled to receive benefits during the summer recess or the seasonal worker after the end of the season if he or she is unable to return to work and demonstrates a loss of wages during the recess.

Temporary disability payments continue if an employee's disability is such that the worker cannot return to his or her normal job, even where the employee is capable of performing light-duty work but none is offered. Where an injured employee is still receiving active medical treatment and yet is able to perform light-duty work, his or her employer must offer such light-duty work or continue paying temporary disability benefits to the employee. The burden is placed on the employer to show that light-duty work was offered but refused by the employee if the employer wishes to be relieved of the duty to continue paying temporary disability benefits.

When an employee manifests an occupational disease years after his or her last employment with the respondent the rate of compensation is fixed by wages at the last employment with that respondent. The rate of compensation is subject to the maximum and minimum rates in effect at the time of the accident or manifestation of occupational disease.

Temporary disability for a part-time employee is based upon actual part-time wages subject to the maximum and minimum rates in effect at the time of the accident or manifestation of occupational disease.

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An employee who removes him/herself from the workforce is not entitled to temporary disability for any period after that removal.

A penalty of 25% of the amount due for temporary disability and a reasonable counsel fee shall be imposed upon the respondent who unreasonably or negligently delays or refuses to pay temporary disability or delays the denial of a claim. A delay of 30 days or more gives rise to a rebuttable presumption of unreasonable and negligent conduct on the part of the respondent. The plain intent of the law is to ensure the prompt payment of temporary disability compensation. Since temporary disability payments form a partial substitute for weekly paychecks, there is need for prompt payment. [This need for prompt payment applies not only to interim payments but also to delays in payment of adjudicated awards of temporary disability.] *Dunlevy v. Kemper Ins. Group*, 220 N.J. Super. 464 Shepardize (App. Div. 1987), *certif. denied*, 110 N.J. 176 Shepardize (1988).

An award of temporary disability and/or medical treatment during the pendency of a workers' compensation proceeding may be appealed as of right.

One final comment: Unlike the rate for permanent disability benefits, which can be reconstructed in cases involving part-time employees, the rate for temporary disability benefits cannot be reconstructed.

TABLE OF CASES

Quereshi v. Cintas Corp., 413 N.J. Super. 492 Shepardize (App. Div. 2010) Decided May 28, 2010.
The Appellate Division held that a workers' compensation judge must award a reasonable counsel fee, in addition to a 25% penalty, when a petitioner is forced to resort to N.J.S.A. 34:15-28.1 to obtain temporary disability benefits after unreasonable delay or refusal by an employer or its carrier to pay such benefits. This "reasonable" counsel fee is not bound by the 20% limitation imposed by N.J.S.A. 34:15-64 as there is no such limitation required by the express language of section 28.1 and the intent of this statute was to make counsel fees, in the context of penalty proceedings, dependent upon the actual costs in petitioner legal fees which were incurred due to improper withholding of benefits.

Cunningham v. Atlantic States Cast Iron Pipe Co., 386 N.J. Super. 423 Shepardize (App. Div. 2006) Decided June 26, 2006. After petitioner was terminated from his job with respondent for cause, a doctor advised petitioner that he needed treatment due to an injury he suffered on the job before his termination. The judge of compensation found petitioner eligible for temporary total disability benefits. However, the Appellate Division reversed the compensation judge's decision and remanded the case. The appellate court held that, in order to receive temporary disability benefits, the petitioner must establish on remand that "but for" his work-related disability he would have been employed.

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Wood v. Jackson Township, 383 N.J. Super. 250 Shepardize Decided February 17, 2006 The Appellate Division affirmed the decision of the workers' compensation judge and held that petitioner's widow was entitled to receive the full amount of compensation benefits petitioner would have received had he not been receiving Social Security disability benefits before he died at age fifty-four. Since petitioner's Social Security disability benefits were terminated when he died, the basis for respondent's receiving an offset under N.J.S.A. 34:15-95.5 was thereby ended, making respondent responsible for paying petitioner's widow the full measure of workers' compensation benefits from the date of petitioner's death to the end of the designated period.

Tobin v. All Shore All Star Gymnastics, 378 N.J. Super. 495 Shepardize (App. Div. 2005). Decided June 24, 2005. The Appellate Division affirmed the decision of the workers' compensation judge and held that petitioner, who doubled as owner and chief instructor at respondent gymnastics school, was entitled to receive total temporary disability benefits for the period of time after she became able to resume her duties as an unsalaried owner but remained unable to perform the more physically demanding job duties of salaried chief instructor.

Outland v. Monmouth-Ocean Educ. Serv. Comm'n, 154 *N.J.* 531 Shepardize (1998). Temporary disability is payable to an employee until that employee is "able to resume work" even if the contract of hire would have expired (in this case a school teacher during summer recess who must demonstrate a loss of wages during that recess).

Williams v Topps Appliance City, 239 *N.J. Super.* 528 Shepardize (App. Div. 1989). Injured worker entitled to temporary disability for period during which he was still receiving active medical treatment yet was available for light-duty work, but no light-duty work was offered by the employer. The burden is on the employer to show that light work was offered and refused. The judge must articulate reasons for granting or denying 25% penalty.

Dunlevy v. Kemper Ins. Group, 220 *N.J. Super.* 464 Shepardize (App. Div. 1987), *certif. denied*, 110 *N.J.* 176 Shepardize (1988). Injured worker filed an action in Superior Court for common law compensatory and punitive damages for emotional and mental anguish sustained as a result of unilateral termination of psychiatric treatment by employer. Common law recovery was denied because *N.J.S.A.* 34:15-28.1 provides the exclusive remedy in cases of wrongful termination of temporary disability benefits. The plain intent of *N.J.S.A.* 34:15-28.1 is to ensure the prompt payment of temporary disability compensation since these payments form a partial substitute for a weekly paycheck. This need for prompt payment applies not only to delay or refusal to pay interim payments of compensation but also to adjudicated awards of temporary disability.

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Hodgdon v. Project Packaging, Inc., 214 N.J. Super. 352 Shepardize (App. Div. 1986), *certif. denied*, 107 N.J. 109 Shepardize (1987). An award of medical and temporary benefits can be appealed as of right.

Amorosa v. Jersey City Welding & Machine Works, 214 N.J Super. 130 Shepardize (App. Div. 1986). Date of entry of judgment is date from which one calculated penalty and interest.

Harbatuk v. S. & S. Furniture Systems Insulation, 211 N.J. Super. 614 Shepardize (App. Div. 1986). Where employee became capable of performing light work but none was offered by employer, employee remained entitled to temporary disability benefits.

Russell v. Saddle Brook Restaurant Corp., 199 N.J. Super. 186 Shepardize (App. Div. 1985). Temporary disability for a part-time employee is based upon actual part-time wages subject to the statutory maximum and minimum.

Tamecki v. Johns Manville Products Corp., 125 N.J. Super. 355 Shepardize (App. Div. 1973), *certif. denied*, 64 N.J. 495 Shepardize (1974). An employee who removes himself from the labor market is not entitled to temporary disability.

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New Jersey Supreme Court Rules That Volunteer Firefighter Is Entitled To Maximum Temp Benefits Even Without Proof Of Employment Or Lost Wages

John H. Geaney February 22, 2019 Court Rulings 1 Comment

Jennifer Kocanowski, a member of the Finderne Fire Department in the Township of Bridgewater, was injured in March 2015 while carrying equipment in response to a multi-alarm fire. She fractured her fibula, tore ligaments in her ankle, and injured her back.

Prior to the injury, Kocanowski had not worked for over a year. She had previously worked in 2013 as a nanny and a home health aide but took a six month leave from volunteering to care for her ill mother after her father's death. She returned to volunteer firefighting in July 2014. However, she did not resume her prior outside employment. Her injury left her with permanent partial impairment.

The issue presented in this case was whether the Township owed Kocanowski temporary disability benefits following her injury in March 2015. Kocanowski argued that she was entitled to temporary disability benefits based on the maximum rate set forth in N.J.S.A. 34:15-75, the provision dealing with rates for volunteer firefighters and EMTs. The Township argued that she was not entitled to temporary disability benefits because she had no lost wage to replace. The Judge of Compensation and the Appellate Division both held that Kocanowski was **not** entitled to temporary disability benefits at all since she had not worked in over a year prior to her injury and had no offer of employment.

The New Jersey Supreme Court issued its decision on February 19, 2019. The decision focused on the legislative intent to encourage volunteerism in passing N.J.S.A. 34:15-75. This statute reads:

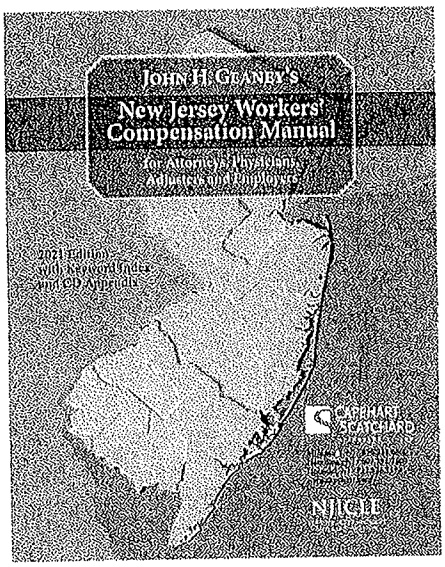
> *"Compensation for injury and death, either or both, of any volunteer fireman . . . (or) emergency management volunteer doing emergency management service . . . shall:*
>
> 1. *Be based upon a weekly salary or compensation conclusively presumed to be received by such person in an amount sufficient to entitle him (or her) or, in the event of his (or her) death, his (or her) dependents, to receive the maximum compensation by this chapter authorized. . ."*

The Supreme Court reversed the decision of the Appellate Division: *"As such, we find N.J.S.A. 34:15-75 authorizes all volunteer firefighters injured in the course of performing their duties to receive the maximum compensation permitted, regardless of their outside employment status at the time of the injury."*

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Section 20 Settlement Versus Order / Settlement

The Court rejected the argument of the defense that all claims for lost wages must meet the test set forth in N.J.S.A. 34:15-38. Defense argued that the words "by this chapter authorized" at the end of N.J.S.A. 34:15-75 refers to the entire workers' compensation statute. The provision dealing with temporary disability benefits is N.J.S.A. 34:15-38. That section requires temporary disability benefits be paid from the day the employee is first unable to work due to the accident up to the first working day that the employee is able to resume work. Defense suggested that this petitioner could not meet the test in N.J.S.A 34:15-38 because she had no work.

The Court responded by pointing out the prior to the passage of N.J.S.A. 34:15-75 in 1952, volunteer firefighters who were unemployed were entitled to temporary disability benefits even though N.J.S.A. 34:15-38 existed. The rules for all other employees were not applied to volunteers. In essence, the Court ruled that the New Jersey Legislature clearly never intended statutory volunteers to be subject to the law that applies to all other employees in New Jersey. The reason for this exemption was to encourage volunteerism.

The Court's decision failed to address one important question raised in oral argument, namely whether this ruling would mean that an 18-year-old high school volunteer firefighter injured in 2019 with no outside employment would be entitled to $921 per week while receiving authorized treatment and attending full-time high school classes. The decision in Kocanowski suggests that this high school volunteer must be paid $921 per week while actively treating until reaching maximal medical improvement, notwithstanding the obvious windfall to the student and the cost to the municipality.

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About the Author:
John H. Geaney, a shareholder and co-chair of Capehart Scatchard's Workers' Compensation department, began an email newsletter entitled Currents in Workers' Compensation, ADA and FMLA in 2001 in order to keep clients and readers informed on leading developments in these three areas of law. Since that time he has written over 500 newsletter updates.

Mr. Geaney is the author of Geaney's New Jersey Workers' Compensation Manual for Practitioners, Adjusters & Employers. The manual is distributed by the New Jersey Institute for Continuing Legal Education (NJICLE). He also authored an ADA and FMLA manual as distributed by NJICLE. If you are interested in purchasing the manual, please contact NJICLE at 732-214-8500 or visit their website at www.njicle.com.

Mr. Geaney represents employers in the defense of workers' compensation, ADA and FMLA matters. He is a Fellow of the College of Workers' Compensation Lawyers of the American Bar Association and is certified by the Supreme Court of New Jersey as a workers' compensation law attorney. He is one of two firm representatives to the National Workers' Compensation Defense Network. He has served on the Executive Committee of Capehart Scatchard for over ten (10) years.

A graduate of Holy Cross College summa cum laude, Mr. Geaney obtained his law degree from Boston College Law School. He has been named a "Super Lawyer" by his peers and Law and Politics. He serves as Vice President of the Friends of MEND, the fundraising arm of a local charitable organization devoted to promoting affordable housing.

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Municipal Volunteers and New Jersey Workers' Compensation

There are many issues pertaining to volunteers in New Jersey and most of them center on municipal workers. Any discussion of the topic of volunteers must begin with the definitions of employee and volunteer. For workers' compensation purposes, an employee is one who performs work with an expectation of some form of compensation, usually but not necessarily salary. In contrast, a volunteer traditionally is one who neither expects nor receives any type of compensation for work performed. There is no workers' compensation coverage for injuries to a true volunteer. In the municipal sector, however, the Legislature has passed several statutes which provide workers' compensation coverage for certain volunteers when performing public duties.

Residents in municipalities often volunteer in a variety of situations. They may volunteer for a July 4th parade or perhaps participate in cleaning up trash on town property. These kinds of volunteers would not be covered for any injury. Absent special legislation, which we will discuss below, there has to be some sort of contractual relationship. In Stevens v. Allamuchy Township, a 1944 case, the Township Treasurer was given a choice of resigning his township position or giving up his job as postmaster of a local post office. So he gave up his township position, and then the Township appointed his wife as the official Treasurer. But Mr. Stevens kept doing the actual job duties of treasurer. His wife signed all the township checks and got paid by the township. Mr. Stevens was injured working at the township and filed a workers' compensation claim petition. The Court ruled that he had no official employment relationship with the Township, and therefore his injury was not covered.

Questions often arise about community service workers who may perform duties for a municipality. To clarify the workers' compensation issue, the Legislature passed NJSA 59:7A-1 in 1991. That

section provides that a county or municipality shall not be subject to any law "governing the provision of labor, workers' compensation, conditions of employment or insurance with respect to an offender performing community service, except for conduct by a municipality which is willful, wanton, or grossly negligent or the negligent operation of a motor vehicle."

The majority of volunteer issues in New Jersey cases stem from volunteers who receive no payment whatsoever but who are in fact covered for workers' compensation by statute. These tend mostly to fall within the class of public safety officers and public officials. There are several statutory provisions that are important to consider. NJSA 34:15-43 provides workers' compensation coverage to certain public officials who might otherwise be considered to be volunteers:

1. Elected and appointed officials;
2. Board of education members;
3. Volunteer firefighters, first aid or rescue squad workers;
4. Reserve or auxiliary police officers

For workers' compensation coverage to attach, these workers must be injured doing public duty or performing official duties when the injury occurs.

Extensive Coverage For Volunteer Firefighters And Rescue Squad Workers

The statute provides very broad protection for volunteer firefighters and rescue squad workers, including coverage in the following scenarios:

1. Participating in any authorized construction such as installation, alteration, maintenance or repair work upon the premises, apparatus, or other equipment owned or used by the fire company, first aid or rescue squad;
2. Participation in any authorized public drill, showing, exhibition, fund raising activity or parade;
3. Rendering assistance in case of fire

Since there is workers' compensation coverage in these situations, how much does the volunteer get paid? Does it matter that the volunteer may not even have another job? Some elected and appointed officials, including school board members, don't get paid at all. So if they are injured doing public duty they would likely receive **minimum** rates for lost time and for permanency. The minimum rate for lost time in 2021 is $258 per week. The minimum rate for permanent partial disability is a mere $35 per week.

At the other end of the spectrum are volunteer public safety workers. The Legislature many years ago passed a law that provided for **maximum** rates for them. For a 2021 accident the maximum rate is $969 per week. Volunteer firefighters, first aid, rescue squad workers, ambulance drivers, special reserve and auxiliary police officers are eligible for maximum rates while out of work and not yet at maximal medical improvement from a work injury.

Consider this example: Janet has no employment outside her volunteer firefighting work. She lives in town and she is raising her family. On February 10, 2021, she responds to a fire in the township and

suffers serious burns. Until she reaches maximal medical improvement for her treatment, Janet will receive $969 per week in tax free benefits. It doesn't matter that she had no outside employment.

Suppose, however, that Janet does have a regular paid weekly job in addition to the volunteer position. If she returns to the paid job while treating for the above burns, her wage loss benefits would end. Her medical benefits would continue until maximum medical improvement. In both situations she could file for permanent partial disability benefits.

Presumptions of Compensability For Certain Volunteers

For municipal volunteers there are a number of presumptions that do not apply to anyone in the private sector. Under NJSA 34:15-43.2, volunteer firefighters receive a presumption of compensability for respiratory diseases that manifest during active service. This provision has been extended by case law to paid firefighters as well. What this means is that the burden is on the employer to disprove that the respiratory disease is work related. The judge must presume that the respiratory disease is work related. The public entity can rebut the presumption by proving more likely than not that the cause of the respiratory disease is not work related – perhaps from heavy cigarette smoking.

A similar provision exists for volunteer firefighters, special, auxiliary or reserve police and rescue squad workers who suffer a heart attack or stroke while responding to a public safety or medical emergency. This presumption is contained in NJSA 34:15-7.3. This covers both injury and death, as does the provision on respiratory illnesses above.

In 2019 the Thomas P. Canzanella Twenty First Century First Responders Protection Act was passed. This is a fairly dense piece of legislation with several important provisions. This law provides that public safety workers, including volunteers, shall have a presumption of compensability if exposed to communicable disease, epidemics, pathogens, or biological toxins. The definition of public safety worker covers not only police, fire and EMT workers, but also members of a Community Emergency Response Team approved by the New Jersey Office of Emergency Management, basic or advanced medical technician of a first aid or rescue squad, or any nurse responding to a catastrophic incident and directly involved and in contact with the public during such an incident.

The most expansive provision of the Canzanella Act provides a presumption to all firefighters, volunteer and paid, whose injury is caused by cancer, including leukemia, if the firefighter has completed not less than seven years of service, provided that the firefighter is not more than 75 years of age. In addition, the firefighter who is diagnosed with cancer long after retirement may file a workers' compensation cancer presumption claim so long as it is filed within 20 years after retirement and not over age 75. The presumption of compensability of the cancer means that the municipality must prove more likely that the cancer was **not** related to work. Again, the burden rests on the employer.

Other public safety workers, paid and volunteer, have the presumption in cancer cases as well under the Canzanella Law, but if they are not firefighters they must prove that the cancer manifested **during their years of service** to have the presumption. Under both provisions the municipal volunteer or paid public safety worker must prove exposure to a carcinogen during employment. As

noted above a volunteer firefighter could contract cancer 19 years post retirement and still be protected by the presumption of compensability. A police officer would not receive the presumption in that

situation.

The most recent presumption in New Jersey law concerns Essential Employees who contract COVID-19. This law borrowed the definition of public safety workers directly from the Canzanella Law. There are many kinds of Essential Employees, both public and private sector, but for purposes of this article it is noteworthy that public safety volunteers also benefit from the presumption of compensability of COVID-19 if their disease manifested between March 9, 2020 and July 3, 2021 when the Governor declared the public health emergency to have ceased. A presumption relieves the covered volunteer from having to identify the source of the virus. This reflects the fact that police officers and EMTs, for example, have countless encounters with the public during the week and would likely never know the source of the virus. The burden rests on the employer to show more likely than not that the exposure did not arise from work.

As one can see, the patchwork of laws that have been passed over many years in respect to statutorily protected volunteers for workers' compensation purposes can be fairly complicated. The number of municipal volunteers and paid public safety officers who file under presumption laws has risen sharply in light of both the Canzanella and the COVID-19 Essential Employee laws. Defense lawyers are learning to muster the necessary evidence to disprove a statutory presumption of compensability under these two laws but no complete trials have occurred yet.

John H. Geaney, Esq.

Capehart Scatchard

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