PAUL

CALCULATIONS

PRESENTED BY

THE HONORABLE DOLORES MCNAMEE, S.J.C.(RETIRED)

THE JUSTICE JAMES H. COLEMAN, JR.

INNS OF COURT

FALL, WINTER, SPRING 2022-2023

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INTRODUCTION

Pursuant to N.J.S.A. 34:15-1 et seq. and the New Jersey Supreme Court in Ort. V. Taylor-Wharton, 47 N.J. 198 (1966) and Paul v. Baltimore Upholstery, 66 N.J. 111 (1974) payments for multiple Orders run consecutively not concurrently for each permanent injury. Also, once a Petitioner has been found to be permanently and totally disabled the Petitioner shall be paid at the Permanent Total Rate even if the Petitioner is still receiving payment for a Permanent Partial Award.

Both cases are included in this material along with a copy of N.J.S.A. 34:15-16 which delineates how benefits are to be paid which is as follows:

1. Medical and hospital benefits as provided for in N.J.S.A. 34:15-15
2. Temporary Disability Benefits
3. Permanent Disability -either partial or total

In Ort. V. Taylor-Wharton, 47 N.J. 198, 207-209 there was a review by the Supreme of awards entered under two different claim petitions. One was an award against NJM entered at an earlier date for earlier period of

employment for 30% Partial Permanent Disability that was being paid over a period which payments extended through December 15, 1959. *The Court held that the Petitioner could receive temporary disability on the second claim petition filed against Liberty Mutual for a subsequent period of employment at the same time he was receiving payments for a partial permanent award against NJM on a claim petition for an earlier period of employment.* However, the Supreme Court held that Liberty Mutual could not start paying benefits on the second later award of partial permanent disability until December 16, 1959 which is the day after the award entered against NJM would be paid out.

The issues addressed in Paul were not raised and therefore, of course, not addressed in Ort. However, there is an extensive discussion of Ort within Paul.

PAUL CALCULATIONS

1. In Paul v. Baltimore Upholstery Co., Inc. 66 NJ 111 (1974) the Court held that a Petitioner must be paid at the permanent total rate after the Petitioner has been found to be totally and permanently disabled.

2. A Paul calculation occurs when the Petitioner is receiving a partial permanent disability award and is being paid at the partial permanent rate and this award is not paid in full before the date of totality.

3. **EXAMPLE:**

   The Petitioner had an accident on 1/4/2007 and the case settled for 50% partial total disability for a cervical injury. The last date when temporary disability benefits were paid was on 11/21/2009. The weekly wage was $887.76 and the rate was $621.43. This award is payable for 300 weeks from 11/22/2009 through and including 8/22/2015 at $474 a week for a total of $142,200.

   The Petitioner had a second accident on 6/17/ 2012. Respondent agreed to pay 35% permanent total disability for a low back injury. The last date of temporary disability benefits paid for the back injury was 9/11/2014. The Petitioner never returned to work after this accident. The Petitioner's wage was $1000 and the rate was $700.

   The Petitioner has also filed a Verified Petitioner for Second Injury Fund benefits because in addition to the cervical injury for which the Petitioner received an award of 50% partial permanent disability, the Petitioner has a long standing history of depression with alcohol and substance abuse along with a congenital club foot which had required three surgeries. The Second Injury Fund has agreed to pay 65% permanent total disability.

PAYMENTS UNDER PAUL

PARTIAL PERMANENT		OVERLAP PERIOD	TOTAL PERMANENT PAYBLE BY RESPONDENT	TOTAL PERMANENT PAYABLE BY SIF
11/22/09-9/11/14	DATE OF TOTALITY	9/12/14-8/22/15	8/23/15-5/9/18	5/10/18-12/16/23
250 5/7 weeks X $474 =		49 2/7 weeks X $474 = $23,361.43 (partial perm) 49 2/7 weeks X $226 = $11,138.57 (total perm)	141 4/7 weeks X $700 =	292 ½ weeks X $700 =
$118, 838.57		$33,500	$99,111.43	$204,750
P receives $474 a week		P receives $700 a week	P receives $700 a week	P receives $700 a week

DOT is 9/12/14

STEPS TO DO A PAUL CALCULATION

1. **DETERMINE DATE OF TOATALITY - 9/12/2014**

2. **DETERMINE THE DATE WHEN THE PARTIAL PERMANENT AWARD WILL BE PAID IN FULL- 8/22/2015**

3. **DETERMINE THE DIFFERENCE BETWEEN THE PARTIAL PERMANENT AND THE PERMANENT TOTAL RATES - $226 calculated as follows: $700 (perm total rate) minus $474 (partial perm) = $226**

4. **DETERMINE THE OVERLAP PERIOD – 49 and 2/7 weeks** - The **overlap period** is the period between the date of totality (9/12/14) and the date when the partial permanent award is paid in full (8/22/2015). During this time the Petitioner will receive $700 a week which is made up of the $474 a week from the partial permanent award and $226 a week from the permanent total award. During the **overlap period** money is being paid to the Petitioner simultaneously from both the partial permanent and the permanent total awards.

5. **DETERMINE HOW MUCH IN PERMANENT TOTAL BENEFITS HAVE BEEN PAID DURING THE OVERLAP PERIOD AND DEDUCT IT FROM THE FULL AMOUNT OF THE PERMANENT TOTAL AWARD OWED BY THE RESPONDENT. $99,111.43**

   The full amount of permanent total disability owed by the Respondent is 35% or 157 and 1/2 weeks at $700 a week or $110, 250. Between 9/12/2014 (DOT) and 8/22/2015 (when the partial permanent award is paid in full) there are 49 and 2/7weeks payable by Respondent at $226 a week (of permanent total money) for a total of $11,138.57. When the $11,138.57 (the portion of permanent total award paid by Respondent during the overlap period) is deducted from $110,250 (full amount of permanent total owed by Respondent) $99,111.43 of the permanent total award remains to be paid by Respondent.

6. **DIVIDE WHAT REMAINS TO BE PAID OF THE PERMANENT TOTAL AWARD BY THE WEEKLY PERMANENT TOTAL RATE TO CALCULATE**

THE NUMBER OF WEEKS BEFORE THE SECOND INJURY COMMENCES PAYING BENEFITS. – 141 and 4/7 weeks

$99,111.43 divided by $700 =141 and 4/7 weeks.

THE EFFECTS OF A PAUL OVERLAP

The case in the Example resolved 35R/65F with a date of totality of 9/12/2014. Normally the Respondent would pay for 157 and ½ weeks from 9/12/2014 through and including 9/18/2017. However because of the overlap period payment is made as follows:

Respondent pays 49 and 2/7 weeks at $226 a week from 9/12/ 2014 through and including 8/22/2015 and then another 141 and 4/7 weeks at the rate of $700 from 8/23/2015 through and including 5/8/2018.

The Second Injury Fund pays 292 and ½ weeks at $700 a week from 5/9/2018 through and including 12/16/2023. Payments under NJSA 34:15-12 (b) commence on 12/17/2023 and continue as long as the Petitioner remains totally and permanently disabled.

THE SECOND INJURY FUND COMES ON AT A LATER DATE BECAUSE OF THE PAUL OVERLAP – 5/9/2018 RATHER THAN 9/19/2017.

PAUL CALCULATION HYPOTHETICAL

Petitioner filed four Claim Petitions against same Respondent as well a Verified Petitions for Second Injury Fund Benefits in this Hypothetical

Case Number One

Claim Petition 2008-1111(DOA 2/19/2008-right leg; Wage of $748 and a Rate of $523.60) was an Application for Review or Modification of an Order for 57 ½ % Partial Permanent Disability of the right leg with an Abdullah Credit of 42 ½ % (for award under Claim Petition 2006-5555 for an earlier right leg injury) entered on May 3, 2010. This resulted in an Award of $33,457.88. based on a wage of $748 and a rate of $523.60.

After testimony of the Petitioner and the recommendation of the Court, this case settled for 75% of the right leg with an Abdullah Credit of 42 ½% of the right leg as well as a Reopener Credit of $33,457.88 resulting in Respondent owing $30,885.74.

LAST DATE OF TEMPORARY DISABILITY BENEFITS PAID ON THIS CLAIM PETITION WAS 2/13/2016.

CASE NUMBER TWO

Claim Petition 2010-2222 (DOA 2/8/2010-left leg; Wage $793.60 and Rate $555,52) settled after testimony and recommendation of the Court for 25% of the left leg with an Abdullah Credit of 15% of the left leg for a prior Order entered under Claim Petition 2003-6666 for an earlier left leg injury resulting in 31.5 weeks of payments at $212 a week for a total of $6678.

LAST DATE OF TEMPORARY DISABILITY BENEFITS PAID ON THIS CLAIM PETITION WAS 5/21/2016

CASE NUMBER 3

Claim Petition 2011-3333 (DOA 10/21/2010-Abdomen; Wage $817.60 and Rate $572.32) resolved after of Partial Permanent Disability for injuries to the Petitioner's abdomen which equals 120 weeks of benefits paid for a total of $27,288.

THERE WAS NO TEMPORARY DISABILITY

CASE NUMBER FOUR

RESULTING IN ORDER FOR 100% TOTAL PERMANENT DISABILITY WITH SECOND INJURY FUND WITH 90% PAYABLE BY THE RESPONDENT AND 10% BY THE SIF

Claim Petition 2011-4444 (DOA 11/3/2010-right shoulder, left hip and left leg*; Wage $817.60 and Rate $57.32)

Wages / Rates and Dates of Temps

Date of claim	Petition #	Wage	Temp Rate	Date of Temp paid through
Right Leg 2-19-08	2008-1111	$748.00	$523.60	2-13-16
Left Leg 2-08-10	2010-2222	$793.60	$555.52	5-21-16
Abdomen 10-21-10	2011-3333	$817.60	$572.32	No temp paid
Shoulder 11-3-10	2011-4444	$817.60	$572.32	10-30-11

STEPS FOR CASE NUMBER ONE

Claim Petition 2008-1111(right leg, DOA 2/19/2008) This Permanent Partial Award is for 75% of the right leg with an Abdullah Credit of 42.5% of the right leg for a prior award entered on Claim Petition 2006-5555 on 1/8/2008 resulting in a new award of 162.48 weeks at $396 equaling $64,343.62 and with a Reopener Credit of $33,457.88 from an award entered in this case on 5/3/10 leaving $30, 885.74. **REMEMBER THE SAME PETITIONER WILL ALSO BE AWARDED A TOTAL PERMANENT DISABILITY AWARD along with two other Partial Permanent Disability Awards.**

1. Determine the date of accident – 2/19/2008
2. Determine the wage and rate- $748/$523.60
3. Determine the last date of temporary disability on this injury: 2/13/2016
4. Determine the Date of Totality: 2/2/2017
5. Determine the Permanent Total Disability Rate on CP 2011-4444: $572.32

6. Use OSCAR to calculate the following:
   57 ½% of the right leg
   With an Abdullah Credit of 42 ½% (always % credit)
   With a Reopener Credit of $33,457.88 (always money credit).
7. The OSCAR calculation results in the Petitioner receiving an award of $30, 885.74 owed by Respondent.

6/24/22, 2:54 PM OscarCalc: Build 0.1.01-TSG



Please note: The calculations in the OSCAR system do not reflect unsettled Hand & Foot cases occurring before 2020.

PARTIAL TOTAL CALCULATOR

Body Part	Partial Total	Abdullah Credit	Reopener Credit	Exclude
Right Leg	75.00	42.50	0.00	☐

Direct Dollar credit:$ 33457.88

Clear Calculate

To add body parts, hit the Back button and revise your initial sections.

RESULTS

Clear Print

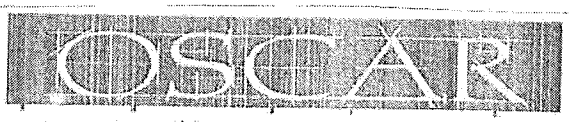
Year of Injury: 2008
Maximum Weekly Rate: $742.00
Minimum Weekly Rate: $198.00
Total Award For:
75.0 % of the right leg
Equivalent to 39.38 % of partial total
236.25 weeks @ $396.00 = $93,555.00
Abdullah Credit:
42.5 % of the right leg
Equivalent to 22.31 % of partial total
133.875 weeks @ $218.20 = $29,211.38
Net compensation:
162.48 weeks @ $396.00 = $64,343.62
Net compensation:
After Dollar Credit of $33,457.88 = $30,885.74

==========

Year of Injury: 2008
Maximum Weekly Rate: $742.00
Minimum Weekly Rate: $198.00
Total Award For:
75.0 % of the right leg
Equivalent to 39.38 % of partial total
236.25 weeks @ $396.00 = $93,555.00
Abdullah Credit:
42.5 % of the right leg
Equivalent to 22.31 % of partial total
133.875 weeks @ $218.20 = $29,211.38
Net compensation:
162.48 weeks @ $396.00 = $64,343.62

==========

8. Divide $30, 885.74 by $396 (the Partial Permanent Rate) and this results in the Respondent paying benefits of $396 a week for 78 weeks.
9. The first date Respondent can pay is 2/14/2016 since this is the day after the last temporary on this case was paid. Use OSCAR to determine the dates over which the benefits will be at $396 a week.



DATE CALCULATOR

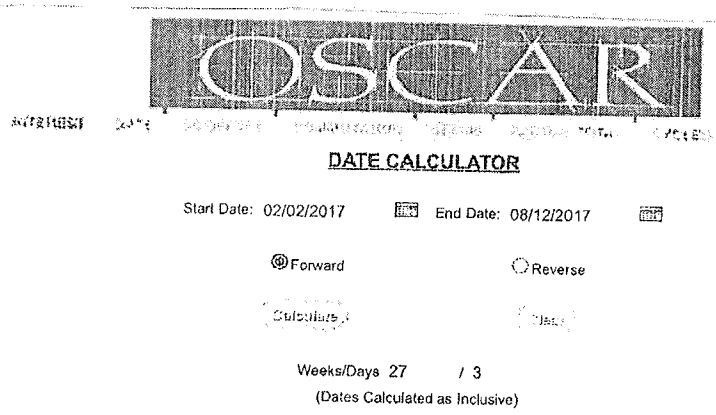
Start Date: 02/14/2016 End Date: 08/12/2017

Forward Reverse

Weeks/Days 78 /
(Dates Calculated as Inclusive)

10. These benefits are paid at $396 a week for 78 weeks from 2/14/2016 through and including 8/12/2017 which equals $30,885.74

11. Use OSCAR to calculate the number of weeks between the Date of Totality (2/2/2017) and the last date of payment by the Respondent on CP 2008-1111 (8/12/2017)



12. Pursuant to Paul the Petitioner must receive the equivalent of the Total Permanent Disability Rate once the Petitioner has been determined to be Permanently and Totally Disabled. Therefore for 27

Case # 1

State of New Jersey Department of Labor and Workforce Development DIVISION OF WORKERS' COMPENSATION WC-160 (r. 8/27/2015)	**ORDER** ☐ JUDGMENT ☒ APPROVING SETTLEMENT	CASE NO'S.: 2008-1111 VICINAGE:

PETITIONER
DATE OF BIRTH: [redacted] | MEDICARE ELIGIBLE: ☒ YES ☐ NO
ADDRESS:

VS

RESPONDENT
ADDRESS:
NAME:
ADDRESS:

ATTORNEY FOR RESPONDENT
A CODE:

ATTORNEY FOR PETITIONER
FEDERAL TAX ID NUMBER
NAME:
ADDRESS:
(CODE):

INSURANCE CARRIER
☐ RESPONDENT IS SELF-INSURED ☐ TPA
ADDRESS:
CLAIM NUMBER:
DATE OF ACCIDENT OR OCCUPATIONAL EXPOSURE: 2-19-08
DESCRIBE INJURY
Trip and Fall- Injury to Right Leg

ADMINISTRATIVE DISMISSALS (List Other Insurance Carriers to be dismissed from case, without prejudice):

Weekly Wages: $748.00 **Rate(s):** $523.60 / $

IF RE-OPENED PETITION, INDICATE FOR LAST AWARD:

Date: 5-3-10 **Award:** 57 1/2% of Right Leg **Permanent Paid:** $ 33,457.88 **Temporary Paid:** $39,793.60

THIS MATTER HAVING COME BEFORE THE COURT ON THIS _____ **DAY OF** _____ , 2022

☐ **ORDER FOR JUDGMENT**
It appearing that the Petitioner suffered a compensable injury on the above mentioned date while in the employ of respondent; It is Ordered and Adjudged that Petitioner be awarded compensation benefits, payable as indicated on Page 2.

☒ **ORDER APPROVING SETTLEMENT**
The parties having settled the matter and a finding by the Court having been made that the terms of the settlement are fair and just; It is Ordered that this settlement be approved and the petitioner be paid as indicated on page 2.

PERMANENT DISABILITY (Describe Percentages below followed by the Nature and Extent of Injury and Members Involved):

75 % of RIGHT LEG

Based on residuals of the tear of the anterior cruciate ligament and tear of the posterior horn of the medial meniscus and lateral meniscus, status post right total knee arthroplasty, a right knee surgery for lysis of adhesions superimposed on the pre-existing internal derangement of the right knee, status post four arthroscopic surgical interventions and failed knee replacement with subsequent surgery for right knee revision with an Abdullah Credit of 42 1/2% of the right leg for an award under Claim Petition and a Reopener Credit in the amount of $33,457.88 which settled on 5-3-10.

State of New Jersey Department of Labor and Workforce Development DIVISION OF WORKERS' COMPENSATION WC-100 (r 8/27/2015)	**ORDER** ☐ JUDGMENT ☒ APPROVING SETTLEMENT	CASE NO'S 2008- 111 1 VICINAGE: ___ ☑

DISABILITY AWARDED:

TEMPORARY: 76 weeks at $ 523.60 = $ 39,793.60 less $ 39,793.60 paid = Balance due $0

PERMANENT: 162.48 weeks at $ 396 = $ 64,343.62 less $ 33,457.88 paid = Balance due $ 30,885.74

Credits: ☐ Bonafide Voluntary Tender ☐ Non Bonafide Voluntary Tender ☒ Reopener Credit ☐ N.J.S.A. 34:15-40 ☐ ___

MEDICAL BILLS (Doctors and/or Institutions) AND/OR MISCELLANEOUS INFORMATION:

All Authorized Medical Bills are paid or will be paid by the Respondent.

Authorized Treating Physician for Right Leg/Knee is A

☐ ORDER FOR CHILD SUPPORT ☐ MEDICARE ADDENDUM ATTACHED ☐ ADDENDUM ATTACHED

ALLOWANCES	REIMBURSE	TAX IDENTIFICATION NUMBER	TOTAL AMT. ALLOWED	PAYABLE BY PETITIONER	PAYABLE BY RESPONDENT
MEDICAL FEES ALLOWED: *(report and/or testimony)* See Summary Sheet	☑				
	☑				
INTERPRETER:					
ATTORNEY(S) FEE:	☑		3,087.50	1,235.00	1,852.50
STENOGRAPHIC SERVICE State Shorthand Reporting Agency ☑			90.00		90.00
MISCELLANEOUS FEES: *(list below)* Atty Fees and Reimbursements to on ☑			2,135.75	922.00	1,213.75
Atty Fees and Reimbursements to: ☑			2,135.75	922.00	1,213.75

☑ The Court finds the parties adequately considered Medicare interest, be that as it may, should a Medicare issue arise, this Court retains jurisdiction.

WE HEREBY CONSENT TO THE ENTRY AND FORM OF THIS ORDER AND ACKNOWLEDGE RECEIPT OF COPY:

PETITIONER'S ATTORNEY

PETITIONER (where applicable)

RESPONDENT'S ATTORNEY

THE COURT FINDS THIS SETTLEMENT FAIR AND JUST.

JUDGE OF COMPENSATION DATE

JUDGE'S NAME

THE ORIGINAL OF THIS DOCUMENT, SIGNED BY THE JUDGE OF COMPENSATION, WILL BE MAINTAINED ON FILE IN THE DIVISION OF WORKERS' COMPENSATION, PURSUANT TO N.J.S.A. 34:15-121 et. seq.

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STEPS FOR CASE NUMBER TWO

Claim Petition 2010-2222 (left leg, DOA 2/8/2010) This is a second permanent partial award for 25% of the left leg with an Abdullah Credit of 15% of the left leg for a prior award under Claim Petition 2003-6466 , resulting **31.5 weeks of payments at $212 for a total of $6678 from 8/13/2017 through and including 3/21/2018.**

1. Determine the Date of Accident- 2/8/2010
2. Determine the wage and rate-$793.60/$555.52
3. Determine the last date of temporary disability on injury-5/21/16

   REMEMBER ON CASE #1 CP 2008-1111, THE RESPONDENT STARTED TO PAY PARTIAL PERMANENT DISABILITY AWARD ON 2/14/16. THEREFORE THE PETITIONER RECEIVED PARTIAL PERM PAYMENTS FROM 2/14/16 TO 5/16/2016 WHEN THE PETITIONER WAS ALSO RECEIVING TEMPORARY DISABILITY BENEFITS ON CP2010-2222. THE ORT COURT SAY THIS IS ALLOWED.
4. Determine the Date of Totality-2/2/2017
5. Determine the Permanent Total Disability Rate on CP 2011-4444-$572.32

6. Date of last payment the Respondent pays on CP
   2008-1111-8/12/2017

7. Use OSCAR to calculate the following:
   25% of the left leg
   with an Abdullah Credit of 15% of the leg (% Credit)
   for a prior award on CP 2003-6666

Year of Injury: 2010
Maximum Weekly Rate: $794.00
Minimum Weekly Rate: $212.00
Total Award For:
25.0 % of the left leg
Equivalent to 13.13 % of partial total
78.75 weeks @ $212.00 = $16,695.00
Abdullah Credit:
15.0 % of the left leg
Equivalent to 7.88 % of partial total
47.25 weeks @ $212.00 = $10,017.00
Net compensation:
31.5 weeks @ $212.00 = $6,678.00

8. Use OSCAR to calculate 31.5 weeks from 8/13/2017
   Which is the day after the Respondent's last
   payment (8/12/2017) was made on CP 2008-1111

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OSCAR

DATE CALCULATOR

Start Date: 08/13/2017 End Date: 03/21/2018

(•) Forward ( ) Reverse

Weeks/Days 31 / 4

(Dates Calculated as Inclusive)

9. The Respondent will pay 31.5 weeks from 8/13/2017
   through and including 3/21/2018 for a total $6678
   on CP 2010-2222

10. Since the Date of Totality is 2/2/2017 the Respondent will also have to pay 31.5 weeks at $360.32 which the difference between $572.32 (the Permanent Total Rate on CP 2011-4444 and the Partial Permanent Rate of $212) or $11,350.08 which is credited towards the payments owed by the Respondent on the Permanent Total Case .
11. The total amount paid by the Respondent on CP 2010-2222 is $6678 plus $11,350.08 or a total of $18,028.08

Case # 2

State of New Jersey Department of Labor and Workforce Development DIVISION OF WORKERS' COMPENSATION WC-100 (r. 8/27/2015)	**ORDER** ☐ JUDGMENT ☒ APPROVING SETTLEMENT	CASE NO'S: 2010 _ 2222 VICINAGE:

PETITIONER
NAME:
DATE OF BIRTH: [redacted] MEDICARE ELIGIBLE: ☒ YES ☐ NO
ADDRESS:

VS

RESPONDENT
NAME:
ADDRESS:

ATTORNEY FOR RESPONDENT
NAME:
ADDRESS:
TELEPHONE NO. & AREA CODE: 85(
APPEARANCE:

ATTORNEY FOR PETITIONER
FEDERAL EMPLOYER NUMBER
NAME:
ADDRESS:
CODE:

INSURANCE CARRIER
NAME: ☐ RESPONDENT IS SELF-INSURED ☐ TPA
ADDRESS:
CLAIM NUMBER:
DATE OF ACCIDENT OR OCCUPATIONAL EXPOSURE: 2-8-2010
DESCRIBE (briefly):
Tripped Getting Off Escalator

ADMINISTRATIVE DISMISSALS
(List Other Insurance Carriers to be dismissed from case, without prejudice):

Weekly Wages: $793.60 Rate(s): $555.52 / $

IF RE-OPENED PETITION, INDICATE FOR LAST AWARD:

Date: 4-15-05 Award: 15% of Left Leg Permanent Paid: $ Temporary Paid: $

THIS MATTER HAVING COME BEFORE THE COURT ON THIS _____ DAY OF _____, _____

☐ **ORDER FOR JUDGMENT**
It appearing that the Petitioner suffered a compensable injury on the above mentioned date while in the employ of respondent;
It is Ordered and Adjudged that Petitioner be awarded compensation benefits, payable as indicated on Page 2.

☒ **ORDER APPROVING SETTLEMENT**
The parties having settled the matter and a finding by the Court having been made that the terms of the settlement are fair and just;
It is Ordered that this settlement be approved and the petitioner be paid as indicated on page 2.

PERMANENT DISABILITY (Describe Percentages below followed by the Nature and Extent of Injury and Members Involved):

28 % of LEFT LEG ☑
based upon Left Total Knee Revision with an Abdullah credit of 15% for the left leg.
Case 2010-2222 was settled on 4-15-05 for 22 1/2 % of partial total apportioned 27 1/2 % of partial total for the right leg and 15% for the left leg with an Abdullah Credit of 10% of the left leg.

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State of New Jersey Department of Labor and Workforce Development DIVISION OF WORKERS' COMPENSATION WC-100 (r 8/27/2015)	**ORDER** ☐ JUDGMENT ☒ APPROVING SETTLEMENT	CASE NO'S. 2010 -2222 VICINAGE:

DISABILITY AWARDED:

TEMPORARY: 41 6/7 weeks at $ 555.52 = $ 23,252.28 less $ 23,252.28 paid = Balance due $0

PERMANENT: 31.50 weeks at $ 212.00 = $ 6,678.00 less $ 0 paid = Balance due $6,678

Credits: ☐ Bonafide Voluntary Tender ☐ Non Bonafide Voluntary Tender ☒ Reopener Credit ☐ N.J.S.A. 34:15-40 ☐ _____

MEDICAL BILLS (Doctors and/or Institutions) AND/OR MISCELLANEOUS INFORMATION:
All Authorized Medical Bills are paid or will be paid by the Respondent.

Authorized Treating Physician for Left Leg/Knee is / M.D. and Dr. r for evaluation of lysis of adhesions

☐ ORDER FOR CHILD SUPPORT ☐ MEDICARE ADDENDUM ATTACHED ☒ ADDENDUM ATTACHED

ALLOWANCES	REIMBURSE	TAX IDENTIFICATION NUMBER	TOTAL AMT. ALLOWED	PAYABLE BY PETITIONER	PAYABLE BY RESPONDENT
MEDICAL FEE ALLOWED: *(report and/or testimony)* See Summary Sheet					
INTERPRETER:					
ATTORNEY(S) FEE: Law Office			667.50	267.00	400.50
STENOGRAPHIC SERVICE State Shorthand Reporting Agency			90.00		90.00
MISCELLANEOUS FEES: *(list below)* Atty Fee and Reimbursements for		See W4	733.75	333.50	400.25
Atty Fee and Reimbursements fo		See W4	733.75	333.50	400.25

☐ The Court finds the parties adequately considered Medicare interest, be that as it may, should a Medicare issue arise, this Court retains jurisdiction.

WE HEREBY CONSENT TO THE ENTRY AND FORM OF THIS ORDER AND ACKNOWLEDGE RECEIPT OF COPY:

PETITIONER'S ATTORNEY

PETITIONER (where applicable)

RESPONDENT'S ATTORNEY

THE COURT FINDS THIS SETTLEMENT FAIR AND JUST.

JUDGE OF COMPENSATION DATE

JUDGE'S NAME

THE ORIGINAL OF THIS DOCUMENT, SIGNED BY THE JUDGE OF COMPENSATION, WILL BE MAINTAINED ON FILE IN THE DIVISION OF WORKERS' COMPENSATION, PURSUANT TO N.J.S.A. 34:15-121 et. seq.

23

STEPS FOR CASE NUMBER THREE

Claim Petition 2011-3333 (abdomen DOA 10/21/2010) This is the third Permanent Partial Award entered for 20% partial permanent disability for injuries to the abdomen.

1. Determine the date of the accident-10/21/2010
2. Determine the wage and rate-$817.60/$572.32
3. Date of last temporary disability on this injury-None
4. The date of last payment on CP2010-2222-3/21/2018
5. Determine the Date of Totality -2/2/2017
6. Determine the Permanent Total Disability Rate on CP 2011-4444: $572.32
7. Use OSCAR to calculate 20% of Partial Permanent Disability
8. The OSCAR calculation results in the Petitioner receiving 120 weeks at $227.40 for a total of $27,288.

Year of Injury: 2010
Maximum Weekly Rate: $794.00
Minimum Weekly Rate: $212.00
Total Award For:
20.0 % of partial total
Equivalent to 20.0 % of partial total
120.0 weeks @ $227.40 = $27,288.00

9. Use OSCAR to calculate the dates of payment for this award of 20%

OscarCalc: Build 0.1.01-TSG



DATE CALCULATOR

Start Date: 03/22/2018 End Date: 07/08/2020

Forward Reverse

Calculate Clear

Weeks/Days 120 /
(Dates Calculated as Inclusive)

25

10. The Respondent is to pay 120 weeks at $227.40 totaling $27,288 payable from 3/22/2018 through and including 7/8/2020.
11. The Respondent will also pay 120 weeks at $344.92 which the difference between the $572.32 (the Permanent Total Rate for CP 2011-4444) and $227.40 (the Partial Permanent Rate of on CP 2011-3333) for a total of $41,390.40 to be credited towards the Respondent's portion of the Permanent Total Award. Therefore, the total paid by Respondent is $27,288 plus $41,390.40 which $68,678.40.

Case # 3

State of New Jersey
Department of Labor and Workforce Development
DIVISION OF WORKERS' COMPENSATION

WC-100 (r. 8/27/2015)

ORDER

☐ JUDGMENT
☒ APPROVING SETTLEMENT

CASE NO'S.: 2011-3333

VICINAGE:

PETITIONER
NAME:
DATE OF BIRTH: 6-14-1946 MEDICARE ELIGIBLE: ☒ YES ☐ NO
ADDRESS:

VS

RESPONDENT
NAME:
ADDRESS:

ATTORNEY FOR RESPONDENT
ADDRESS:
TELEPHONE NUMBER (AREA CODE):
APPEARING:

ATTORNEY FOR PETITIONER
FEDERAL EMPLOYER NUMBER
NAME:
ADDRESS:
TELEPHONE NUMBER (AREA CODE):

INSURANCE CARRIER
NAME ☐ RESPONDENT IS SELF-INSURED ☐ TPA
NUMBER:
CLAIM NUMBER:

DATE OF ACCIDENT OR OCCUPATIONAL EXPOSURE: 10-21-2010
DESCRIBE (Briefly):
Struck by heavy equipment
Injury to Abdomen

ADMINISTRATIVE DISMISSALS
(List Other Insurance Carriers to be dismissed from case, without prejudice):

Weekly Wages: $817.60 **Rate(s):** $572.32 / $

IF RE-OPENED PETITION, INDICATE FOR LAST AWARD:

Date: _____ **Award:** _____ **Permanent Paid:** $_____ **Temporary Paid:** $_____

THIS MATTER HAVING COME BEFORE THE COURT ON THIS _____ **DAY OF** _____ , 2022

☐ **ORDER FOR JUDGMENT**
It appearing that the Petitioner suffered a compensable injury on the above mentioned date while in the employ of respondent;
It is Ordered and Adjudged that Petitioner be awarded compensation benefits, payable as indicated on Page 2.

☒ **ORDER APPROVING SETTLEMENT**
The parties having settled the matter and a finding by the Court having been made that the terms of the settlement are fair and just;
It is Ordered that this settlement be approved and the petitioner be paid as indicated on page 2.

PERMANENT DISABILITY (Describe Percentages below followed by the Nature and Extent of Injury and Members involved):

20 % of PARTIAL TOTAL

for the abdominal area, multiple hernias and multiple surgeries - based on residuals of postoperative limitations of abdominal hernia, status post six surgical interventions and multiple in office excisions including an incisional hernia; open repair of large abdominal wall hernia with mesh; second open repair of incisional hernia with mesh with subsequent abdominal wall ventral dehiscence, supraumbilical midline recurrent hernia, abdominal wall midline fascia dehiscense; panniculectomy and hernia repair; followed by in-office excision of scar tissue; excision of chronic wound of left lower abdomen for chronic wound of left lower abdomen and incarcerated type 3 inguinal hernia/left inguinal hernia repair; repair of incarcerated left inguinal hernia with double plug mesh, plug and patch of extra large lighweight and larger lightweight plug with extensive abdominal scarring limiting the motion of the abdominal wall.

State of New Jersey Department of Labor and Workforce Development DIVISION OF WORKERS' COMPENSATION WC-100 (r 8/27/2015)	**ORDER** ☐ JUDGMENT ☒ APPROVING SETTLEMENT	CASE NO'S. 2011-3333 VICINAGE:

DISABILITY AWARDED:

TEMPORARY: _____ weeks at $ _____ = $ _____ less $ _____ paid = Balance due $ _____

PERMANENT: 120 weeks at $ 227.40 = $ 27,288.00 less $ 0 paid = Balance due $ 27,288.00

Credits: ☐ Bonafide Voluntary Tender ☐ Non Bonafide Voluntary Tender ☐ Reopener Credit ☐ N.J.S.A. 34:15-40 ☐ _____

MEDICAL BILLS (Doctors and/or Institutions) AND/OR MISCELLANEOUS INFORMATION:

All Authorized Medical Bills are paid or will be paid by the Respondent.

Authorized Treating Physician for Abdomen/Hernia is Dr. .

☐ ORDER FOR CHILD SUPPORT ☐ MEDICARE ADDENDUM ATTACHED ☒ ADDENDUM ATTACHED

ALLOWANCES	REIMBURSE	TAX IDENTIFICATION NUMBER	TOTAL AMT. ALLOWED	PAYABLE BY PETITIONER	PAYABLE BY RESPONDENT
MEDICAL FEE ALLOWED: *(report and/or testimony)* See Summary Sheet					
INTERPRETER:					
ATTORNEY FEE to			2,727.50	1,091.00	1,636.50
STENOGRAPHIC SERVICE State Shorthand Reporting Agency			90.00		90.00
MISCELLANEOUS FEES: *(list below)* Atty Fees and Reimbursements t			1,788.75	758.00	1,030.75
Atty Fees and Reimbursements t			1,788.75	758.00	1,030.75

☑ The Court finds the parties adequately considered Medicare interest, be that as it may, should a Medicare issue arise, this Court retains jurisdiction.

WE HEREBY CONSENT TO THE ENTRY AND FORM OF THIS ORDER
ACKNOWLEDGE RECEIPT OF COPY

X _____
PETITIONER'S ATTORNEY

_____
PETITIONER (where applicable)

_____
RESPONDENT'S ATTORNEY

THE COURT FINDS THIS SETTLEMENT FAIR AND JUST.

_____
JUDGE OF COMPENSATION DATE

_____
JUDGE'S NAME

THE ORIGINAL OF THIS DOCUMENT, SIGNED BY THE JUDGE OF COMPENSATION, WILL BE MAINTAINED ON FILE IN THE DIVISION OF WORKERS' COMPENSATION, PURSUANT TO N.J.S.A. 34:15-121 et. seq.

2 8

STEPS FOR CASE NUMBER FOUR

AND SECOND INJURY FUND

Claim Petition 2011-4444 (right shoulder, left hip and left leg DOA 11/3/2010; Wage $817.60/ Rate $572.32) 90/10 Split between the Respondent and Second Injury Fund

1. Determine the Date of Accident – 11/3/2010
2. Determine the wage and rate -$817.60/$572.32
3. Determine Date of Totality 2/2/2017
4. Determine last date of Temporary Disability Benefits-10/30/11
5. Determine if there is a Social Security Offset-None
6. Determine last date of payment of benefits on CP 2011-3333-7/8/2020
7. Determine split between the Respondent and the Second Injury Fund- 90% Respondent; 10% Second Injury Fund
8. The Respondent is paying 90% Permanent Total Disability (450 weeks X .90) or 405 weeks at $572.32 a week which equals $231,789.60. You cannot use OSCAR to calculate the number of

weeks due for a Permanent Total Award since OSCAR which is used to calculate Partial Permanent Awards calculates benefits based on 600 weeks.

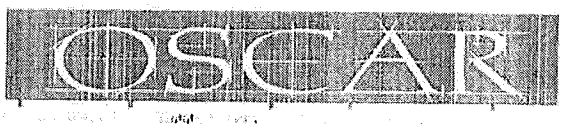
9. However the Respondent's payments made pursuant to Paul v. Baltimore Upholstery of $4,836.28 (CP2008-1111); $11,350.08 (CP 2010-2222) and $41,390.40 (CP 2010-3333) total $57,576.76 shall be deducted from this amount leaving the Respondent owing $174,212.84.

10. Divide the amount of $174,212.84 by the Permanent Total Rate of $572.32 to determine that the Respondent will owe 304 and 3/7 weeks at $572.32 before Second Injury Fund commences payment.

11. Use OSCAR to calculate the dates for 304 and 3/7 weeks of payments by the Respondent. The starting date is 7/9/2020 (the day after the last payment made by Respondent on CP 2011-3333)

6/28/22, 7:45 PM

OscarCalc: Build 0.1.01-TSG



DATE CALCULATOR

Start Date: 07/09/2020 End Date: 05/09/2026

Forward Reverse

Weeks/Days 304 / 3

(Dates Calculated as Inclusive)

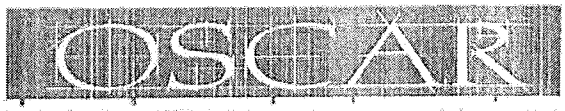
30

The Respondent makes payments from 7/9/2020 through and including 5/9/2026 at the rate of $572.32 before Second Injury Fund Commences payment on 5/10/2026.

12. The Second Injury Fund shall pay 10% Permanent Total or 45 weeks at $572.32 commencing on 5/10/2026.

(Use OSCAR to calculate the end date) through and including 3/20/2027 with benefits then to continue pursuant to N.J.S.A. 34:15-12(b) on 3/21/2027.

6/28/22, 7:46 PM OscarCalc: Build 0.1.01-TSG



DATE CALCULATOR

Start Date: 05/10/2026 End Date: 03/20/2027

Forward Reverse

Calculate Clear

Weeks/Days 45 /

(Dates Calculated as Inclusive)

Case # 4

State of New Jersey
Department of Labor and Workforce Development
DIVISION OF WORKERS' COMPENSATION

WC-376i (r. 3/19/13)

ORDER FOR TOTAL DISABILITY w/Second Injury Fund

CASE NO'S.: 2011-4444

VICINAGE:

PETITIONER

SOCIAL SECURITY NUMBER:

DOB: 6-14-1946

NAME:

GENDER: ☐ MALE ☒ FEMALE

MEDICARE ELIGIBLE: ☒ YES ☐ NO

ADDRESS (Including County):

VS

ATTORNEY FOR PETITIONER

☐ SSN ☒ FEDERAL EMPLOYER NUMBER ☐ NJ REG NUMBER

NAME:

ADDRESS:

TELEPHONE NUMBER (AREA CODE):

APPEARING:

RESPONDENT

NAME:

ADDRESS (Including County):

ATTORNEY FOR RESPONDENT

NAME:

APPEARING:

APPEARING FOR SECOND INJURY FUND:

INSURANCE CARRIER

NAME: Scibal Associates ☒ SELF-INSURED ☐ TPA

CLAIM NUMBER:

DATE OF ACCIDENT OR OCCUPATIONAL EXPOSURE: 11-3-10

DESCRIBE (Briefly):

11-3-10 - fell when mopping injuring right shoulder, left hip and left knee

FUND PETITION FILE DATE: July 3, 2020

Upon the proofs presented and the stipulations made, I find and determine the following facts:

LAST COMPENSABLE ACCIDENT OR EXPOSURE

WAGES:	RATE:	Date of last payment of Permanent Compensation by Respondent:
817.60	572.32	5/9/2026 *

In accordance with the provisions of the New Jersey Workers' Compensation Law (N.J.S.A. 34:15-1 et seq.), I find as follows:

Petitioner is totally and permanently disabled as of February 2, 2017

Permanent Disability payable by Respondent (Describe Percentages, Nature and extent of Disability, and Members involved):
90% Permanent Total Disability for the Right Shoulder, Left Hip and Left Knee as follows:

Right Shoulder for Status post-surgical arthroscopy of the right shoulder with capsular release, arthroscopic subacromial decompression, arthroscopic extensive debridement of the labrum and chondral flap and Arthroscopic rotator cuff repair resulting in persistent adhesive capsulitis (frozen shoulder)

Left Knee/Leg for another Total Left Knee Revision.

Left Hip for trochanteric Bursitis with multiple injections and moderate arthritis

State of New Jersey
Department of Labor and Workforce Development
DIVISION OF WORKERS' COMPENSATION

WC-376l

ORDER FOR TOTAL DISABILITY w/Second Injury Fund - Page 2

CASE NO'S.: 2011-4444

VICINAGE:

AWARD WITHOUT SOCIAL SECURITY OFFSETS

TEMPORARY: 47.43 Weeks at $ 572.32 = $ 27,145.13 less $ 27,145.13 paid = Balance due $ -0

PERMANENT: 405 Weeks at $ 572.32 = $ 231,789.60 less $ 0 paid = Balance due $ 231,789.60

☐ Voluntary Tender ☐ Reopener Credit

PAYMENTS DUE FROM RESPONDENT WITH SOCIAL SECURITY OFFSETS

Payments before offset begins	____	weeks at $ ____	less $ ____	Paid = $ N/A	+
Payments with offset (aux)	____	weeks at $ ____	less $ ____	Paid = $ N/A	+
Payments with offset (no aux)	____	weeks at $ ____	less $ ____	Paid = $ N/A	+
After offset completed	____	weeks at $ ____	less $ ____	Paid = $ N/A	
TOTAL PAYMENTS				$ ____	

The total and permanent disability is due to the combined effects of the petitioner's previous disabilities and the last compensable accident or occupational exposure and is clearly within the provisions of the above cited statute.

Accordingly, it is determined that the petitioner receive benefits from the Second Injury Fund as follows:

a. ☐ 45 weeks, being the difference between 450 weeks and the 405 weeks of permanent disability compensation previously received.
☐ 450 weeks has expired.

b. Weekly rate prior to offset is $572.32. (If third party offset, please explain on page 6)

c. Weekly rate subsequent to offset is $ N/A.

d. Payment to begin upon the expiration of payment of compensation from the last compensation award, but, in any event, not sooner than the date of filing of the petition for benefits from the Second Injury Fund. Commencement date for Fund benefits is 5/10/2026 *.

e. On 3/21/2027, which is the expiration of the 450 week period, benefits to continue in accordance with the provision of N.J.S.A. 34:15-12(b) as amended.

MEDICAL BILLS (Doctors and/or Institutions):

All authorized medical bills are the reponsibility of the Respondent have either been paid or will be paid.

Authorized Treating Physicians for Right Shoulder and Arm is Dr. ; Left Leg/Knee and left hip is . ; M.D.; and left leg/knee for lysis of adhesions is L ; Head is Kennedy ER, M a; and Neuropsychiatrist is D

☐ Petitioner is in receipt of Social Security Disability Benefits and the initial date of entitlement was N/A.

Petitioner's 80% ACE is N/A and petitioner's initial entitlement was $ N/A including $ N/A for auxiliary beneficiaries. Therefore respondent and the Second Injury Fund are entitled to an offset resulting in a rate of $ N/A until petitioner's last auxiliary graduates from high school or turns 18 years of age, whichever is later. Thereafter, until the petitioner reaches 62 years of age on N/A the offset rate shall be $ N/A.

Name of Auxiliary	Date of Birth

State of New Jersey Department of Labor and Workforce Development DIVISION OF WORKERS' COMPENSATION WC-376i	**ORDER FOR TOTAL DISABILITY w/Second Injury Fund - Page 3**	CASE NO.: 2011- 444 M VICINAGE:

The first 33 3/7 weeks of permanent disability are to be paid at the full rate of $ 572.32 reflecting Petitioner's share of counsel fee and costs.

☐ An Application for Social Security Disability Benefits and / or Government Ordinary Disability Pension ☐ is pending ☐ is on appeal ☐ has not been filed. Should Petitioner be awarded Social Security Disability Benefits and / or Government Ordinary Disability Pension, Petitioner shall immediately notify the Respondent and the Second Injury Fund of this award. The Petitioner shall reimburse the Respondent and the Second Injury Fund for any workers' compensation benefits paid to Petitioner in excess of the offset rate during the period of time Petitioner has received Social Security Disability benefits or Government Ordinary Disability Pension.

In the event there is a change in the number or status of the auxiliary beneficiaries while Petitioner is receiving Workers' Compensation benefits, Petitioner shall immediately notify the Respondent.

I further Order that Respondent furnish the Petitioner such medical attention, prosthesis, and medical supplies as the condition of the Petitioner may require. Should any emergency arise, necessitating immediate medical attention for the Petitioner, notice and request to Respondent shall not be necessary.

☒ Respondent authorizes _____ as treating physician.

The date of Petitioner's Permanent Total disability is 2/2/2017.

On 3/21/2027, which is the expiration of the 450 week period, benefits to continue in accordance with the provision of N.J.S.A. 34:15-12(b) as amended.

Pursuant to N.J.S.A. 34:15-12(b), petitioner will be referred to the Division of Vocational Rehabilitation Services for evaluation and services prior to the expiration of 450 weeks from the date of Total Permanent Disability.

PETITIONER DATA

Date of Last Employment:	Occupation:	Gross Weekly Wages:
1-31-2014	Equipment Custodian	817.60 +

PRE-EXISTING COMPENSABLE DISABILITIES

Date of Injury: 2-21-98 - 1998	Claim Petition Number:
Employer Name:	
Permanent Disability Award: Settled claims for $5,000	
Description of Injury and Disability: C- Right leg and Elbow C- left arm liftin 2- 3 toes, . . - nail in leg -7 - lumbar strain; . . . . 5 -left shoulde 4 contusion left knee; 0 - re-injury left shoulder and left elbow	
Hearing Date: 12-7-1998	

Date of Injury: 10-21-2002	Claim Petition Number
Employer Name:	
Permanent Disability Award: 22 1/2% apportioned 27 1/2% Right leg and 15% Left leg with 10% Abdullah credit	
Description of Injury and Disability: Arthroscopy Right knee with a subtotal lateral meniscectomy and chondroplasty of medial femoral condyle , tear involving anterior horn lateral meniscus	
Hearing Date: 4-15-05	

State of New Jersey Department of Labor and Workforce Development DIVISION OF WORKERS' COMPENSATION WC-376i	**ORDER FOR TOTAL DISABILITY w/Second Injury Fund - Page 4**	CASE NO'S.: 2011-4444 VICINAGE: ☑

Date of Injury: 10-21-2002	Claim Petition Number:
Employer Name:	
Permanent Disability Award: Settled 1-8-08 with claim number for 42 1/2% of right leg with abdullah credit of 27 1/2%	
Description of Injury and Disability: 5-1-03 - Repeat Arthroscopy and debridement to correct tear, anterior horn of lateral meniscus/osteophyte & chondroplasty right knee.	
Hearing Date: 1-8-08	

Date of Injury:4-18-06	Claim Petition Number
Employer Name:	
Permanent Disability Award: 42 1/2 % of right leg with 27 1/2% Abdullah credit along with case 2003-38430	
Description of Injury and Disability: 4-18-06 - osteophyte fracture of patella with lateral meniscal tear, status post surgery repair (7-26-06) removal of 2 loose bodies subtotal lateral meniscectomy and Chondroplasty medial femoral condyle/severe tri-compartmental arthritis w/osteophyte fracture of pole/patella	
Hearing Date: 1-8-08	

Date of Injury: 2-19-08	Claim Petition Number: Modification
Employer Name:	
Permanent Disability Award: 57 1/2% with Abdullah credit of 42 1/2%	
Description of Injury and Disability: Right total knee replacement superimposed on prior internal deranged right knee	
Hearing Date: 5-3-10	

Date of Injury: 2-19-08	Claim Petition Number:
Employer Name:	
Permanent Disability Award: Order Approving Settlement with Dismissal $4,500.00	
Description of Injury and Disability: Injury to back and right wrist	
Hearing Date: 5-3-10	

(Provide like data on additional sheets as required)

State of New Jersey Department of Labor and Workforce Development DIVISION OF WORKERS' COMPENSATION WC-376i	**ORDER FOR TOTAL DISABILITY w/Second Injury Fund - Page 5**	CA[illegible]: 2011-4444 VICINAGE:

Date of Injury: 2-19-08	Claim Petition Number:
Employer Name	
Permanent Disability Award: 75% of right leg	
Description of Injury and Disability: Residuals of tear of antrior cruciate ligament and posterior horn of medial meniscus and lateral meniscus, right total knee replacement, surgery for lysis of adhesion superimposed on pre-existing internal derangement of right knee. Abdullah credit of 57 1/2%.	
Hearing Date:	

Date of Injury: 2-8-10	Claim Petition Number:
Employer Name	
Permanent Disability Award: 25% of left leg	
Description of Injury and Disability: Total left knee Revision with Abdullah credit of 15%	
Hearing Date:	

Date of Injury: 10-21-2010	Claim Petition Number:
Employer Name:	
Permanent Disability Award: 20% of the abdominal area, multiple hernias, six surgeries and multiple in office excisions	
Description of Injury and Disability: Six surgeries and multiple office excisions;	
Hearing Date:	

Date of Injury:	Claim Petition Number:
Employer Name:	
Permanent Disability Award:	
Description of Injury and Disability:	
Hearing Date:	

(Provide like data on additional sheets as required)

State of New Jersey Department of Labor and Workforce Development DIVISION OF WORKERS' COMPENSATION WC-376i	**ORDER FOR TOTAL DISABILITY w/Second Injury Fund - Page 6**	CASE NO'S.: 2011-4444 VICINAGE:

PRE-EXISTING NON-COMPENSABLE DISABILITIES

Date of Onset: 3-17-97	Origin (if known): ☐ Congenital ☒ Accident / Injury
Description: low back injury - slipped on ice.	

Date of Onset: 11-1-97	Origin (if known): ☐ Congenital ☒ Accident / Injury
Description: Dislocation of left shoulder, hit by dry ice.	

Date of Onset: 1999	Origin (if known): ☐ Congenital ☒ Accident / Injury
Description: Left shoulder and left arm, rotator cuff tear and injury to bicep/ Arthroscopy left shoulder	

Date of Onset:	Origin (if known): ☐ Congenital ☐ Accident / Injury
Description:	

Date of Onset:	Origin (if known): ☐ Congenital ☐ Accident / Injury
Description:	

Date of Onset:	Origin (if known): ☐ Congenital ☐ Accident / Injury
Description:	

Date of Onset:	Origin (if known): ☐ Congenital ☐ Accident / Injury
Description:	

(Provide like data on additional sheets as required)

State of New Jersey Department of Labor and Workforce Development DIVISION OF WORKERS' COMPENSATION WC-376i	**ORDER FOR TOTAL DISABILITY w/Second Injury Fund - Page 7**	CASE NO'S.: 2011- 4444 VICINAGE:

PETITIONER DATA

Education (highest level completed): 2 years of college

Special Occupational Skills:

None

Rehabilitation Potential:

None

Third Party Actions:

If third party liability action is pending, provide the name and address of the attorney representing this petitioner if different than the workers' compensation attorney, the defense attorney(s), the case name and docket number.

N/A

(Respondent and Second Injury Fund reserve their rights under N.J.S.A. 34:15-40)

REMARKS:

* See Addendum

State of New Jersey
Department of Labor and Workforce Development
DIVISION OF WORKERS' COMPENSATION

WC-376i

ORDER FOR TOTAL DISABILITY w/Second Injury Fund - Page 8

CASE NO'S.: 2011-4444

VICINAGE: Camden

	REIMBURSE	TAX IDENTIFICATION NUMBER	TOTAL AMT. ALLOWED	PAYABLE BY PETITIONER	PAYABLE BY RESPONDENT
MEDICAL FEE ALLOWED: *(expert and/or testimonial)* t, Report and Evaluation	ti		600.00	300.00	300.00
Dr. ey, Report and Evaluation	i		600.00	300.00	300.00
A FEE:			23,178.96	9,271.59	13,907.37
STENOGRAPHIC SERVICE:					
MISCELLANEOUS Attorney Fees		See W-4	11,589.48	4635.79	6,953.69
Attorney Fee		See W-4	11,589.48	4,635.79	6,953.69

☐ ORDER FOR CHILD SUPPORT ☐ ADDENDUM ATTACHED

JUDGE OF COMPENSATION DATE

WE HEREBY CONSENT TO THE ENTRY AND FORM OF THIS ORDER AND ACKNOWLEDGE RECEIPT OF COPY:

Petitioner's Attorney

Respondent's Attorney

Petitioner (where applicable)

Deputy Attorney General

ADDENDUM

The following document is the Addendum which incorporates in one document the information needed for the Respondent and the Second Injury Fund to make the correct payments pursuant to Ort and Paul in all four cases. This Addendum should be attached to each of the four Orders not just the Order for Total Disability with Second Injury Fund Involvement.

If you have any questions about this material or the calculations please contact me at dmcnamee19@gmail.com or 609-509-6578 and I will do my best to answer your questions.

ADDENDUM TO ORDER FOR TOTAL DISABILITY WITH SECOND INJURY FUND INVOLVEMENT

Pursuant to N.J.S.A. 34:15-1 et seq. and the New Jersey Supreme Court in Ort. V. Taylor-Wharton, 47 N.J. 198 (1966) and Paul v. Baltimore Upholstery, 66 N.J. 111 (1974) payments for multiple Orders run consecutively not concurrently for each permanent injury. Also, once a Petitioner has been found to be permanently and totally disabled the Petitioner shall be paid at the Permanent Total Rate even if the Petitioner is still receiving payment for a Permanent Partial Award. The Permanent Total Rate in this matter is $572.32 based on a Wage of $817.60. Thus, after February 2, 2017, the Date of Totality herein, the Respondent, must pay the difference between the rates being paid in each of the three Permanent Partial Awards in Claim Petitions 2008-1111(right leg); 2010-2222 (left leg); 2011-3333 (abdomen) and $572.32 and the rate to be paid in the Permanent Total Award, Claim Petition 2011-4444(right shoulder, left hip and reinjury of left leg).

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1. Claim Petition 2008-1111(right leg, DOA 2/19/2008) This Permanent Partial Award is for 75% of the right leg with an Abdullah Credit of 42.5% of the right leg for a prior award entered on Claim Petition 2006-5555 on 1/8/2008 resulting in a new award of 162.48 weeks at $396 equaling $64,343.62 and with a Reopener Credit of $33,457.88 from an award entered in this case on 5/3/10 resulting in the Respondent owing $30,885.74 which when is paid at $396 results in Respondent paying 78 weeks from 2/13/2016 (the last date of temp paid on this case was 2/12/2016) through and including 8/12/2017. Since the Date of Totality is 2/2/2017 pursuant to Paul v. Baltimore Upholstery, Respondent must pay $176.32 to bring the Permanent Partial Rate of $396 up to the Permanent Total Rate of $572.32. This results in the Respondent paying $176.32 a week for 27 and 3/7 weeks from 2/2/2017 (DOT) to 8/12/2017 which is $4,836.28 towards the Permanent Total Award of CP2011-4444. Therefore, the total paid by Respondent is $35,722.02.
2. Claim Petition 2010-2222 (left leg, DOA 2/8/2010) This is a second permanent partial award for 25% of the left leg with an Abdullah Credit of 15% of the left

H 2

leg for a prior award under Claim Petition 2003-6666 resulting 31.5 weeks of payments at $212 for a total of $6678 from 8/13/2017 through and including 3/21/2018. The Respondent shall also pay pursuant to Paul v. Baltimore Upholstery, $360.32 a week which is the difference between the Permanent Total Rate of $572.32 a week and the Permanent Partial Rate of $212 a week for 31.5 weeks or $11,350.08 which is credited towards the Respondent's portion of the Permanent Total Award under CP 2011-4444. Therefore, the total owed by the Respondent is $18,028.08.

3. Claim Petition 2011-3333 (abdomen DOA 10/21/2010) This is the third Permanent Partial Award entered for 20% or 120 weeks at $227.40 totaling $27,288 payable from 3/22/2018 through and including 7/8/2020. The difference between the Permanent Total Rate of $572.32 and the Permanent Partial Rate of $227.40 is $344.92 which the Respondent will pay pursuant to Paul v. Baltimore Upholstery for 120 weeks for a total of $41,390.40 towards the Respondent's portion of the Permanent Total Award under CP2011-4444. Therefore, the total owed by Respondent is $68,678.40.

4. Claim Petition 2011-4444 (right shoulder, left hip and left leg DOA 11/3/2010) The Respondent is paying 90% Permanent Total Disability or 405 weeks at $572.32 a week which equals $231,789.60 however the Respondent's payments made pursuant to Paul v. Baltimore Upholstery of $4,836.28 (CP2008-1111); $11,350.08 (CP 2010-2222) and $41,390.40 (CP 2010-3333) totaling $57,576.76 shall be deducted from this amount leaving the Respondent owing $174,212.84 which when divided by the Permanent Total Rate of $572.32 results in the Respondent paying 304 and 3/7 weeks from 7/9/2020 through and including 5/9/2026 at the rate of $572.32
5. The Second Injury Fund shall pay 10% Permanent Total or 45 weeks at $572.32 commencing on 5/10/2026 through and including 3/20/2027 with benefits then to continue pursuant to N.J.S.A. 34:15-12(b) on 3/21/2027.

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Paul v. Baltimore Upholstering Co.

66 N.J. 111 (1974)

328 A.2d 610

FRED PAUL, PLAINTIFF-APPELLANT, v. BALTIMORE UPHOLSTERING CO., RESPONDENT-RESPONDENT, AND TWO PERCENT FUND, RESPONDENT-APPELLANT.

The Supreme Court of New Jersey.

Argued October 8, 1974.

Decided November 15, 1974.

*115 Mr. Charles J. Farley, Jr. argued the cause for plaintiff-appellant Fred Paul (Messrs. Farley & Farley, attorneys).

Mr. Lawrence G. Moncher, Deputy Attorney General, argued the cause for the respondent-appellant Second Injury Fund (Mr. William F. Hyland, Attorney General, attorney; Mr. Stephen Skillman, Assistant Attorney General, of counsel; Mr. Steven A. Tasher, Deputy Attorney General, on the brief).

Mr. Gerald W. Conway argued the cause for respondent-respondent Baltimore Upholstering Co. (during coverage of *116 Employers Mutual Liability Insurance Company

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of Wisconsin) (Messrs. Conway, Reiseman & Michals, attorneys).

Messrs. O'Brien, Brett, Holly & Martin filed a brief on behalf of respondent-respondent Baltimore Upholstering Co. (during coverage of Firemen's Fund American Insurance Company).

The opinion of the court was delivered by CONFORD, P.J.A.D., Temporarily Assigned.

The Second Injury Fund (known at times in the past as the One Percent Fund and the Two Percent Fund, and hereinafter referred to as the Fund) created by the Legislature from contributions by employers to absorb in certain cases of permanent and total disability part of the impact on employers of awards of workmen's compensation, L. 1923, c. 81, as amended at various times thereafter (now N.J.S.A. 34: 15-94, 95, 95.1), seeks review in this court of the imposition of partial liability upon it by the Appellate Division in respect of claims for compensation by Fred Paul for accidental disability arising out of his employment by Baltimore Upholstering Co. ("Baltimore")

On November 25, 1969 Paul suffered his fourth myocardial infarction, all in the course of employment by Baltimore as an operator and tufter in its upholstering plant. The first one occurred in February 1966. For this he was awarded partial permanent disability of 25% of total. Two additional infarctions in July and December 1966 resulted in another partial permanent disability award of 25% of total. In late 1967 Paul returned to work for Baltimore and continued there (except for a three-month interval in early 1969 when he was ill with coumadin[1] poisoning) until November 25, 1969, at which time he experienced severe chest pains while lifting a piece of furniture at work. The pains *117 persisted, and Paul received medical attention, being hospitalized about a week later. He has not been able to work since the November 1969 incident because of severe "heart" symptoms.

The original 25% award was entered against Firemen's Fund American Insurance Company ("Firemen's Fund") and the second against United States Fidelity & Guaranty Company ("U.S.F. & G."), which were respectively on the risk when the several prior infarctions occurred. In November 1969 Baltimore was covered by Employers Mutual Liability Insurance Company of Wisconsin ("Employers Mutual"), which is the real adversary of the Fund in this litigation.

Paul filed another claim petition for compensation in the Division of Workmen's Compensation after his 1969 infarction, based thereon, claiming total and permanent disability. Employers Mutual filed an answer and brought in as respondents to that proceeding the two carriers on the prior coverage and also the Fund. Judge of

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Compensation Saland found Paul to be totally and permanently disabled as a result of the November 1969 heart attack. He dismissed the claim of Employers Mutual against the Fund on the ground that the latter attack "aggravated and accelerated" the prior coronary disability "to the extent that [Paul] is now totally and permanently disabled." See N.J.S.A 34:15-95(b). The judge held U.S.F. & G. liable for 12 weeks of temporary disability for the coumadin poisoning and Employers Mutual for 450 weeks of compensation at $83.33 per week, less $11,000 in awards paid by the prior carriers, and he dismissed the claim against Firemen's Fund.

On Employers Mutual's appeal to the Appellate Division that tribunal in an unreported per curiam opinion held:

(1) the trial holding that the incident of November 1969 aggravated and accelerated the pre-existing coronary disability, thus rendering the total disability chargeable to the employer alone, was unjustified. The medical proofs compelled a conclusion that the said incident was the cause of *118 only some partial permanent disability, which when combined with and superimposed upon the partial permanent disability previously existing rendered the workman totally and permanently disabled. In such a situation the employer is responsible only for the disability attributable to the incident of November 1969 and the Fund is responsible for the remainder of the permanent total disability, subject to credit for the amounts awarded on the earlier claim petitions. The court directed a remand to the Division of Workmen's Compensation for allocation of the respective percentages of disability as between the employer and the Fund;

(2) because of the differential between the statutory maximum weekly rates for partial permanent disability ($40.00) and those for total permanent disability (as to this employee, $83.33), the deductions allowable for the earlier awards are to be calculated on the basis of dollars awarded rather than according to the number of weeks for which such awards were granted;

(3) the present award is payable beginning after the payment of the last installment of the previous awards for partial permanent disability, not before.

Paul and the Fund sought certification, which was granted. 65 N.J. 556 (1974). Although Paul's financial stake in the Appellate Division decision extends only to the delay in receipt of current compensation at full total permanent disability rates, see IV, infra, he also assails the decision that the Fund is responsible for any part of the liability of 450 weeks (less credits for previous payments). He maintains that liability therefor is solely the responsibility of the carrier, while that of the Fund will begin at the expiration of that

period, for such extended payments as may become due the workman under N.J.S.A. 34:15-12(b) (disability of the workman after the 450 weeks notwithstanding rehabilitation efforts to earn wages equal to those earned at the time of the accident).

The Attorney General on behalf of the Fund argued before the Appellate Division for an affirmance of the judgment *119 of the Division of Workmen's Compensation relieving the Fund of liability. In his petition here, however, assuming the Fund is liable, he attacks the holding of the Appellate Division that the employer's share of the joint liability is to be measured at the maximum partial disability rate of $40 provided for in N.J.S.A. 34:15-12(c) rather than at the maximum total disability schedule set forth in N.J.S.A. 34:15-12(b).

I

The initial issue presented for determination is whether the Appellate Division erred in overruling the holding of the Judge of Compensation, in effect, that the permanent total disability following the November 1969 infarction resulted from an aggravation and acceleration by that episode of the previous coronary disability of the workman. If so, it will then be necessary to determine whether, as a matter of law, such a finding of aggravation and acceleration leads to relieving the Fund of liability, as decided by the Judge of Compensation, even though the prior disabilities were compensable.

A

The Appellate Division was required to affirm the finding of fact mentioned above if that finding could reasonably have been reached on sufficient credible evidence present in the whole record, giving due weight to the expertise in the field of the Judge of Compensation and his opportunity of hearing and seeing the witnesses. De Angelo v. Alsan Masons, Inc., 122 N.J. Super. 88, 89 (App. Div.), aff'd o.b., 62 N.J. 581 (1973). Our own review of the record leads us to conclude that application of the stated test called for an affirmance of the trial finding of aggravation and acceleration.

Dr. Saul Lieb, a specialist in internal medicine, was called as an expert witness for Paul. On the basis of the *120 hospital records, Dr. Lieb testified that Paul had been admitted to the hospital on December 10, 1969 with a final diagnosis of arteriosclerotic heart disease and acute coronary insufficiency. The doctor also stated that the hospital's electrocardiograms indicated that Paul had suffered an acute myocardial infarction on November 25, 1969. Dr. Lieb had initially examined Paul in August 1966, when he estimated his disability from the first coronary to be permanent and to amount to 50% of total. He saw the patient again in August 1966 and on March 23, 1967 after the second and third infarctions, respectively, and

had then concluded that Paul was permanently disabled to the extent of 75% of total. Dr. Lieb's subsequent examination on February 27, 1970 led him to a conclusion that Paul was now 100% permanently disabled. The increased disability was attributed to the episode of November 25, 1969. The coumadin poisoning was no factor in the ultimate disability. He also opined that Paul's condition was causally related to his work.

The testimony on aggravation and acceleration was developed on cross-examination of Dr. Lieb on behalf of the Fund and Employers Mutual. While at one point he answered in the affirmative a question as to whether his "diagnosis of coronary insufficiency and probable myocardial infarction" of 1969 "combined with" the pre-existing pathology to cause the man "to be 100% of total", he said Paul's coronary condition had stabilized prior to the last infarction, and he responded in the affirmative to an inquiry whether the "last incident" aggravated the coronary or cardiac disability. He explained that it increased it. He also answered affirmatively an inquiry as to whether the last incident in any way "did aggravate, activate, accelerate any of the previous disabilities from infarctions or insufficiencies that [Paul] suffered". He explained, on further cross-examination: "The heart is one organ; it is not separate. While the incidents were separate, they occurred in the same person in the same organ."

*121 Dr. Sanford Lewis, also a specialist in internal medicine and cardiology, testified for Employers Mutual. As a result of an examination of Paul on July 14, 1970 he concluded that he had arteriosclerotic coronary artery disease with multiple episodes of myocardial infarction and coronary insufficiency. This rendered him disabled to the extent of 75% of total. Dr. Lewis stated that Paul's infarction on November 25, 1969 did not cause him any permanent disability. Rather, the 25% increase in disability since the prior awards of 50% of total was solely attributable to petitioner's increased age. In addition, the doctor was of the opinion that the man was still able to do sedentary work.

Dr. Jack S. York, also a specialist in internal medicine and cardiovascular disease, testified for U.S.F. & G. He examined Paul on November 14, 1967 and on March 22, 1972. Dr. York stated that he was 100% permanently disabled as a result of his medical history of heart trouble. The attack of November 29, 1969 did not aggravate the prior condition but rather added to the already existing problem. He concluded that the patient had no residual effects from the coumadin poisoning.

Judge Saland credited Dr. Lieb's testimony as to the November 1969 incident having aggravated Paul's earlier condition after an intervening period in which he had been a "competent working unit." He rejected the hypotheses of Doctors Lewis and York as "unrealistic and medically improbable." He expressly found that "as a result of the attack in

November 1969 [Paul's] coronary disability was aggravated and accelerated to the extent that he is now totally and permanently disabled."

We conclude it was within Judge Saland's province, under the proper limits of the rule of judicial review stated above, to accept the opinion of Dr. Lieb and reject those of the opposing physicians not only as to the extent of Paul's ultimate disability (permanent-total) but also as to whether that ultimate disability resulted from an aggravation or acceleration of the pre-existing disease. There was a sufficient, *122 credible basis in the testimony for the judge's affirmative finding on that question. None of the parties disputes on this appeal the invulnerability of the finding of ultimate total permanent disability, and of course the Appellate Division so found.

B

Were it not for the language of paragraph (b) of N.J.S.A. 34:15-95, the statute before us, we would entertain no doubt that the comprehensive construction of the Fund act in cases like Balash v. Harper, 3 N.J. 437, 442 (1950) and Wexler v. Lambrecht Foods, 64 N.J. Super. 489 (App. Div. 1960), certif. den. 34 N.J. 326 (1961), calls for the legal result of Fund immunity where the injury from the later employment-connected accident aggravates or accelerates the injury or condition attendant upon the prior accident, whether or not the prior injury was compensable.

Paragraph (b), added along with three other express exceptions to Fund liability by amendment of the act in L. 1940, c. 133, excludes liability of the Fund,

"(b) If permanent total disability results from the aggravation, activation or acceleration, by the last compensable injury, of a pre-existing noncompensable disease or condition. (emphasis added).

Although no one in this case has seriously argued the point, the question arises in our mind, cf. Ort v. Taylor-Wharton Co., 47 N.J. 198, 204, 205 (1966), whether the allusion in paragraph (b) to "pre-existing noncompensable disease or condition" justifies an inference that the Legislature intended thereby that the Fund was not to be immune from contribution if total permanent disability resulted from aggravation, acceleration, etc., by the last accident of a pre-existing compensable disease or condition, as in the present case. We think it in the public interest that we settle the question. We consequently proceed to explain our conclusion that a proper construction of the act as a whole does not warrant the inference of legislative intent just posed.

*123 First, it is noteworthy that this court long ago summarized the purpose and object of the statute in terms of exclusion of Fund liability where there was a causative connection between the injury or condition occasioning the compensable disability and the results of the prior disability without qualification as to the status of the prior disability as compensable or otherwise. See Balash v. Harper, supra, where the court said, in a carefully considered dictum, (3 N.J. at 442):

The test of the applicability of the "One Per Cent Fund" is (a) that an employee has become totally and permanently disabled when a compensable disability is superimposed upon a prior disability, whether compensable or not, and (b) that the prior disability is one for whose results the subsequent disability has not been a competent producing cause as by aggravation, activation or acceleration. If the last compensable accident produces an aggravation, activation or acceleration then any progression in the pre-existing condition is attributable and is part of the last compensable accident. Cf. Richardson v. Essex National Trunk & Bag Co., 119 N.J.L. 47 (E. & A. 1937); Voessler v. Palm Fetchteler & Co., 120 N.J.L. 553 (Sup. Ct. 1938) In re Glennon, 18 N.J. Misc. 196 (Essex Pleas 1940). (emphasis added)

The foregoing formulation has been frequently recognized by our courts as authoritative. Wexler v. Lambrecht Foods, supra (64 N.J. Super. at 501); Belth v. Anthony Ferrante & Son, Inc., 88 N.J. Super. 9, 16 (App. Div. 1965), aff'd 47 N.J. 38 (1966); In re Malinowski v. Male, 78 N.J. Super. 458, 463-464 (Cty. Ct. 1963); Schulman v. Male, 70 N.J. Super. 234, 244 (App. Div. 1961).[2]

*124 Significant evidence of the kind of separateness between the prior and later (employment-connected) accidental disabilities which the Legislature probably had in mind as a prerequisite for Fund liability in enacting the legislation in the first place is found in the case of Combination Rubber Mfg. Co. v. Obser, 95 N.J.L. 43 (Sup. Ct. 1920) aff'd o.b. 96 N.J.L. 544 (E. & A. 1921). That decision was later attributed by the Court of Errors and Appeals as the probable reason for the enactment not long thereafter of the first fund liability act in 1923. Richardson v. Essex National Trunk, etc., Co., Inc., 119 N.J.L. 47, 51-52 (1937).

In Obser it was held that an award for total permanent disability would be entered against an employer who took into his employ a one-eyed workman who lost the remaining eye in an employment-connected accident. By enacting the Fund statute the Legislature sought to encourage employers to hire handicapped or partially disabled people, secure in the knowledge that if total permanent disability occurred in employment because of the coincidental effect of the prior disability and the accidental disability in the employment the employer would not have to pay for the completely disparate disability which the

workman originally brought with him to the job. Richardson, supra (119 N.J.L. at 53). Even prior to the adoption of the 1940 amendment with its exculpatory subparagraphs (a), (b), (c) and (d), the Essex County Court, in a carefully reasoned opinion by Judge Hartshorne, recognized that the intent of the act was to impose upon the Fund liability only where the later compensable disability "has no causative connection with, the results of" the prior disability even though the combination of the two disabilities left the employee permanently and totally disabled. In re Glennon, 18 N.J. Misc. 196, 197, 12 A.2d 360 (1940). In language substantially appropriated by this court for its opinion in Balash v. Harper, supra (3 N.J. at 442), *125 the Essex Court said, 18 N.J. Misc. at 197, the purpose of the act was "to relieve the employer of the undue burden of a prior disability, with which, or its results, the disability arising in his employ had no causative connection, but which burden the previous broad provisions of the Workmen's Compensation Act were found to impose upon him." (emphasis added).

The foregoing rationale would seem to bar Fund liability where there is a physiological or pathological causal effect by the prior injury or condition operating upon the later, or vice-versa. See Wexler v. Lambert Foods, supra (64 N.J. Super. at 505); Vaccaro v. Walter Kidde and Co., 134 N.J.L. 491 (Sup. Ct. 1946). This has been the general understanding of the Fund section ever since. Berkowitz, Workmen's Compensation (1960) p. 229; Report, New Jersey Workmen's Compensation Study Commission (1973) pp. 38-41.

A possible clue to the purpose of the adoption of the exculpatory paragraphs of Section 95, particularly (b), by the 1940 amendment (which became effective June 18, 1940), may be found in the decision of the Court of Errors and Appeals on April 25, 1940 in Toohey v. Gorman, 125 N.J.L. 41, affirming the (former) Supreme Court judgment reported in 123 N.J.L. 235 (1939). There the court held the Fund liable for payments to a workman beyond the statutory 400 weeks for total permanent disability (under the extended payment provisions of N.J.S.A. 34:15-12b.) when the original award was against the employer for 75% partial permanent disability on the basis of an employment-connected fracture of the hip-bone which failed to heal because of a previous underlying Paget's disease. The Fund liability (which could continue for the employee's lifetime) was pegged to a finding in the (former) Court of Common Pleas of a 25% pre-existing disability constituted by the Paget's disease. Since there was an obvious physiological causal connection between the previous disease and the unhealed bone fracture eventuating in the total permanent disability in that case, the Legislature may have deemed the entire ultimate disability *126 in such a case fairly the burden of the employer alone, consistent with the rationale of the Glennon case, supra, and have therefore been motivated to prevent any further such impositions on the Fund by the adoption of the 1940 limitations of liability of the Fund.[3]

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Further indication of a legislative purpose for discreteness of the earlier and later conditions, in relation to each other, as a basis for Fund liability, is found in that paragraph of the 1940 amendment of the act, immediately following paragraphs (a), (b), (c) and (d), which states:

"Nothing in the provisions of said paragraphs a, b, c and d, however, shall be construed to deny the benefits provided by this section to any person * * * who in successive accidents has suffered compensable injuries, each of which, severally, causes permanent partial disability, but which in conjunction result in permanent total disability." (emphasis added).

As was noted in Vogel v. Red Star Express Lines, 73 N.J. Super. 534, 543 (App. Div. 1962), aff'd 40 N.J. 44 (1963), the word "severally" in this regard means, "distinctly, separately, apart from others." Thus further force is lent the hypothesis, in effect accepted by our courts since Balash v. Harper, supra, that the earlier and later conditions not be aggravative, activative or accelerative, physiologically, one of the other, if the Fund is to be implicated.

*127 Certain expressions in our opinion in Ort v. Taylor-Wharton, supra (47 N.J. 198), require comment in relation to the present discussion. In that case the workman was exposed to industrial dust over many years, and on a petition filed in 1956 was awarded 30% of total permanent disability on a finding of incapacity which was "fixed, measurable and permanent". He returned to work, and in February 1961 filed a petition for increased disability asserting total and permanent disability and that the additional exposure had imposed "an additional and independent disability on the already existing and fixed 30%", creating a "further 70% which in combination produced total and permanent incapacity". (47 N.J. at 202). The compensation judge made findings of fact accordant with the allegations of the petition, awarding the workman 100% permanent disability and allocating liability 30% to the carrier on the risk when the first exposure took place and 70% to the different carrier at the time of the subsequent exposure (including liability for extended payments after payment of 450 weeks of compensation). On appeal, the second insurer sought to hold the Fund for liability for the extended period. This court held that the matter should be remanded to bring in the Commissioner of Labor and Industry as a party to defend the claim against the Fund (47 N.J. at 203), but it then undertook a discussion of considerations which might be pertinent on the remand (Id. at 204-207).

In that discussion the court noted that paragraph (b) of section 95 was not specifically applicable to the situation for two reasons: (1) the earlier exposure was compensable; and (2) the later disability did not result from aggravation of the earlier but was "independent" and had "attached itself" to a previous disability adjudicated to have been "measurable,

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fixed and arrested." (47 N.J. at 204). The court implied that in such a situation the Fund might well be liable for any compensation due after 450 weeks. As to that much of the opinion, we remain in accord. The Ort facts as judicially *128 found represent a situation of absence of causal connection, physiologically, between the later and earlier conditions.

However, the implication in the extended discussion on page 205 of the Ort opinion of potential liability of the Fund in a purely hypothetical case of two successive accidents, both injurious to the lungs of an employee, with an "aggravation" by the second accident of the pre-existing lung condition resulting from the first accident, was not based on the facts before the court for adjudication. It does not in our present view represent a persuasive basis for departing from the long-settled understanding of Section 95 expressed by the court in Balash v. Harper, supra (which was not cited in Ort), and in the subsequent cases which have accepted its authority, without the intervention of any pertinent change in the statute since that time.

The core question activated by the reference in paragraph (b) of Section 95 to "pre-existing noncompensable disease or condition" is whether there is any discernible rationale in the policy and background of the statute supporting a view that while the Legislature would not want Fund liability where the last injury aggravates, activates or accelerates a noncompensable pre-existing disease or condition it nevertheless would intend such liability if the pre-existing disease or condition were compensable. None suggests itself or has been suggested to us. In a proper case the Fund can be liable whether the pre-existing condition arises from a compensable or a noncompensable accident. Richardson v. Essex National Trunk, etc., Co., Inc., supra (119 N.J.L. at 52). The only practical difference to the Fund between the two situations is that it would receive a credit against its obligation for any award made to the employee for a prior compensable disability. N.J.S.A. 34:15-12 subd. d. That difference has no relevance to the rationale of a statutory policy of denying the employer Fund relief when the ultimate total permanent disability is the product of aggravation, activation, etc. by the later injury of the earlier condition. The statutory policy *129 appears equally apposite whether the earlier incident is compensable or not.

While we are, as we should be, cognizant of the general policy of the statute to encourage the hiring by industry of people handicapped by pre-existing disabilities, the Legislature has manifested concern that the Fund not be subject to undue invasion (e.g., liability ensues only upon ultimate total permanent disability). The interests here in opposition are employers and insurers, and the State Fund; not employers or insurers versus employees. We are fully satisfied that against the background of past legislative and judicial treatment of the specific subject matter before us, as developed above, our holding here should be,

and it is, that the Fund is not liable for participation in the discharge of the workman's award, the later heart episode having aggravated and accelerated the earlier condition to bring about total and permanent disability.

II

In the Appellate Division, assailing a determination by the Division of Workmen's Compensation of sole responsibility for the permanent and total disability, Employers Mutual complained that the Division, in crediting it for the prior awards aggregating 50% of total permanent, had fixed the credit in terms of dollars of award ($11.000, at $40 per week for 275 weeks; the statute provides for the percentage of partial total disability to be translated into a corresponding portion of 550 weeks, N.J.S.A. 34:15-12, subd. c, par. 22). It was Employers Mutual's position that the pertinent section, N.J.S.A. 34:15-12, subd. d, calls for a credit of the number of weeks, not dollars, represented by the prior award. Acceptance of this position would benefit the carrier and by the same token harm the employee since the weeks of the prior partial award were admeasured at the $40 per week partial permanent rate while the weeks of the later total permanent award are payable at the higher rate of $88.33 per week.

*130 Since we have affirmed the Division holding dismissing the claim against the Fund, Employers Mutual is entitled to a determination of this question. In the Appellate Division, where the impact of the issue in question fell upon the Fund, not the employer, the credit was held measurable in terms of the prior dollar awards rather than in terms of weeks of disability.

On this question we conceive the Appellate Division to have been correct. The statute requires the employer or his carrier to be given credit "to the extent of the previous loss for which compensation has been paid." It seems to us totally inconsistent with the beneficent interpretation of the compensation act to which an injured worker is entitled to say that a subsequent award of total permanent disability, required by the act to be paid at the higher weekly rates fixed for such a disability, was intended to be permitted to be watered down by devaluing the statutory period of weeks due therefor through a credit against that number of weeks of the lower-rated weeks of the former partial permanent award to the employee. The net result of such an approach would be nothing less than the denial to the workman of the full measure of the total permanent disability award adjudicated in his favor by the Division of Workmen's Compensation.

Employers Mutual cites in support of its position Nelson v. Meeker Foundry Co., 30 N.J. 139 (1959). There the petitioner had in 1931 sustained an injury resulting in the loss of

three fingers of the left hand for which he was awarded and paid 135 weeks of compensation at the scheduled rate for loss of digits. In 1952 he lost his fourth finger of the hand in an accident, resulting in an impairment of his left hand equivalent to 100% loss of such member. The court held the petitioner entitled to an award for the statutory scheduled loss of the hand, but credited the employer for the number of weeks previously allowed for the loss of the digits, which, Employers Mutual tells us, had been compensated for at the maximum rate obtaining in 1931 one much lower than the maximum in effect in 1956. However, *131 the difference in rates was not noted in the opinion of the court nor was there any indication therein that the employee argued for restriction of the employer's credit to dollars of prior award rather than weeks. It thus does not appear that the issue we are resolving here was faced by the court in Nelson, and we do not regard the opinion as standing in the way of the eminently just result we are arriving at here on the facts before us.

Employers Mutual will be allowed a credit for the $11,000 paid Paul in the prior awards, not for the weeks of prior awards against the weeks due for the current total, permanent disability.

III

In directing apportionment of liability between Employers Mutual and the Fund on the basis of the "percentage of partial permanent disability which is found to have resulted from the incident of November 25, 1969" a percentage to have been fixed on remand the Appellate Division held that Employers Mutual would be liable for its proportionate share of 550 weeks at the partial permanent disability rate of $40 per week, with the balance of the total disability award of $37,498.50 (450 weeks at $83.33 per week) payable by the Fund. Both Paul and the Fund complain of this ruling. They contend that Employers Mutual should have been held at total permanent disability rates for the proper proportionate period of the 450 week statutory period.

As we have held there is to be no apportionment, the Fund not being liable at all, the issue posed does not have to be decided on this appeal. However, the Attorney General urges that we decide the question as the Appellate Division ruling is assertedly contrary to prior case law and administrative practice and is causing confusion in the field of Fund liability. We have therefore decided to deal with the matter.

N.J.S.A. 34:15-95 generally provides that Fund benefits are to be available "to persons totally disabled, as a result of *132 experiencing a subsequent permanent injury under conditions entitling such persons to compensation therefor, when such persons had

previously been permanently and partially disabled from some other cause". The only language in the section at all relevant to the question of apportionment of the total disability obligation between the employer and the Fund is the provision that payment from the Fund "shall be made from the date when the final payment of compensation by the employer is or was payable for the injury * * * sustained in the employment wherein the employee became totally and permanently disabled". This language is debatably construable as relating merely to the chronology of payments. It is uninformative as to the quantum or rate of payments by either category of obligor. Equally unhelpful is the corresponding language in the previous statutory formulation (L. 1936, c. 55) which called for the Fund payment to "cover that portion of the period for which the employer is not legally responsible due to the permanent and partial disability suffered or possessed by the employee at the time that the employee sustained" the permanently disabling injury. Cf. Svec v. Westfield Motor Sales, 110 N.J. Super. 225, 231 (App. Div.), certif. den. 56 N.J. 478 (1970).

The statutory language being murky as to the legislative intent, we look to the decided cases for enlightenment.

This much has always seemed clear. Where the Fund is held liable, while the employee receives compensation for total permanent disability, the employer at the time of the second injury is liable "for the percentage of disability attributable to that injury" (emphasis added) and the balance of the award due the workman is payable by the Fund. Nelson v. Meeker Foundry Co., supra (30 N.J. at 144); and see Vogel v. Red Star Express Lines, supra (40 N.J. at 45). It seems to us almost self-evident that when we referred, in Nelson, supra, to a "percentage of disability" chargeable to the employer, we meant a percentage of the total permanent disability, payment for which was to be awarded the workman. Thus, if it were determined in the instant case that *133 50% of Paul's total permanent disability was attributable to the 1969 infarction and 50% to the earlier disabilities, a failure to charge the last employer for 50% of what Paul is now entitled to receive for the 450 weeks due for total permanent disability, and instead limiting the employer's liability to half the 550 weeks (the statutory measuring period for partial disability) at the substantially lower partial disability rate, would be in effect to load the Fund with more than its due 50% of the liability to the employee in favor of relieving the employer of its full 50% (putting to one side liability for the extended period beyond 450 weeks, concededly the obligation of the Fund in entirety).[4]

A similar contention was rejected by the Appellate Division in Svec v. Westfield Motor Sales, supra (110 N.J. Super. 225). In Svec the petitioner had suffered an injury to his eye.

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When combined with his pre-existing condition, this left petitioner totally disabled and implicated liability of the Fund. The respondent argued that its liability should be limited to the scheduled loss for an eye, as provided in N.J.S.A. 34:15-12(c), which was a $35 per week maximum, and that the Fund should be responsible for the difference between such scheduled award and the award for total permanent disability, at that time fixed at $40 per week. The court expressly rejected this argument and in so doing stated (110 N.J. Super. at 232-233):

Our ultimate conclusion that the employer must pay the additional $5 per week for the 200 weeks is not incompatible with the basic philosophy of the Fund legislation. Were it not for the Fund Act, as was demonstrated in Belth v. Anthony Ferrante & Son, Inc., supra, 47 N.J., at 45-48, employers would continue to be, as they previously were, responsible for the entirety of the total and permanent disability consequent upon an accident at work even though the disability would not have been permanent and total had it not been for a *134 previous partial disability not attributable to the employment. See Combination Rubber Mfg. v. Obser, 95 N.J.L. 43 (Sup. Ct. 1920), aff'd o.b. 96 N.J.L. 544 (E. & A. 1921). Respondent continues, notwithstanding today's decision of the present case, to retain the basic benefit of the Fund Act in that the Fund takes over liability for that period of disability (here, for the heart and nephritis conditions) distinct from the period of disability for the eye which is the exclusive responsibility of the employer. That it must pay for that period at the permanent and total rate does not undermine the basic benefit it retains under the Fund scheme.

We are in full accord with these expressions. We consequently hold that when the Fund is properly held liable for benefits in a given case, the employer's share of the award payable for the total permanent disability is at the adjudged percentage of its causal contribution to that disability applied to 450 weeks at the statutory rate for total permanent disability.

IV

Finally, we have to deal with Paul's complaint that Employers Mutual has wrongfully refused to account to him for the full total permanent disability rate of $83.33 for any part of the period prior to January 29, 1972, notwithstanding that, as a matter of law, it was liable at that rate after the temporary disability period (ending April 28, 1970) following the infarction of November 29, 1969 which was adjudicated to have produced a total permanent disability. Employers Mutual has resisted this claim, invoking the provisions of N.J.S.A. 34:15-16, which states that:

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"Compensation for all classes of injuries shall run consecutively, and not concurrently * * * as follows: First, medical and hospital services and medicines as provided in said section 34:15-15. After the waiting period, compensation during temporary disability * * *. * * * Following both, * * * compensation consecutively for each permanent injury * * *."

See, applying the statute literally, Ort v. Taylor-Wharton Co., supra (47 N.J. at 207-209).

*135 Employers Mutual calls our attention to these facts. The obligations of the previous carriers for partial permanent disability payments at a maximum of $40 per week (which was the effective rate as to this particular workman) if paid weekly would not have expired until January 29, 1972. In fact, total payment of the prior awards was completed well prior to that date because the U.S.F. & G. voluntarily made its payments concurrently with those of Firemen's Fund still unpaid rather than exercise its right to withhold payment until Firemen's Fund had completed its due number of weekly payments. But Employers Mutual says the latter fact is irrelevant under the statutory direction for consecutive payment of permanent injury awards it had no liability to begin its payments of total permanent disability until January 29, 1972, when the period of weeks for which the prior insurers were responsible would have expired. (It had already, as the statute required, paid for temporary disability).

Paul counters that the presumptive statutory object of adequately sustaining an injured workman during his incapacity cannot be squared with remitting him to maximum $40 partial permanent weekly payments during a period of time subsequent to his sustaining total permanent disability for which the Legislature has ordained that he is entitled to maximum $83.33 weekly payments. To avoid a period of multiple compensation, he suggests the second carrier be required to pay so much of its weekly obligation as to make up for the deficiency between partial disability and total disability rates during the period when a prior award of partial disability is being paid.

In Ort, supra, where the discussion of N.J.S.A. 34:15-16 was in a context assuming non-applicability of Fund liability (47 N.J. at 208), the question was simply whether a carrier obligated for a 70% partial permanent award was entitled to withhold payments until completion of payment of a prior award of 30% partial permanent. The court held in the affirmative, relying on the literal import of the statute *136 as quoted above. Since the weekly rates were the same under both awards, the case did not present the hardship posed the workman in the instant case arising from the sharp difference between partial permanent and total permanent maximum rates. Even if, in Ort, the earlier award had been for partial permanent disability and the later one for total permanent disability, the weekly

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difference in maximums at that time would have been only five dollars. See L. 1962, c. 57, Sec. 1.

While, therefore, the strict holding in Ort, as well as the literal import of the statute, would seem in cold logic to sustain Employers Mutuals' position here, our courts have not hesitated in the past to construe the workmen's compensation act so as to comport with its presumptive beneficent and remedial objectives favorable to injured workmen rather than to be bound by its coldly literal import. See, e.g. Combination Rubber Mfg. Co. v. Obser, supra ("the spirit should not be killed by the letter", 95 N.J.L. at 45); Thornton v. Chamberlain Manufacturing Corp., 62 N.J. 235, 242 (1973); Dawson v. Hatfield Wire & Cable Co., 59 N.J. 190, 196-197 (1971).

In this light, we cannot conceive the Legislature would intend an injured worker, adjudicated to be entitled to benefits for total permanent disability at a then controlling maximum weekly rate of $83.33, to be required to subsist for any substantial period of time at the weekly maximum of $40 then being paid to him for a prior partial permanent disability. No doubt it would violate the statutory intent against double weekly payments, see Ort, supra (47 N.J., at 208-209), for both awards to be paid in full concurrently. However it would be fair and consonant with the clearly inferable intent of the Legislature as to how such a situation should be handled, had it been contemplated when the statute was drawn, for the subsequent carrier to be required, on notification by the employee of the facts, to pay so much of its weekly liability as would, together with the payments then being received under the prior award, equal the total permanent disability rate for which that carrier is responsible. We *137 so hold. The effect of our determination is not to increase the total dollar liability of the carrier, but only to accelerate its obligation for a portion of it.

In the present case, Employers Mutual having been on notice of the workman's claim in this regard pending this litigation, the matter is remanded to the Division of Workmen's Compensation for such adjustment of accounts between the parties as will cause the workman to have received from Employers Mutual what we are holding he should have been paid by that carrier before as well as after January 29, 1972, but without interest for any past due obligation of the nature discussed under this Point of the opinion.

Reversed and remanded to the Division of Workmen's Compensation for further proceedings conformable with this opinion.

For reversal and remandment Chief Justice HUGHES, Justices JACOBS, HALL, SULLIVAN, PASHMAN and CLIFFORD and Judge CONFORD 7.

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For affirmance None.

NOTES

[1] Coumadin is a blood thinner prescribed to avert myocardial infarctions.

[2] Distinguish such a case as Mayti v. Male, 59 N.J. Super. 478 (Cty. Ct. 1960), aff'd 79 N.J. Super. 554 (App. Div. 1963), holding that paragraph (b) is not applicable when the prior disability is due to more than one abnormality, one of which is aggravated by the later accident and the other not, although a substantial factor in producing the permanent total disability.

The facts in the instant case do not call for an expression by us as to the soundness of the Mayti holding. The general sclerotic condition from which Paul suffered prior to the last infarction would not qualify as a prior partially and permanently disabling condition, as it was not then "fixed, measurable and arrested," see Ort v. Taylor-Wharton Co., supra, 47 N.J. at 204-205. See also Wexler v. Lambrecht Foods, supra, 64 N.J. Super. at 505-506.

[3] Legislative history is not too helpful. The short "Statement" of purpose appended to Assembly Bill No. 284 of 1940 which in amended form became L. 1940, c. 133, contains no allusion, express or implied, to the purpose of the excepting paragraphs (a), (b), (c) and (d). The version of (b) in the bill was somewhat different from that of the committee substitute that finally adopted in that, inter alia, the former did not refer to the prior condition or disease as "non-compensable". However, the drafters may well have been specially concerned with specific cases where Fund liability had been adjudicated in relation to prior, causally related conditions which were in fact noncompensable, as in Toohey v. Gorman, supra. This would be a weak basis for necessarily inferring intent to render the Fund liable where the prior, causally related condition was compensable. See infra, passim.

[4] It is implicit in what we are saying that we find totally without merit Paul's contention that in a Second Injury Fund case the Fund can never be held for anything but the extended period after the initial 450 weeks of total permanent disability.

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Ort v. Taylor-Wharton Co.

47 N.J. 198 (1966)

219 A.2d 866

ENOS ORT (C-5240), PETITIONER, v. TAYLOR-WHARTON CO., DIVISION OF HARSCO CORPORATION (IMPLEADED AS TAYLOR-WHARTON IRON & STEEL COMPANY), RESPONDENT. ENOS ORT (D-87337), PETITIONER, v. TAYLOR-WHARTON CO., DIVISION OF HARSCO CORPORATION, RESPONDENT.

The Supreme Court of New Jersey.

Argued April 25, 1966.

Decided May 23, 1966.

*200 Mr. Everett Rhinehart argued the cause for respondent Taylor-Wharton Co., Division of Harsco Corporation (Mr. John W. Taylor, attorney, and Mr. Rhinehart, of counsel).

Mr. William T. McElroy argued the cause for respondent New Jersey Manufacturers Casualty Insurance Company (Messrs. Pindar, McElroy, Connell & Foley, attorneys, and Mr. McElroy of counsel).

Mr. Henry Harris argued the cause for petitioner (Messrs. Rothbard, Harris & Oxfeld, attorneys, and Mr. Harris of counsel).

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*201 Mr. Richard Newman, Deputy Attorney General, argued the cause for Raymond F. Male, Commissioner of Labor and Industry and Trustee of the One Per Cent Fund (Mr. Arthur J. Sills, Attorney General of New Jersey, attorney, and Mr. Newman of counsel and on the brief).

The opinion of the court was delivered by FRANCIS, J.

This is a workmen's compensation occupational disease case. The petitioner Enos Ort was employed for many years in respondent's foundry where in the course of his work he was extensively exposed to dust. On November 21, 1956 he filed a petition for compensation claiming that the dust inhalation had caused pneumoconiosis and emphysema which produced substantial permanent disability. After hearing at which the compensability of his claim was not contested the judge of compensation found that the incapacity was fixed, measurable and permanent and amounted to 30% of total permanent disability. Judgment for that percentage was awarded. It is not clear from the record whether the proceeding was a contested one or a species of settlement commonly referred to as a "streamline judgment." At the time of filing of the petition for compensation the New Jersey Manufacturers Casualty Insurance Company was the employer's insurer, and accordingly payment of the judgment was assumed by it.

Thereafter Ort returned to respondent's employ where he continued to be exposed to the dust. At this time the workmen's compensation risk had been assumed by the Liberty Mutual Insurance Company, it having replaced the New Jersey Manufacturers as the carrier. On February 27, 1961 Ort filed two new petitions for compensation alleging that as of March 2, 1959 (the date of cessation of work) his exposure to dust had resulted in total permanent disability. In one petition he sought a modification of the earlier judgment awarding him compensation for 30% of total permanent disability, alleging that the disease which produced that disability had progressed so as to increase the incapacity to total. Therefore, *202 he claimed that the earlier judgment should be altered so as to provide compensation for the total disability then existing. See N.J.S.A. 34:15-27. Since this alleged cause of action related back to the initial claim the original carrier, New Jersey Manufacturers, defended the employer in that case, as concededly it was obliged to do.

The thesis of the second petition for compensation was that the increase from 30% to total permanent disability existing as of February 27, 1961 resulted from an additional exposure to the employment dust and that such exposure superimposed an additional and independent disability on the already existing and fixed 30%, that is, a further 70% which in combination produced total and permanent incapacity. This alleged cause of action

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having come into existence when the Liberty Mutual was on the risk, it was required to assume the defense and the payment of any judgment awarded thereon.

The two actions were consolidated for trial. After hearing the medical evidence all of which agreed the petitioner was totally and permanently disabled, the judge of compensation dismissed the petition seeking to charge the increase in disability to a natural progression of the disease, and therefore the responsibility of the New Jersey Manufacturers Casualty Insurance Company. He held that at the time of the award of 30% of total permanent disability, the incapacity was fixed and certain, not of itself progressive and would not have progressed were it not for the additional hazard, in the sense of new or independent exposure to dust. This finding signified that Ort had not sustained the burden of proving by a preponderance of the evidence that the additional 70% disability was causally related to the original exposure. Schiffres v. Kittatinny Lodge, Inc., 39 N.J. 139, 149 (1963).

On the second petition the judge found that Ort's disability was total and permanent and that the additional 70% was chargeable to the Liberty Mutual since it was on the risk during the later exposure and particularly at the time when Ort was forced to cease working. In fine, so far as the additional 70% is concerned the judge treated it just as though *203 the exposure which produced it had come from a different employment. He found in effect that at the time of the 30% award the disability was fixed and static; if Ort had ceased the exposure to dust there would have been no change in his condition. Then he seems to have found that the continued exposure thereafter constituted a new and independent incident which, of and by itself, produced a disability to the extent of 70% of total. He treated the later exposure as if it were a second and distinct "accident," causing its own separate measure of disability, i.e. 70% of total.

As a consequence of his findings the judge declared Ort to be entitled to compensation on the basis of 100% disability, 30% of which constituted the full measure of the New Jersey Manufacturers liability, and the remaining 70%, plus any additional payments to be made after payment of the 450 weeks compensation (because of failure of rehabilitation) representing the responsibility of Liberty. See N.J.S.A. 34:15-12(b).

Liberty appealed the award to the County Court and thereafter to the Appellate Division, both of which affirmed the judgment in unreported opinions. A number of grounds of appeal were urged, particularly that the findings and judgment of the judge of compensation required a holding that the One Per Cent Fund, N.J.S.A. 34:15-95, is responsible for any payments after Ort has received 450 weeks of compensation. The Commissioner of Labor and Industry, who administers the Fund, was not a party to the

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proceedings in any tribunal below. We granted certification and requested the Commissioner to present his views on the issues involved. 47 N.J. 80 (1965).

In the briefs and oral argument before us the Commissioner and the petitioner took the position the One Per Cent Fund is not involved, while Liberty urged the contrary view. After a consideration of the case we are of the view that the matter should be remanded so that the Commissioner of Labor and Industry can be joined as a respondent, the nature and significance of the present judgment reviewed, and the problem *204 of liability of the One Per Cent Fund fully explored in light of that judgment.

I.

Under N.J.S.A. 34:15-95 the Fund comes into the zone of liability when a workman becomes totally and permanently disabled as a result of experiencing subsequent permanent injury under conditions entitling him to compensation therefor, when he had "previously been permanently and partially disabled from some other cause," subject to four other specified qualifications. Three of them, subsections (a), (c) and (d), obviously are inapplicable and so need not be mentioned. The fourth, subsection (b) is inapplicable also but may throw some light on the over-all problem. It operates as a bar to Fund liability "[i]f permanent total disability results from the aggravation, activation or acceleration, by the last compensable injury, of a pre-existing noncompensable disease or condition." ("Compensable injury" in this context would appear to have the same connotation as "compensable occupational disease." Cf. N.J.S.A. 34:15-32.) In the present case the 70% of total permanent disability did not result from aggravation of a "pre-existing noncompensable disease." That percentage added to or attached itself to a pre-existing disease compensable to the extent of 30% of total disability. And the 30% had been declared by judgment to be measurable, fixed and arrested. Cf. Brooks v. Bethlehem Steel Co., 66 N.J. Super. 135, 146 (App. Div.), certif. denied 36 N.J. 29 (1961). In view of the language of subsection (b) therefore, could it be said that if an employee had suffered a previous compensable occupational disease with a different employer, which had caused 30% of total permanent disability, and later became exposed to an occupational condition which independently caused the static disease to escalate to total disability, the One Per Cent Fund would not be liable after the second employer had made payments equalling 70% of total, and the workman continued to be *205 entitled to compensation after 450 weeks because of failure of rehabilitation? Would it make any difference that in the second employment he was exposed to the same kind of dust or that his total disability was from the same disease? Should it make any difference then to the availability of the Fund that in the present case Ort had a compensable, measurable, fixed, static, non-progressive disease

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before the additional exposure for the same employer which independently and of itself added 70% more to the existing disability?

Is not the situation the same as if Ort had sustained two separate and distinct compensable accidents each of which produced a percentage of partial total disability, but which in combination rendered him 100% disabled? Suppose a part of a machine on which Ort was working struck him in the chest causing damage to both his lungs and he was awarded 30% of total permanent disability for the injury. After returning to work for the same employer and while operating the same machine, the same part again struck him in the chest again injuring and aggravating the existing lung condition so as to cause total permanent disability. Would not the Fund be liable for any compensation required to be paid after 450 weeks? In this connection the paragraph of N.J.S.A. 34:15-95 which follows the limiting subsections (a), (b), (c) and (d) referred to above, says nothing in their provisions shall be construed to deny Fund benefits "to any person who in successive accidents has suffered compensable injuries, each of which, severally, causes permanent partial disability, but which in conjunction result in permanent total disability."

Those opposing the thesis of Fund liability here rely upon one phrase in the first paragraph of N.J.S.A. 34:15-95, noted above, namely that access may be had to its benefits by persons totally disabled as the result of experiencing a subsequent compensable permanent injury, when such persons have previously been permanently and partially disabled "from some other cause." They maintain that Ort's disability came from the same cause, namely pneumoconiosis and emphysema *206 resulting from the same type of dust exposure with the same employer.

It must be conceded the phrase creates some ambiguity in the application of the statute here. But in light of all of the provisions described can it be said that the Legislature intended to treat a pre-existing partial permanent disability caused by a fixed, non-progressive disease resulting from a specific period of dust exposure, as the "same cause," particularly in the face of a determination that the additional 70% which raised the existing incapacity to total, came from a different period of exposure, in the absence of which incapacity would not have increased. Here it may be noted that in Calabria v. Liberty Mutual Insurance Co., 4 N.J. 64, 71 (1950) this Court indicated that if increased disability results from continued exposure, as distinguished from the natural progress of the disease, an award against a subsequent carrier would be in order. On the other hand if the increased disability followed as the natural progress of the disease, the first carrier, or the first employer, if the employment had been changed after the original award, would be held responsible. See, 2 Larson, Workmen's Compensation Law, § 95.26 (1961).

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All of those questions have arisen because of the seemingly clear line of demarcation drawn by the judge of compensation between the first dust exposure which was responsible for 30% of the total disability, and the second, which separately and independently and without regard to the non-progressive, pre-existing static incapacity, caused an additional 70% of total disability. As was said at the outset, we shall not attempt either to resolve the questions on this record or to express any firm view thereon. In our judgment it would be more appropriate for the Division to explore the matter against a background of the entire proceeding and with the Commissioner of Labor and Industry as an active party and participant. In connection with the Commissioner's appearance as a party we point out that the judgment discharging New Jersey Manufacturers from liability on the *207 second petition for further compensation, and the judgment awarding the additional 70% of partial permanent compensation against Liberty Mutual on the petition against it, although binding on the two carriers, are not res judicata against him. He is entirely free to contend, and to offer supporting proof, medical or otherwise, that Ort's increase in disability from 30% to total permanent disability did not arise "from some other cause" as the statute requires, but came from the same cause which produced the 30%. And, of course, he may raise any other pertinent defense to the alleged liability of the Fund for such payments as may be required after 450 weeks. Moreover, in the proceeding under discussion, the burden will not be on the Commissioner to demonstrate non-liability of the Fund. On the contrary the burden of persuasion in that regard rests with Liberty, whose liability for compensation after the 450 week period must be recognized, unless that carrier establishes an obligation under the statute on the part of the Fund to take over such payments.

II.

The record reveals that payment of 165 weeks compensation representing the award of 30% of permanent total disability had not been completed by New Jersey Manufacturers when the second judgment requiring Liberty to pay for the additional 70% was entered. New Jersey Manufacturers continued payments until December 15, 1959 when the award became fully satisfied. In the meantime under the second award Liberty was directed to pay compensation for temporary disability from November 1, 1958 to May 13, 1959, with payments for the 70% of permanent total disability to begin on the latter date. Liberty argues it should not have been required to make any payments on the award against it until the first judgment had been fully satisfied. In support of its position reliance is placed on N.J.S.A. 34:15-16 which provides in pertinent part:

*208 "Compensation for all classes of injuries shall run consecutively, and not concurrently, * * * as follows: First, medical and hospital services and medicines as

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provided in said section 34:15-15. After the waiting period, compensation during temporary disability. * * * Following both, * * * compensation consecutively for each permanent injury * * *."

The significance of the statutory language is that where a second award of compensation for partial permanent disability is made while a previous award for partial permanent disability is being paid, but has not been satisfied fully, payment on the second award should not begin until after the last installment of the first has been delivered. Cf. Diskon v. Bubb, 88 N.J.L. 513 (Sup. Ct. 1916). This rule, however, does not apply to payment of compensation for temporary disability for a second compensable accident which occurs while payments for permanent disability are being made on an outstanding award arising from an earlier accident. Obviously, if a workman is given an award for partial permanent disability, returns to work while it is being paid, and sustains a second compensable accident causing temporary disability, compensation therefor should be paid notwithstanding the other award then being paid. The statute provides no bar. Moreover there is no conflict between the two types of payments because compensation for temporary disability represents a partial substitute for loss of current wages.

Under the circumstances we may put aside the payments of compensation for temporary disability under the second award. There was no error in paying such compensation while the permanent disability payments under the first award were being made. The inception date of Liberty's liability for permanent disability payments under the second award, however, became fixed as of December 15, 1959 when the last payment of the first 165 week award was made. This represents no diminution in extent of Liberty's monetary obligation under the award; simply a recognition of the statutory mandate to satisfy two permanent disability awards consecutively and not concurrently, and thus avoid double *209 weekly payments. The extent to which the compensation payments overlapped on the two awards is not clear from the record, nor is it clear whether any adjustments have been made with respect thereto. In view of our holding, the parties are directed to adjust the payment schedule to bring it into compliance. If they cannot agree, the matter may be presented to the judge of compensation for resolution on the remand.

III.

We have examined the other grounds of appeal presented, and find no merit in any of them as would require reversal.

For the reasons stated the judgment is modified, and the matter is remanded to the Division to be disposed of in accordance herewith.

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For modification Chief Justice WEINTRAUB and Justices JACOBS, FRANCIS, PROCTOR, HALL and SCHETTINO 6.

Opposed None.

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2013 New Jersey Revised Statutes
Title 34 - LABOR AND WORKMEN'S COMPENSATION
Section 34:15-16 - Compensation to run consecutively; payment for compensation, medical treatment, etc., after termination of liability

Universal Citation: NJ Rev Stat § 34:15-16 (2013)

34:15-16. Compensation to run consecutively; payment for compensation, medical treatment, etc., after termination of liability

Compensation for all classes of injuries shall run consecutively, and not concurrently, except as provided in this section and in section 34:15-15 of this Title, as follows: First, medical and hospital services and medicines as provided in said section 34:15-15. After the waiting period, compensation during temporary disability. If total period of disability extends beyond 4 7 days, compensation to cover waiting period. Following both, either or none of the above, compensation consecutively for each permanent injury, except that permanent disability, total or partial, shall not be determined or awarded until after 26 weeks from the date of the employee's final active medical treatment, or until after 26 weeks from the date of the employee's return to work, whichever is earlier, or, if no time is lost or no treatment is rendered, then permanent disability, total or partial, shall not be determined or awarded until after 26 weeks from the date of the accident, except in cases of

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amputation or enucleation or death from other cause within that time and except when earlier determination of permanent disability is waived by the employer or his insurance carrier. Nothing herein contained shall prevent an employer or his insurance carrier from paying permanent disability compensation voluntarily prior to the expiration of the 26-week period. Following any or all or none of the above, if death results from the accident, expenses of last sickness and burial. Following which compensation to dependents, if any.

Where an employer or his insurance carrier desires to pay for or furnish compensation, medical, surgical, or hospital treatment, drugs, orthopedic or prosthetic appliances, after the date when payments under sections 34:15-12 and 34:15-13 of this Title have terminated, the employer or his insurance carrier may, in writing, reserve the defense of the jurisdictional limitations provided by sections 34:15-27, 34:15-34, 34:15-41 and 34:15-51 of this Title; provided, that the reservation is approved by a deputy director after advising the petitioner personally of his rights and of the effect of such reservation.

Amended by L.1945, c. 74, p. 390, s. 8; L.1956, c. 141, p. 572, s. 4; L.1959, c. 138, p. 579, s. 1; L.1966, c. 126, s. 4.

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