CATRAMBONE REVISITED

Making permanent and partial disability claims co-exist

Justice James H. Coleman, Jr. Inns of Court

2022

By: Frank A. Petro, Esquire

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INTRODUCTION

Few workers' compensation case decisions over the past decade have generated more controversy and misunderstanding than Catrambone v. Bally's Park Place. It addresses the relatively rare issue of whether a Petitioner who receives an award of 100% permanent total disability is barred as a matter of law from **thereafter** receiving increased permanent partial disability for a pre-existing compensable disability involving a **different** body part for which an Application for Review or Modification is filed, compensable medical treatment provided and for which the prior condition has worsened **subsequent** to the date of Petitioner's permanent total disability onset. A Catrambone increase can never occur if the permanent total disability claim is an aggravation of the body part contained in the prior claim.

As in any Court decision (Trial or Appellate), the particular facts of the case in question are critical to the determination which is ultimately made regarding any contested issue. This is particularly true within the framework of Catrambone since on its face, it is "axiomatic" that: 1) the workers' compensation statute provides 100% permanent total disability as the maximum permanency a Petitioner can receive for any one case **and** 2) once permanent total disability benefits are apportioned on a Second Injury Fund award, such apportionment never changes so long as the Petitioner remains permanently and totally disabled.

RELEVANT PROCEDURAL HISTORY AND FACTS

Catrambone involves two specific Claim Petitions. Claim Petition 2007-16972 represented a compensable low back injury of March 18, 2006 for which the Petitioner received a permanent partial disability Order Approving Settlement on May 15, 2008 in the amount of 27 ½% with a 12 (d) credit of 7 ½%.

Thereafter the Petitioner filed Claim Petition 2009-7914 against the same Respondent for a wholly unrelated left shoulder injury of June 14, 2008 for which he underwent a left shoulder repair and received a permanent total disability award with Second Injury Fund involvement on November 29, 2010. Total disability permanency was apportioned 33 1/3% against the Respondent (for the left shoulder) and 66 2/3% against the Second Injury Fund (for multiple prior disabilities including his prior low back disability part of which was associated with his claim of March 18, 2006). The Petitioner's date of total disability was deemed to be February 1, 2009.

During the pendency of the left shoulder Claim Petition 2009-7914, the Petitioner had re-opened his prior 27 ½% low back disability Claim Petition 2007-16972. He received significant additional non-surgical treatment. His low back claim was consolidated for hearing with the left shoulder total disability claim. On November 29, 2010, the Petitioner's low back award of 27 ½% was increased to 30% permanent partial total in addition to the Petitioner receiving his

aforementioned total disability/Second Injury Fund Award regarding his subsequent shoulder injury.

It should be noted that at the time of the consolidated hearing, technically the Petitioner was receiving a 2 ½% permanent partial disability increase on his prior low back claim effective November 29, 2010 (date of hearing). This was almost one year and ten months subsequent to the agreed upon onset date of permanent total disability for the subsequent left shoulder condition (February 1, 2009). Additionally the increase represented permanency weeks of compensation fully accrued prior to February 1, 2009. There was no objection by any of the parties as to the entry of both awards.

Following the entry of the November 29, 2010 awards, the Petitioner's low back condition deteriorated. He filed a second Application for Review or Modification of Claim Petition 2007-16972. The Respondent accepted responsibility for all necessary compensable medical treatment, however it contested that the Petitioner was entitled to **any** increased permanency benefits notwithstanding that there was a clear natural deterioration of the Petitioner's overall medical condition which was causing an increased loss of function both anatomically and in the performance of the Petitioner's ordinary activities of daily living. The Respondent primarily contested any increased permanency on the basis that since the Petitioner was now a permanent total disability recipient from his subsequent left shoulder claim, he was therefore "legally" barred from receiving any further permanency benefits for the prior low back claim because he was then receiving "all the permanency disability payments the law permits" which should be considered the "maximum permanency" entitlement.

The issue of Petitioner's entitlement to increased permanent partial low back permanency was fully litigated with both evaluating physicians testifying. The Judge of Compensation entered a permanent partial disability Judgment on March 19, 2014 finding a 5% worsening of the Petitioner's low back disability thereby increasing the permanency award to 35% permanent partial disability. This normally would have equaled compensation running from March 18, 2006 to September 27, 2009 (184.218 weeks) at $322.00 per week. New net permanency would have totaled $27,048.00 once appropriate credits were taken. However, the Court recognized that as of February 1, 2009, the Petitioner was then entitled to (and had already received) permanent total disability benefits in connection with the subsequent left shoulder claim which benefits had now been fully paid to date by both the employer with the Second Injury Fund now making payments. Consequently the Respondent was Ordered to pay the Petitioner low back accrued permanency benefits through January 31, 2009 only. The Second Injury Fund was ordered to be reimbursed by the Respondent for the balance of the awarded payments between February 1, 2009 and September 27, 2009 (on the rationale that the Second Injury Fund was the natural beneficiary of payments by way of a conventional "Paul overlap" award. Here the Respondent's obligation for permanent total disability had already been fully paid so there was no "Paul" modification of the Respondent's permanent total disability payments.

APPEAL PROCESS

The Second Injury Fund was never a party to the Petitioner's second Application for Review or Modification of Claim Petition 2007-16972. The Respondent appealed the Trial Court Judgment essentially arguing that it was error for the Judge to award **any** increased permanency benefits as a matter of law because the Petitioner, as a permanent total disability recipient, had been adjudicated for the maximum permanency benefits he could receive as of the February 1, 2009 (the date of total).

Ultimately the Second Injury Fund filed to intervene in connection with the Respondent's appeal basically stating that while it agreed with the Respondent's position, in the event the Appellate Division affirmed the Trial Judge's decision, the Second Injury Fund agreed that the balance of payments between February 1, 2009 and September 27, 2009 should be paid to it consistent with the Court's ruling.

The Respondent never specifically addressed this narrow part of the decision of the Court (i.e., who, if anyone, should be paid for the weeks awarded representing the permanency payments from 02/01/2009 date of total and 09/27/2009 the last date of permanent partial disability awarded).

The primary emphasis of Respondent's Appeal was that the Petitioner was not entitled to be paid **any** further benefit for increased permanency even though a portion of the retroactive permanency payments represented weeks of compensation having accrued prior to the Petitioner's date of permanent total disability payments notwithstanding that the actual payment issuance of the same was subsequent to the date of permanent total disability.

There were numerous arguments made on behalf of the Petitioner seeking Appellate affirmance which included:

1. Respondent's position regarding statutory and legal precedent only applied to the permanent total disability award itself and not any prior viable partial disability awards;

2. Close v. Kordulak Bros., N.J. 589 (1965);

3. The liberal construction requirement of the statute in favor of the claimant in order to effectuate legislative intent;

4. The absence of any legal precedent inconsistent with the determination of the Trial Judge on the manner of payment in this particular case;

5. No specific statutory provision restricting payment as urged by the Respondent;

6. Unequivocal statutory mandates regarding payment of separate and distinct claims of compensation and the express and specific time periods restricting or limiting re-opening of such claims, inclusive of the concept of a "ceaseless" flow of indemnity benefits in any one claim;

7. The Respondent's position would result in an improper windfall to the Respondent in the low back claim regarding its potential statutory period of liability for future medical treatment in re-opened claims especially where the last date of permanency paid represented the last date of payment for the starting of the running date for the Statute of Limitations;

8. Recognition that Workers' Compensation is a claim-specific statute where the provisions of the statute must be integrated as a whole in order to effectuate reasonably and responsibly all of the multiple compensation benefits entitled to a Petitioner consistent with overall legislative intent that significantly injured employees should be entitled to significantly increased compensation benefits well in excess of the provisions of the prior Statute;

9. The impropriety of a permanent total disability award as being used as a sword to thwart the re-opening of a pre-existing permanent partial disability and consequential restriction of benefits especially to those accrued prior to the date of permanent total disability;

10. The rate for permanent total disability is not always a higher rate than the permanent partial disability are payable to a Petitioner depending upon wages and disability awarded in each claim (unlike what pre the 1979 amendments where all permanent partial disability awards were paid at a maximum rate of $40.00 per week) and therefore always lower than the permanent total disability rate;

11. Paul established the template that the Compensation Judge properly relied upon (notwithstanding that it was inconsistent with Ort and the arguable "literal" language of Section 16.) (Ironically Respondent in Paul (a pre-1979 case) argued the award of permanent total had to be deferred until the $40.00 per week permanent partial disability award was fully paid);

12. The Second Injury Fund only pays for a specific permanent total disability award when the Petitioner's permanent total disability award for a specific accident or occupational exposure **alone** is deemed insufficient to reach 100% permanent total disability overall status without an appropriate amount of contributory pre-existing disability deemed to exist at the time of the aforementioned accident/exposure which **in combination** with the Respondent's liability renders the Petitioner permanently and totally disabled. The Second Injury Fund's liability is always the difference between the percentage of permanency against the Respondent on the last compensable accident and 100%. (In other words, the payment of a pre-existing medical condition whether compensable or not, is not necessarily an expression of the amount of any such pre-existing disability awards in the aggregate. Rather the Fund pays so long as there is a **sufficient** quantum of **remaining** disability in existence at the time of the last compensable accident or exposure to render the Petitioner 100% disabled once it is added to the Respondent's specific percentage which is always determined first);

SUPREME COURT APPLICATION AND RESULT

Ultimately the Appellate Division affirmed the Trial Judge's decision in an unpublished decision which thereafter was appealed by the Respondent. Certification was granted by the Supreme Court which heard oral argument but then issued a final Order that the Respondent's form of Order on December 6, 2016 concluding that the Respondent's Certification to the Supreme Court was "Improvidently Granted" and therefore the appeal was dismissed with a subsequent January 24, 2017 denial of an Application for further reconsideration of the Supreme Court's dismissal of the appeal.

CONCLUSION

Attached is a copy of the Briefs filed by the parties and a copy of the decision from the Appellate Division which provide more detailed reference to the multi-faceted arguments and considerations appropriate in connection with the issues presented in the appeal process regarding Catrambone.

There are a number of obvious nuances associated with the issues presented in a Catrambone situation. While it is a situation that rarely occurs, it is simultaneously one of considerable import addressing the practical manner of liability payment situations in multiple claim permanency payments involving permanent total disability. Its resolution also touches upon collateral issues beyond the strict manner of payment of multiple awards. It recognizes the independent integrity of separate and distinct disability claims. It appreciates that while a claimant cannot receive more than permanent total disability for his or her specific 100% disability claim, such a permanent total disability claim confines itself solely to the specific claim in question and does not "automatically" extinguish the full rights and benefits contemplated by the Statute with respect to pre-existing otherwise viable separate and distinct claims for permanent partial disability, some of which can be even more substantial than the Respondent's exposure in the total disability claim depending upon the totality of circumstances presented.

The practical consideration first step in any case where Catrambone is an issue (once a permanency increase is determined regarding the reopened claim) is to determine the weeks of newly increased permanency that will be paid with the new permanent partial disability award. This requires a complete determination of full retroactive benefits inclusive of the dates of the weeks of both retroactive and potentially prospective permanency payments which would be paid in a conventional non-total setting. If the reopened claim results in an award of compensation for which overall permanency benefits are fully accrued prior to the date of subsequent total disability (which has already been entered) for which payments have been made, the same presents an easier issue for resolution than if the new permanent partial disability award in the aggregate causes permanency benefits to exceed the date of permanent total disability for the subsequent unrelated condition.

Strict Catrambone compliance requires that the part of the increased partial disability award representing weeks subsequent to the date of total is paid to the Second Injury Fund if the Respondent has already paid its permanent total disability obligation. If Respondent is still paying, then there would be an appropriate credit and modification as to the permanent total disability award so that the Fund would come on later (consistent with "Paul" type modification).

An important consideration here is that a permanent partial disability award can sometimes be greater in amount and/or rate than the Respondents' component of the permanent total disability award with Second Injury Fund liability. Depending upon the wages in each such case and/or the severity of the relative compensable injuries from the Respondent's perspective, the permanent partial disability award could be far more significant (at least as to the need for further medical treatment) than the medical component of the permanent total disability award, again depending upon the relative nature of the claims. The medical condition which was deemed compensable in a permanent partial disability claim can also be far more significant in terms of the overall aggregate benefits payable by the Respondent than is the permanently totally disabling condition which is the subject matter of a permanent total disability award especially if there is Second Injury Fund liability and the last compensable accident disability is a relatively modest percentage. These are significant factors preserved by the Catrambone decision.

The argument that a person "can't get more than total" is true. But such truth is only within the context of the actual claim giving rise to the Petitioner's Award for 100% permanent total disability. In this context, Workers' Compensation is best viewed as a claim specific practice. For example, in every case where there is Second Injury Fund liability where the Fund is paying a lower percentage than the aggregate amount of pre-existing disability awards which may exist, the Petitioner could arguably be receiving "more than total," but this is not the definition of permanent total disability under the law. Consider a hypothetical where a Petitioner has three separate partial total awards of 35% each for a repaired compensable right shoulder, a repaired cervical spine and a repaired low back respectively and then suffers a serious compensable left shoulder injury requiring a total left shoulder replacement. It is determined that the Petitioner is permanently and totally disabled as a result of a combination of the left shoulder disability and those three prior compensable disability awards each of which remained disabling at the time of the last compensable accident. It is further determined that the left shoulder was a severe loss of function resulting in an Award of 100% permanent total disability with an apportionment of 50/50 with the Second Injury Fund.

Simply looking at the "arithmetic," the argument could be made that this Petitioner was receiving "more than total" because he or she had three separate Awards of 35% of permanent partial disability on top of which he or she was now receiving 100%. The Fund's contribution is always only the difference between 100% and the percentage contribution by the Respondent for the last compensable disability and not the amount of actual "pre-existing disability" that

may pre-exist as an actual medical functional concept. Again, such Respondent/Fund apportionment never changes so long as there remains liability for permanent total disability.

It should also be appreciated that much of the "Second Injury Fund" precedent and liability between multiple carriers (such as in Paul, Ort, etc.) involve pre-1979 claims where permanent partial disability was capped at $40.00 per week and the Second Injury Fund was more limited than its existing liability. These are important considerations in understanding the scope of relevancy of the statutory provisions when the current Act is taken as a whole. Both Ort and Paul dealt with a single employer and the same medical conditions within the context of whether the Second Injury Fund was relieved of liability regarding aggravation issues.

Cases such as Ort and Paul ultimately interpreted certain statutory provisions and precedents where appropriate at their time to make certain that Petitioners with significant disabilities were not denied or delayed their entitlements. See e.g. Poswiatowski where post 1979 amendments were the subject of judicial gloss combining the disabilities for one accident for total award calculation contrary to explicit contrary statutory language.

We presently live in a far different workers' compensation world than we did 46 years ago. We now have an entirely different statute for payment of permanency benefits designed specifically to make certain more significantly injured workers are more substantially compensated as compared to their pre 1979 predecessors. That was a clear cornerstone legislative intent in addition to also providing Respondents some specifically enumerated cost containment provisions. Respectfully, the legislature was unlikely to have considered the impact of the significant legislative changes on the manner of payment of revised second injury fund liability under the new Act especially with multiple viable pending permanency claims.

In dealing with any novel fact situation involving payment of significant partial disability awards, such as presented by Catrambone, but by no means confined to the same, it is often useful to consider the overall intent of the Statute, the explicitness of the statutory language, purpose and relative equities of result depending upon the interpretation and whether or not your position comports with the intent of the Compensation Act as applied to current circumstances. This is particularly compelling in a current system where the norm is to fully pay each claim as it arises.

In the final analysis, Catrambone only answers the simple question whether the Petitioner can re-open and receive increased permanency benefits for a pre-existing permanent partial disability notwithstanding that he or she has already received an award of permanent total disability for an unrelated subsequent accident involving a different body part. But it does open the door to potentially addressing many different types of manner of payment issues within the context of multiple claims.

TALKING POINTS AND QUESTIONS

These materials are intended to facilitate not only a better understanding of the Catrambone decision, but to discuss associated issues and practical considerations involved generally with the interplay of permanent partial disability awards and permanent total disability awards regarding issues of both calculation and/or payment. To that end, consider the following:

1. What is the precedential import of an Appellate Division decision which is not formally "approved for publication," but for which the New Jersey Supreme Court decides its certification decision was "Improvidently Granted" after oral argument occurred?

2. If Catrambone's second Application for Review or Modification of Formal Award for his low back disability award was "denied" as a "matter of law" solely because he had been awarded 100% permanent total disability for a subsequent shoulder injury, would the Respondent/carrier in his low back claim be receiving an improper "windfall" by way of a premature extinguishing of the benefits otherwise contemplated under the Compensation Statute regarding permanent partial disability claims (especially with respect to medical treatment) not to mention retroactive permanency otherwise payable prior to the date of total?

3. Do you feel that the Respondent should have been estopped from appealing increased permanency in connection with the second Application for Review or Modification on the basis that technically the same argument was technically available at the time the first Application for Review or Modification was adjudicated concurrently with the permanent total disability claim?

4. In a Catrambone situation, (where the Respondent in the compensable total claim has already paid its indemnity obligation), do you agree that the Second Injury Fund should be reimbursed by the Respondent in connection with the payments that are made beyond the date of total on the basis that it would otherwise be the natural beneficiary of a conventional "Paul overlap" award? If not, why not?

5. If you were the Judge initially hearing the Catrambone claim, would you have decided it differently and if so, how and why?

    5a. Do you believe that the Statute equally protects the benefits it provides for permanency and medical treatment both with respect to permanent partial and permanent disability awards?

6. If the Petitioner's permanent total disability rate was significantly less than his permanent partial disability rate, how, if at all would this factor into your opinion as to the appropriate recipient of the re-opener's increased permanency benefits especially as to whether or not the Petitioner vs. the Second Injury Fund should be paid the same? Should not the Petitioner who has a previous permanency partial disability award, be entitled to all of the

monetary benefits that the claim entitles him/her to receive regardless of whether or not there is a subsequent permanent totally disabling claim which involves a significantly lower wage and rate (potentially in part because of the prior significant disability) and which disability technically contributes in part to the Petitioner's overall permanent total disability with Second Injury Fund benefits notwithstanding that the Second Injury Fund itself is not paying that claim in particular.

7. Consider the following hypothetical and calculate payments pursuant to Catrambone.

a. CASE ONE: Date of accident 01/02/2015 – Low back injury

Wage $1,000.00 – Rate for TTD - $700.00

Temporary disability was paid through 06/30/2015 for low back injury.

CASE TWO: Date of accident 02/01/2016 involving serious injuries to cervical spine, right shoulder and concussion

Wage $1,000.00 – Rate for TTD - $700.00

Temporary disability was paid 02/01/2016 through 02/01/2018 for which the Petitioner undergoes significant medical treatment inclusive of two cervical spine fusions and two right shoulder repairs and having significant cognitive deficits from a severe traumatic brain injury.

A Second Injury Fund Petition was pending during the pendency of the first claim and ultimately the Petitioner received a 25% permanency Award in connection with the first claim and a 75/25% split with the Fund for the second claim with a date of total of 02/02/2018. These claims are consolidated for their respective permanency awards.

How are each of these two awards paid (this represents a classic Paul overlap calculation.

b. Further consider that the January 2, 2015 claim was re-opened and the Petitioner further undergoes a two level fusion surgery for the low back. On 02/20/2020 it is determined that the Petitioner's low back permanency is 50% permanent partial total disability (there had been significant complications in connection with the surgeries with significant osteomyelitis). Under Catrambone how would the Application for Review or Modification be paid? (total number of weeks, total payments and the duration of the same).

c. Assuming all of the above, if there was another compensable accident of 01/02/2014 wherein the Petitioner suffered a multifaceted non-operated pelvic fracture

with 26 weeks of temporary disability benefits paid and an Award entered on 06/01/2015 in the amount of 25% of permanent partial total in a case where the wage was $1,000 and a maximum temporary disability rate of $700.00. Assume further that this accident did not impact the Second Injury Fund split in connection with the last compensable accident of 02/10/2016. Would this Award have any impact on the original Paul calculation and/or the Catrambone calculation. If so, why? If not, why not? How would you calculate payments?

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3589-13T4

DOMENICK CATRAMBONE,

Petitioner-Respondent,

v.

BALLY'S PARK PLACE,

Respondent-Appellant.

SECOND INJURY FUND,

Intervenor-Respondent.

Argued June 16, 2015 – Decided November 12, 2015

Before Judges Alvarez and Simonelli.

On appeal from the Department of Labor and Workforce Development, Division of Workers' Compensation, Claim Petition No. 2007-16972.

Anthony C. Famulari argued the cause for appellant (Biancamano & DiStefano, P.C., attorneys; Joseph V. Biancamano and James E. Santomauro, of counsel and on the briefs).

Frank A. Petro argued the cause for respondent (Petro Cohen Petro Matarazzo, P.C., attorneys; Mr. Petro and Steven S. Lubcher, on the brief).

Cheryl B. Kline, Deputy Attorney General, argued the cause for respondent Second Injury Fund (John J. Hoffman, Acting Attorney General, attorney; Lewis A. Scheindlin, Assistant Attorney General, of counsel; Ms. Kline, on the brief).

PER CURIAM

Appellant Bally's Park Place (Bally's) appeals from the March 19, 2014 judgment of the Division of Workers' Compensation, which awarded respondent Domenick Catrambone an increase in his permanent partial total disability for a lower back injury. For the following reasons, we affirm.

I.

The First Claim Petition and the First Application to Modify the Compensation Award

From March 1995 to February 2009, Catrambone was employed by Bally's as a security supervisor. On March 18, 2006, he sustained a work-related lower back injury. On June 25, 2007, he filed a claim petition, seeking compensation for his injury (the first claim petition).

The first claim petition was settled. In a May 15, 2008 Order Approving Settlement, Catrambone was awarded 27.5% of permanent partial total disability for his lower back injury (the May 2008 award). Bally's received a credit of 7.5% partial total disability for Catrambone's pre-existing conditions. Accordingly, Catrambone was entitled to permanent partial total

disability benefits for 126.893 weeks, from March 18, 2006 to August 21, 2008, at the rate of $217.27 per week, for a total of $27,570. On March 24, 2009, Catrambone filed an application to modify the May 2008 award based on a material worsening of his compensable lower back condition.

The Second Claim Petition and the
Petition Filed with the Second Injury Fund

On June 14, 2008, Catrambone suffered a work-related injury to his neck, left shoulder, and left wrist. On March 24, 2009, he filed a claim petition, seeking compensation for his injuries (the second claim petition).

Thereafter, on March 16, 2010, Catrambone filed a petition with intervenor Second Injury Fund (Fund) in connection with his left shoulder injury (the SIJ petition). Catrambone alleged he was eligible for benefits from the Fund because he was "totally and permanently disabled as the result of a combination of [his] pre-existing physical . . . conditions and [his] last compensable injury" to his left shoulder. The SIJ petition was subsequently consolidated with Catrambone's application to modify the May 2008 award.

Settlement of the Application
to Modify and the SIJ Petition

The application to modify the May 2008 award was settled. A November 29, 2010 order approving settlement increased

Catrambone's permanent partial total disability from 27.5% to 30% for the increased disability to his lower back. Bally's received a credit of 27.5%. Accordingly, Catrambone was entitled to permanent partial disability benefits for 143.265 weeks, from March 18, 2006 to December 12, 2008, at the rate of $225.40 per week, for a gross of $32,292, minus $27,570 from the May 2008 award, for a net award of $4722.

The SIJ petition was also settled. A November 29, 2010 order for total disability awarded Catrambone 100% total and permanent disability for his left shoulder (the SIJ order). The order deemed Catrambone totally and permanently disabled as of February 1, 2009, "due to the combined effects of [his] previous disabilities and the last [left shoulder] compensable accident[.]" The order required Bally's to pay 33 1/3% of the total award as follows: $634.10 per week for 150 weeks for a total of $95,115, with payments ceasing on December 17, 2011. The order required the Fund to pay 66 2/3% of the total award as follows: $634.10 per week for 300 weeks commencing on December 18, 2011 and ending on September 16, 2017. Under pre-existing compensable disabilities, the order listed Catrambone's 30% permanent partial total disability award for his lower back.

Catrambone, Bally's and the Fund were present at the November 29, 2010 hearing before the judge of compensation to

approve the two settlements. Neither Bally's nor the Fund objected when the judge mentioned, and Catrambone acknowledged, his right to reopen the first claim petition within two years if his lower back condition worsened.

The Second Application to Modify

On November 14, 2011, Catrambone timely filed an application to modify the November 29, 2010 award based on a material worsening of his compensable lower back condition. In opposition, Bally's argued that Catrambone could not receive an increase in disability because the SIJ order awarded him 100% total permanent disability and his lower back injury was mentioned and considered in determining he was totally and permanently disabled.[1]

After considering Catrambone's medical records, the testimony presented, and the expert reports, the judge of compensation concluded that Catrambone's compensable lower back disability had increased to 35% of permanent partial total

[1] Bally's also argued that Catrambone had no increase in his disability. In this appeal, Bally's does not challenge the judge of compensation's finding that Catrambone's lower back disability had increased to 35% of permanent partial disability. Therefore, the issue is deemed waived. Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011); Pressler & Verniero, Current N.J. Court Rules, comment 4 on R. 2:6-2 (2015).

disability. The judge determined that neither N.J.S.A. 34:15-27[2] nor N.J.S.A. 34:15-95[3] barred Catrambone from receiving an increase in disability benefits for a claim relating to his lower back based on a finding that he was totally and permanently disabled under a different claim for his shoulder injury.

The judge found that Mayti v. Singer Manufacturing Co., 76 N.J. Super. 379 (Law. Div. 1962), aff'd, 79 N.J. Super. 556

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[2] N.J.S.A. 34:15-27 provides as follows, in pertinent part:

> An agreement for compensation may be modified at any time by a subsequent agreement. Upon the application of any party, a formal award, determination, judgment, or order approving settlement may be reviewed within two years from the date when the injured person last received a payment on the ground that the incapacity of the injured employee has subsequently increased.

[3] N.J.S.A. 34:15-95 provides as follows, in pertinent part:

> The sums collected under [N.J.S.A. 34:15-94] shall constitute a fund, to be known as the Second Injury Fund, out of which a sum shall be set aside each year by the Commissioner of Labor from which compensation payments in accordance with the provisions of [N.J.S.A. 34:15-12(b)] shall be made to persons totally disabled, as a result of 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[.]

(App. Div. 1963), and Taylor v. Engelhard Industries, 230 N.J. Super. 245 (App. Div. 1989), on which Bally's relied, did not apply because those cases involved attempts to modify an award for total disability. The judge explained that

> [c]learly, under one event or exposure, a person cannot ever be greater than 100 percent disabled. However, there are many examples as to a person's receiving aggregate awards from multiple claims that would exceed 100 percent if added together. We do not add them together, nor are we required to by law. The [c]ourt, in Taylor, states that a new accident or exposure is necessary to make a further and greater finding of disability. That is what we have here.
>
> To extinguish [Catrambone's] rights to review or modify an award under which he was not adjudged as permanently and totally disabled would be contrary to both the strict construction and the spirit of our law.

Finally, the judge noted that he was "mindful of the notions of unjust enrichment" and that "it would be inappropriate for . . . Catrambone to receive more money than he might otherwise be entitled to under law." However, the judge found that in Paul v. Baltimore Upholstering Co., 66 N.J. 111 (1974), our Supreme Court provided a tool for calculating any offsets which might exist when a petitioner has separate claims for benefits and one of them is for permanent and total disability, known as a "Paul calculation."

In a March 19, 2014 order, the judge increased Catrambone's permanent partial total disability from 30% to 35% for the increased disability to his lower back, and awarded Bally's a credit of 30% for his permanent partial total disability and 7.5% for his permanent partial total for pre-existing conditions. Accordingly, Catrambone was entitled to permanent disability benefits for 184.29 weeks at a rate of $322 per week, for a total of $59,340, which was an increase of $27,048 from the November 29, 2010 award.

The order also contained the following "Paul calculation:"

> There was no lost time in connection with the original accident of March 18, 2006, therefore, permanent partial disability benefits [for the lower back] run from March 18, 2006 through September 27, 2009. However, [Catrambone] received an award of permanent and total disability on November [29], 2010 in connection with [the left shoulder] with a date of totality of February 1, 2009. As such, the time period from March 18, 2006 through January 31, 2009 (the day before the date of totality) represents a period of 150 & 1/7 weeks [totaling] new accrued compensation of $16,054.00 [$322.00 per week less previous benefits paid at $225.40 per week]. Permanency benefits beginning February 1, 2009 through September 27, 2009 equal 34 & 1/7 weeks at the rate of $322.00 per week [totaling] $10,994.00 which is to be credited against the permanent total disability award, for which [Bally's] shall reimburse the . . . Fund which has been making payments on the [t]otal [d]isability [a]ward since December 18, 2011.[]

> [Catrambone] retains the right to re-open this claim within two years from the date when the last payment is issued in connection with this [a]ward.

II.

On appeal, Bally's reiterates that Catrambone could not receive an increase in disability because he was awarded 100% total permanent disability and his pre-existing compensable lower back injury was mentioned and considered in determining he was totally and permanently disabled. The Fund joins in this argument.

Bally's also argues that the doctrines of res judicata and collateral estoppel barred the second modification application. Alternatively, Bally's argues that Catrambone was only entitled to an increase of $16,054 and there should be no reimbursement to the Fund.[4]

Our review of workers' compensation cases is limited. Hersh v. Cnty. of Morris, 217 N.J. 236, 242 (2014). We must determine

> whether the findings made could reasonably have been reached on sufficient credible

[4] The Fund agrees with the judge's "Paul calculation." On appeal, the Fund asks this court to require that it be joined as a party in any future modification cases involving a subsequent total disability award with Fund liability. However, as the Fund's counsel conceded at oral argument, this requires an impermissible advisory opinion from this court. G.H. v. Twp. of Galloway, 199 N.J. 135, 136 (2009).

> evidence present in the record, considering the proofs as a whole, with due regard to the opportunity of the one who heard the witnesses to judge of their credibility and, in the case of agency review, with due regard also to the agency's expertise where such expertise is a pertinent factor.
>
> [Sager v. O.A. Peterson Constr. Co., 182 N.J. 156, 163-64 (2004) (quoting Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)) (internal quotation marks omitted).]

We may not substitute our own factfinding for that of the judge of compensation. Lombardo v. Revlon, Inc., 328 N.J. Super. 484, 488 (App. Div. 2000). We must defer to the factual findings and legal determinations made by the judge of compensation "unless they are 'manifestly unsupported by or inconsistent with competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Lindquist v. City of Jersey City Fire Dep't., 175 N.J. 244, 262 (2003) (quoting Perez v. Monmouth Cable Vision, 278 N.J. Super. 275, 282 (App. Div. 1994), certif. denied, 140 N.J. 277 (1995)). We will "appraise the record as if we were deciding the matter at inception and make our own findings and conclusions" only if the judge of compensation "went so wide of the mark that a mistake must have been made." Manzo v. Amalgamated Indus. Union Local 76B, 241 N.J. Super. 604, 609 (App. Div.) (internal quotation marks omitted), certif. denied, 122 N.J. 372 (1990). However, we afford no deference to a judge of compensation's

interpretation of the law and review legal questions de novo. Renner v. AT&T, 218 N.J. 435, 448 (2014). Because this matter involved the judge's interpretation of the law, our review is de novo.

An injured employee in a workers' compensation case may apply for modification of an order approving settlement within two years from the date when the employee last received a payment on the ground that the incapacity of the employee had subsequently increased. N.J.S.A. 34:15-27. Thus, when the petitioner has been awarded partial disability benefits, he or she may subsequently apply to have the award reopened and modified if the compensable condition worsened. See, e.g., Milos v. Exxon Co., USA, 281 N.J. Super. 194, 197 (App. Div. 1995), aff'd o.b., 143 N.J. 333 (1996).

However, when a petitioner has received an award for total disability benefits, he may not apply to have the award increased on the ground that the compensable condition has worsened. See Taylor, supra, 230 N.J. Super. at 251. As we explained in Taylor,

> [A]n award of compensation for 100% total permanent disability should preclude any further award for any increase in the effects of the same injury. This is not because the effects of the injury may not increase. They may and frequently do increase and the condition of the employee may grow worse. But further compensation

> may not be allowed because the employee has received all that the law allows.
>
> [Ibid. (quoting Mayti, supra, 76 N.J. Super. at 382).]

In Taylor, the petitioner was determined to be totally and permanently disabled from several causes, including a pulmonary condition. Id. at 247. After his death, his widow filed an application to increase his disability benefits, alleging that his pulmonary condition had worsened between the time of the total disability award and the time of his death. Id. at 247-48. We held that "there can be no further increase in a compensable disability after an adjudication of 100 percent total permanent disability unless the worker returns to work and is reinjured." Id. at 250-51.

In reaching this conclusion, we expressly adopted the rationale in Mayti that once a petitioner is awarded the maximum statutory compensation for a compensable injury, he may not apply for increased benefits based on an increase in the effects of the same injury; however, if a petitioner's claim for increased benefits is based on a different injury, then a prior determination of total and partial disability would not preclude an increased award. Id. at 251 (citing Mayti, supra, 76 N.J. Super. at 382-83).

In this case, Catrambone was awarded partial disability for his lower back under the first claim petition, and total disability for his left shoulder under the separate second claim petition. Although he may have received the maximum statutory amount for his left shoulder, he was not determined totally and permanently disabled for his lower back injury, and thus did not receive the maximum statutory amount with respect to his lower back. Accordingly, he was entitled to apply for and receive an increase in the partial disability award relating to his lower back, so long as he did so within two years from the date when he last received a payment and proved an increased disability. N.J.S.A. 34:15-27. Bally's cites no authority that barred Catrambone from disability benefits for multiple disabling conditions. The increased award for Catrambone's lower back, therefore, did not create a windfall or result in a double recovery.

We have considered Bally's remaining contentions in light of the record and applicable legal principles and conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). However, we make the following brief comments.

The doctrines of res judicata and collateral estoppel may form a valid defense for a total disability award. Taylor,

supra, 230 N.J. Super. at 252-53. However, these doctrines do not apply to a petitioner, such as Catrambone, who timely applied to reopen and modify a partial disability award under N.J.S.A. 34:15-27. Milos, supra, 281 N.J. Super. at 198.

The Fund was entitled to a reimbursement as set forth in the March 19, 2014 order. Catrambone was determined to be totally and permanently disabled as of February 1, 2009 as the result of his shoulder injury. The November 29, 2010 order for total disability provided that 66 2/3% of total disability was attributable to Catrambone's pre-existing conditions, and therefore payable by the Fund. When the partial disability award for Catrambone's lower back was increased, the Fund's payments under that award extended beyond February 1, 2009 by 34 1/7 weeks. Thus, the payments attributable to the partial disability award for Catrambone's lower back during the overlapping period constituted a compensable pre-existing disability for which the Fund was entitled to a credit. See Di Bernard v. Great Atl. & Pac. Tea Co., 303 N.J. Super. 280, 285-86 (App. Div. 1997) (holding that the Fund is liable for the percentage of the total disability award that is attributable to the petitioner's pre-existing disabilities), certif. denied, 152 N.J. 365 (1998); Paul, supra, 66 N.J. at 128 (holding that when a pre-existing condition is compensable, the Fund is entitled to

a credit against its obligations for any award made to the employee for a prior compensable disability).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

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Domenick Catrambone Respondent-Petitioner vs. Bally's Park Place Petitioner-Respondent	SUPREME COURT OF NEW JERSEY DOCKET NO. 076953 APPELLATE DIVISION DOCKET NO: A-3859-13 Claim Petition No. 2007-16972 Sat Below: Hon. Carmen H. Alvarez, JAD Hon. Marie P. Simonelli, JAD

RESPONDENT-PETITIONER'S BRIEF IN OPPOSITION TO PETITIONER-RESPONDENT'S PETITION FOR CERTIFICATION

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PROCEDURAL HISTORY

Respondent-Petitioner (hereinafter referred to as "Mr. Catrambone") adopts the Procedural History set forth in the brief of Intervenor-Respondent, Second Injury Fund, with the significant addition under Claim Petition 2009-7914, Mr. Catrambone was deemed as permanently and totally disabled as of February 1, 2009, approximately twenty-two months prior to the November 29, 2010 Order Approving Settlement on the first Application for Review or Modification on the underlying claim. (Pa. 23-31). Mr. Catrambone also disagrees with the Second Injury Fund's contention that its "payments were modified," as set forth in its procedural history.

RESPONSE TO PETITIONER-RESPONDENT'S (HEREINAFTER BALLY'S") STATEMENT OF MATTER INVOLVED

The Courts below properly decided that under the specific fact presentation of the case at bar, Mr. Catrambone was entitled to a five percent increase of permanent partial disability for the compensable worsening of his low back disability under Claim Petition 2007-16972.

They also properly determined that Claim Petition 2009-7914, Mr. Catrambone's subsequent, compensable, left shoulder disability claim which occurred on June 14, 2008, while rendering him totally and permanently disabled with Second Injury Fund liability as of February 1, 2009, was not a bar to

any determination that his low back permanent partial disability had worsened by five percent since the November 29, 2010 entry of the prior Order Approving Settlement. Under the specific facts of this claim, Mr. Catrambone's awarded, increased permanent partial disability benefits were payable to him until those benefits reached the February 1, 2009, date of permanent total disability in connection with the subsequent shoulder claim. After that date, the remaining weeks payable (a mere 34 1/7 weeks at a rate of $322.00 per week totaling $10,994.00) ultimately and properly went to the Second Injury Fund consistent with the Supreme Court's rationale in Paul v. Baltimore Upholstering Co., 66 N.J. 111 (1974) (*Superseded on other grounds*). (Pa.33). This calculation ensured that Mr. Catrambone did not receive an impermissible double recovery (i.e. a weekly compensation beyond his maximum rate for permanent and total disability). Thus, the remaining permanent partial disability benefits awardable after the date that Mr. Catrambone was deemed to have been totally and permanently disabled under Claim Petition 2009-7914 were not paid to Mr. Catrambone, and were instead paid to the Second Injury Fund, which had been making payments on Claim Petition 2009-7914 since December 18, 2011. Here, the lower courts' circumspect decisions ensured that there was no overlap that exceeded the maximum rate for permanent and total disability just like the Supreme Court

did in Paul, when it allowed the petitioner to receive the full rate of permanent total disability benefits when that disability accrued even though his permanent partial disability benefits were still being paid. Id.

The lower courts' holdings were entirely consistent with both the preponderance of credible evidence and the beneficent purposes of the New Jersey Workers' Compensation Act ("Act") N.J.S.A. 35:15-1 et seq., specifically the language of N.J.S.A. 34:15-27, which places no restriction on an Application for Review or Modification of an award of compensation for either indemnity or medical treatment other than a statute of limitations of two years from the date of last indemnity benefit paid or authorized medical treatment (whichever date is later) or a subsequent trauma which aggravates the medical condition such that further medical treatment is no longer deemed compensable. The Appellate Division also correctly determined that there is no legal authority which extinguishes an injured workers' right to continued permanent partial disability payments as of the date that he or she becomes permanently and totally disabled as a result of a separate and distinct, unrelated compensable disability with or without Second Injury Fund liability. Rather, the courts below rendered decisions which allow those claims to coexist in a sensible fashion,

consistent with the mandates of the Act, and the Supreme Court's rationale in Paul, supra.

The decisions below also recognize that this is not merely a monetary issue, as the practical ramifications of dismissing Mr. Catrambone's claim on the basis urged by Bally's (i.e. no further weeks of benefits paid either before or after the date of permanent and total disability) would leave him with no further rights for medical treatment and/or indemnity benefits as the Statute of Limitations would then bar any future reopening of this claim since more than two years have elapsed since the date of last indemnity paid or last authorized medical treatment (July 26, 2012). (Ra.124)[1] Furthermore, to date, despite no stay being entered by either the trial court or the Appellate Division, Bally's has not paid benefits in compliance with the underlying March 19, 2014 Order for Judgment.

It is also noteworthy that the very same claims, issues and parties in the underlying Petition were present at the time that the first Application for Review or Modification concluded on November 29, 2010. At that time an Order Approving Settlement was entered with the **consent of all parties** in the underlying claim increasing Mr. Catrambone's subject low back disability from 27½% of permanent partial disability to 30%, notwithstanding, that on the very same date, in a consolidated

[1] "Ra" refers to Bally's Appellate Division appendix.

hearing regarding the subsequent permanent and total disability claim, Mr. Catrambone was adjudicated as entitled to permanent and total disability as of February 1, 2009, approximately twenty-two months prior to the entry of the award. (emphasis added). There, Bally's, as well as the Second Injury Fund conceded increased permanency on the underlying claim despite the contemporaneous entry of an Order Approving Settlement for Permanent and Total Disability with Second Injury Fund Liability. Had Mr. Catrambone's permanent partial disability at that time been increased to 35% rather than 30%, this would have resulted in a "conventional" Paul overlap with the permanent total disability award being modified to allow the same net result for Bally's and the Second Injury Fund.

Bally's now claims that the Courts below were in error, when it previously conceded that Mr. Catrambone was entitled to an increase of permanent partial disability for the low back claim on November 29, 2010, after the date that he was adjudicated permanently and totally disabled with respect to the left shoulder claim (February 1, 2009). Accordingly, Bally's should be estopped from raising this belated argument after previously conceding the same issue.

ARGUMENT

I. CERTIFICATION SHOULD BE DENIED BECAUSE THE UNIQUE, UNDERLYING SET OF FACTS DO NOT PRESENT A QUESTION OF GENERAL PUBLIC IMPORTANCE, AND THE DECISIONS BELOW ARE IN ACCORD WITH THE LEGISLATIVE INTENT OF THE WORKERS' COMPENSATION ACT, THE PRECEDENT IN THIS VERY CASE (THE NOVEMBER 29, 2010 ORDER APPROVING SETTLEMENT IN CONNECTION WITH CLAIM PETITION 2007-16872 AWARDING AN INCREASE OF MR. CATRAMBONE'S LOW BACK PERMANENT PARTIAL DISABILITY FROM 27.5% TO 30% AS OF THAT DATE, WHICH WAS BEYOND THE DATE OF PERMANENT TOTAL DISABILITY IN THE CONSOLIDATED CASE), AND THE SUPREME COURT HOLDING OF PAUL V.BALTIMORE UPHOLSTERING CO., 66 N.J. 111 (1974) (SUPERSEDED ON OTHER GROUNDS).

This Court will generally decline to accept an appeal that does not present an unsettled question of general public importance. R. 2:12-4; In re Contract for Route 280, 89 N.J. 1 (1982). Certification will generally not be allowed on final judgments of the Appellate Division except for special reasons. R. 2:12-4. Certification will normally be denied if the "rights of innocent persons, or an unwary public, are not jeopardized," unless to do so would leave intact a decision that is "palpably wrong, unfair" or an "egregious miscarriage of justice." Mahony v. Danis, 95 N.J. 50, 52 (1983) (Handler, J., concurring).

In order to properly assess whether the strict standard for granting Certification has been met, it is important to emphasize the particular set of facts and procedural history presented before this Court. In workers' compensation, a claim for permanent and total disability is a relatively rare

occurrence relative to the number of claims filed, the overwhelming majority of which awards are for permanent partial disability. An individual's aggregate permanent partial disability claims can exceed a numeric figure of 100%; such is the unique nature of permanent partial disability. Permanent total disability cases either arise from a single disability borne 100% by the employer, or if there is sufficient combined preexisting disability at the time of the compensable accident, the employer's liability for permanent and total disability is shared by the Second Injury Fund. N.J.S.A. 34:15-95; Lewicki v. New Jersey Art Foundry, 88 N.J. 75, 83, 438 A.2d 544 (1981). A claim for permanent and total disability with a conventional "Paul" overlap under Paul v. Baltimore Upholstering Co., supra 66 N.J. at 135-136, is an even rarer occurrence. Finally, the case at bar, a two time re-opened permanent partial total disability award, pre-existing and unrelated, with a subsequent permanent total disability award is such an extremely rare occurrence under these particular facts, Supreme Court intervention is not warranted.

Bally's appeal does not present a question of general public importance. The Appellate Division neither changed nor expanded the existing law. Rather, the Appellate Division followed the template set forth in Paul v. Baltimore Upholstering Co., 66 N.J. at 135-136, which is the only Supreme

Court decision arguably addressing the manner of payment with an overlap of permanent partial disability and permanent total disability benefits, and which clearly allows these two distinctive claims to coexist. Paul firmly establishes the importance and integrity of a prior permanent partial disability award, payable at the time of a determination of permanent total disability for a subsequent totally disabling condition, while still recognizing that a petitioner cannot receive more than the total disability benefit rate if there is a simultaneous payment of both permanent partial disability and permanent total disability benefits. Id. Paul did not extinguish permanent partial disability benefits as of the date of permanent and total disability (as is urged by Bally's) and did not delay the entitlement to permanent total disability which would have caused an injustice to the petitioner if there was literal compliance with the Act, with the Court noting "the spirit should not be killed by the letter [of the law]." Id. at 136.

Consistent with Paul, the Appellate Division's Decision recognized that an Award of permanent total disability is not an impediment to the calculation of the increased permanent partial disability, contemplated by the Act under these particular factual circumstances. The Decision also recognized that the trial court's calculations of Mr. Catrambone's monetary increase of disability under Paul prevented any type of windfall or

impermissible double recovery to the Petitioner. It is important to note that the Second Injury Fund agrees with Judge Taglialatella and the Appellate Division as it relates to the calculated payment of the award, assuming that there is entitlement to that payment.

Here, in light of the very specific facts of this case and the well-reasoned decisions of the Courts below, Certification is not justified. As indicated above, the facts in this case and the decisions of both Judge Taglialatella at the trial level and the Appellate Court are consistent with the well-entrenched legislative intent of affording full workers' compensation coverage to as many workers as possible under the Act's protective umbrella, with each and every viable claim enjoying full statutory protection in the absence of a clear bar. N.J.S.A. 34:15-1 et. seq.

II. BALLY'S ARGUMENT SET FORTH IN POINT I OF ITS BRIEF AS TO THE USE OF "INCAPACITY" AND "DISABILITY" WAS NOT "RAISED BELOW," AND IS A NEW ARGUMENT ON APPEAL AND AS SUCH SHOULD NOT BE CONSIDERED BY THIS COURT

Bally's failed in any of its submissions below to raise its current argument that the term "incapacity" as used in N.J.S.A. 34:15-27, is synonymous with the term "disability." Therefore, Bally's has presented a new argument on appeal. "The presentation of new issues on appeal 'is repugnant to the spirit of our practice which contemplates that, except in extraordinary

situations, as where public policy or jurisdiction are involved, a party shall make his points in the court of first instance before urging them as grounds on appeal.'" State v. Mahoney, 226 N.J. Super. 617, 626, 545 A.2d 235 (App. Div. 1988). Issues not raised below, even constitutional issues, will ordinarily not be considered on appeal unless they are jurisdictional in nature or substantially implicate public interest. Zaman v. Felton, 219 N.J. 199, 226-227 (2014).

However, even assuming arguendo that this Court was to consider this new argument, Bally's seems to suggest that an Application for Review or Modification can only be made in a total disability claim, using its definition of "incapacity." This is clearly not what is meant by N.J.S.A. 34:15-27's use of the term "incapacity," since Applications for Review or Modification under N.J.S.A. 34:15-27 apply almost **exclusively** to permanent partial disability claims and not permanent total disability claims (for which such claims cannot be increased as to either the employer or Second Injury Fund). (emphasis added)

Accordingly it is respectfully submitted that Bally's argument that Mr. Catrambone not be entitled to an increase of disability in connection with a timely Application for Review or Modification under N.J.S.A. 34:15-27, solely because he was adjudicated permanently and totally disabled in a subsequent claim for a separate and distinct condition, and thus cannot

prove an increase in "incapacity," not be considered by this Court.

III. THE APPELLATE DIVISION PROPERLY HELD THAT THERE WAS NO LEGAL AUTHORITY BARRING MR. CATRAMBONE FROM FILING A TIMELY APPLICATION FOR REVIEW OR MODIFICATION UNDER N.J.S.A. 34:15-27

The Appellate Division correctly stated that Bally's failed to cite any legal authority barring Mr. Catrambone from obtaining disability benefits for multiple disabling conditions. Moreover, the Appellate Division properly held that the cases cited by Bally's, specifically, Taylor v. Engelhard Industries, 230 N.J. Super. 245 (App. Div. 1989) and Mayti v. Singer Manufacturing Co., 76 N.J. Super. 379 (Law Div. 1962), did not address the issue at bar, specifically, whether a workers' compensation petitioner is entitled to apply for, and receive an increase of a **permanent partial disability** award under N.J.S.A. 34:15-27, on a single claim petition for which he or she was not adjudged as permanently and totally disabled, when that same petitioner was rendered 100% permanently and totally disabled after a subsequent, wholly and distinct accident, with wholly and distinct disabilities. (emphasis added). Mayti and Taylor do not address the ongoing **permanent partial disability** benefits, both medical and indemnity, to which an injured worker is entitled to under the Act for his or her compensable pre-existing conditions. (emphasis added). Rather, those cases deal

with a single disabling accident or exposure wherein an injured worker (or his or her dependents) was seeking additional compensation for the **same disability** and on the **same claim** for which he or she was already adjudicated as totally and permanently disabled. (emphasis added). Essentially, Taylor and Mayti stand for the notion that in a **single claim**, wherein an injured worker has been **adjudicated 100% permanently and totally disabled**, that specific total disability award cannot be increased under the notion that **that specific compensable disability has worsened** and that worker cannot have more than 100% permanent and total disability for that single accident or exposure. See Taylor, supra, 230 N.J. Super. at 251. (emphasis added). This has never been contested by Mr. Catrambone and is not the issue here.

The language of the Taylor Court is clear "[A]n award of compensation for 100% total permanent disability should preclude any further award for increase in the effects of **the same injury...** But further compensation may not be allowed because the employee has received all that the law allows." Id. (quoting Mayti, supra, 76 N.J. Super. at 382). (emphasis added). Indeed, Mr. Catrambone received all benefits that the law allows with respect to the subsequent, totally-disabling claim for his shoulder. However, he did not receive all benefits that the law allows with respect to the underlying low back claim. He did not

receive actual payments due to him for a permanent partial disability increase for those weeks prior to the date of permanent and total disability in the consolidated claim. He also did not receive the benefit of a determination of a last date of increased permanency award for future statute of limitations concerns. The Appellate Division's holding appropriately entitles Mr. Catrambone to the full benefits of the Act in no less measure for his permanent partial disability relative to his low back condition, than he is entitled to receive with respect to his subsequent award for permanent total disability for his left shoulder, with due regard to the respective difference of statutory rights between permanent partial and permanent total disability. N.J.S.A. 34:15-1 et seq.

Bally's further argument that Mayti and Taylor stand for the proposition that a workers' compensation petitioner may not receive additional compensation once he or she has been found 100% totally and permanently disabled unless he returns to work and is reinjured, is therefore, also misleading, and was previously appropriately rejected by the Appellate Division below, which noted the aforementioned distinctions between the case at bar and the cases of Mayti and Taylor. Bally's references to those cases and the language in those cases as being precedential or otherwise binding with respect to the

instant matter is a "red herring" as the fact patterns and issues involved are wholly separate and distinct.

Additionally, Bunk v. Port Authority of New York and New Jersey, 279 N.J. Super. 613 (App. Div. 1995) reversed on other grounds 144 N.J. 176 (1996), is also distinguishable from the case at bar, and aptly was not relied upon by the Appellate Division. It should be noted that the primary issue decided by the Appellate Division in Bunk, involved a petitioner's right to receive New Jersey Workers' Compensation benefits while at the same time, receiving a New York State pension. This was the only issue addressed by the Supreme Court after the Supreme Court granted Certification. Bunk v. Port Authority of New York and New Jersey, 144 N.J. 76 (1995). Bally's uses snippets of the language of the Appellate Division decision in Bunk without providing this Court the proper context. In Bunk, the issue of whether or not a workers' compensation petitioner is entitled to recovery for different injuries sustained during the same employment period in excess of 100% was only briefly addressed. Bunk v. Port Authority of New York and New Jersey, 279 N.J. Super. at 625. Even the limited available facts in Bunk illuminate the distinct differences between that case and the case at bar. In Bunk the Appellate Division dealt with a unique circumstance wherein the Appellate Court felt as though all of the Petitioner's claims (inclusive of the orthopedic, neurologic

and pulmonary conditions) could have been addressed through a singular claim petition. Id. In Bunk there was no Second Injury Fund involvement, and the permanent total disability award was solely borne by the employer.

Contrarily, Bunk did not address a situation wherein there was **already** a recognized, well-entrenched, separate and distinct, pending claim where there has been an acknowledgment of permanent partial disability both before and after the date of permanent and total disability, such as here. (emphasis added). Further, in the instant matter, Bally's does not bear the burden of the entire permanent and total disability award as was the case in Bunk. Here, Bally's was only responsible for 33 1/3% of the initial 450 weeks, or 150 weeks of permanency benefits, with the Second Injury Fund paying not only the remaining 300 weeks of the initial 450 week period, but also Mr. Catrambone's subsequent lifetime benefits. Again, this was not the case in Bunk, wherein the employer was presumably responsible for 100% of the 450 weeks, in addition to lifetime benefits. The underlying specific factual situation was not disqualified by Mayti, Taylor or Bunk. Moreover, Bally's attempts to consistently use language applicable to permanent and total disability cases as a sword to prematurely cut Mr. Catrambone's permanent partial disability benefits in the underlying claim are unjust.

Furthermore, as the Appellate Division accurately noted, the language of N.J.S.A. 34:15-27 places no legal restriction on an Application for Review or Modification of an award of compensation for either indemnity or medical treatment aside from a statute of limitations of two years from the last indemnity benefit paid or authorized medical treatment (whichever is later) or a subsequent, aggravating trauma to the compensable disability. Recognizing that there is no such restriction, and recognizing that the cases cited by Bally's are inapplicable to the facts at bar, the courts below appreciated the vital practical ramifications of extinguishing Mr. Catrambone's rights under the Act, which would occur if Bally's argument is accepted. Here, it is unquestioned that Mr. Catrambone suffers from a very serious, compensable lumbar spine condition for which significant ongoing medical treatment has occurred over the years, and for which there have been recommendations for further significant surgical intervention, which has been postponed primarily because of Mr. Catrambone's cardiac condition and fear of surgical outcome. As evidenced by the eight years of progressive worsening, it is likely that this condition will continue to deteriorate as time goes on. As such, he is precisely the person the Act was designed to protect to the fullest extent possible under an Application for Review or

Modification, given the issues for all aspects of the claim. See Perez v. Panatoste, Inc., 95 N.J. 105, 114 (1984).

As this Court stated in Perez, the primary objectives of the Workers' Compensation Act's 1979 Amendments "were to eliminate awards from minor disabilities, to increase awards for the more seriously disabled, and to contain the overall cost of workers' compensation." Id. The practical effect of dismissing the underlying claim on the basis urged by Bally's would extinguish all further rights for medical treatment and/or indemnity benefits, and render Mr. Catrambone's right to future medical treatment, a fundamental right under the Act, a nullity, merely because he suffered a subsequent totally disabling accident to his left shoulder. Thus, Mr. Catrambone would become reliant upon Medicare in contravention of the Medicare Secondary Payer ("MSP") Statute, 42 U.S.C. 1395(y)(b)(2), which assigns primary responsibilities for medical bills of Medicare recipients to collateral sources when available, and which regulations denote that Medicare does not pay for any service for which payment has been made, or can reasonably be expected to be made under a workers' compensation law, or plan of the United States or a state. 42 U.S.C. 411.40.

IV. BALLY'S ASSERTION THAT MR. CATRAMBONE'S AWARD FOR PERMANENT AND TOTAL DISABILITY UNDER CLAIM PETITION 2009-7914 "TAKES INTO ACCOUNT" PETITIONER'S LOW BACK DISABILITY UNDER CLAIM PETITION 2007-16972, AND THEREFORE PETITIONER HAS RECEIVED ALL BENEFITS ALLOWED BY LAW UNDER CLAIM PETITION 2007-16872 IS MISGUIDED

Bally's erroneous contention that because Mr. Catrambone's lumbar spine condition was one of a multitude of preexisting disabilities, which, when taken in the aggregate at the time of his subsequent, compensable accident involving his left shoulder, June 14, 2008, combined to render him permanently and totally disabled, he should not be entitled to any further permanent partial disability benefits for the instant claim was appropriately denied by the courts below. This contention is unsupported by any legal authority and fails to acknowledge the aforementioned practical ramifications, particularly the extinguishment for further, future medical treatment for a worsened, compensable condition, under N.J.S.A. 34:15-27, which inextricably ties together a Petitioner's right to future indemnity and medical benefits.

The courts below were very mindful of this consideration and recognized that Mr. Catrambone did not "receive all that the law allows" in connection with that low back injury. Rather, he was entitled to further, future medical and indemnity benefits consistent with N.J.S.A. 34:15-27. As the Appellate Division stated, he was entitled to "apply for and receive an increase in

the partial disability award relating to his lower back, so long as he did so within two years from the date when he last received a payment and proved an increased disability." N.J.S.A. 34:15-27. Bally's has cited no authority barring him from receiving further benefits in connection with the underlying claim, nor does any such authority exist.

The lower courts also ensured that Mr. Catrambone's permanent total disability award was undisturbed as to legal apportionment of liability between Bally's and the Second Injury Fund. Further, as a practical matter, in every claim for permanent and total disability with Second Injury Fund liability where there have been prior awards of permanent partial disability, a petitioner receives "more compensation" than is awarded merely by the permanent total disability award.

V. THE APPELLATE DIVISION APPROPRIATELY FOUND BALLY'S COLLATERAL ESTOPPEL ARGUMENT MERITLESS

The Appellate Division correctly found the Respondent's collateral estoppel argument as without merit as to the underlying permanent partial disability claim. Furthermore, Respondent has failed to meet the standard set forth by this Court in Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 522 (2006).

Rather, for the reasons set forth above and in Mr. Catrambone's Brief in Opposition to Appellant's Appeal in Docket

No. A-3859-13, at 44-47, it is respectfully submitted that Bally's should have been estopped from raising this issue at the Appellate level, and that the underlying Petition should be dismissed, as every issue that was raised by Bally's was available on November 29, 2010, at which time it conceded an increase of permanent partial disability in the underlying claim (from 27.5% to 30%) and also conceded that Mr. Catrambone was totally and permanently disabled as of February 1, 2009 in the subsequent claim.

CONCLUSION

For the reasons set forth above, the Petition for Certification should be denied. However, if Certification is granted, the Court should affirm the Appellate Division and trial court, as the courts below rendered a carefully reasoned decision which struck a fair balance between the Act's intent to fully compensate a seriously injured workers' compensation petitioner for all of his or her compensation benefits (indemnity and medical), while simultaneously making certain that there was no double recovery or unjust enrichment by way of receipt of concurrent indemnity benefits above the maximum rate payable.

Respectfully submitted,
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Dated: 01/11/2016

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Domenick Catrambone Petitioner/Respondent vs. Bally's Park Place Respondent/Appellant	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-3859-13 On Appeal from a Decision of the Division of Workers' Compensation Dated March 19, 2014 Claim Petition No. 2007-16972 Sat Below: Hon. Carmine J. Taglialatella JWC

PETITIONER/RESPONDENT'S BRIEF IN OPPOSITION TO APPELLANT'S APPEAL

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PROCEDURAL HISTORY[1]

The Petitioner-Respondent received four awards which are relevant to this appeal. Ra.5-6; 11-12; 20-26; 178-179. Three are in relation to the Petitioner-Respondent's low back, permanent partial disability in connection with Claim Petition 2007-16972. Ra.5-6; 11-12; 178-179 The Petitioner-Respondent received a separate award for permanent total disability with respect to Claim Petition 2009-7914. Ra. 20-26.

On May 15, 2008, the Petitioner-Respondent received the first Order Approving Settlement in connection with Claim Petition 2007-16972. Ra.5-6. This award was entered for 27.5% permanent partial total disability, with a credit for 7.5% permanent partial disability. Ra5. This entitled Petitioner-Respondent to permanent partial disability awarded as follows: 126.893 weeks of disability, running from approximately March 18, 2006 (the date of his low back injury) through approximately August 21, 2008, at a rate of $217.27 per week, for a gross amount of $27,570.00. Ra5-6.

There were two awards entered on November 29, 2010. Ra. 11-12; 20-26. The Petitioner-Respondent received an Order for

[1] For the sake of brevity and judicial economy, Petitioner-Respondent, Domenick Catrambone, adopts the Respondent-Appellant's Statement of Facts, and also adopts the Procedural History submitted by the Respondent-Appellant with certain significant additions.

Permanent Total Disability with Second Injury Fund liability in connection with Claim Petition 2009-7914. Ra. 20-26. This Award was for his last compensable accident of June 14, 2008, wherein Respondent-Appellant was deemed to have liability for 33 1/3% permanent total disability for his left shoulder, and the Second Injury Fund was deemed to have liability in the amount of 66 2/3% for compensable and non-compensable conditions that existed at the time of the compensable accident on June 14, 2008. Ra. 20-26. Respondent-Appellant has adequately spelled out the mechanism of payout for the permanent total disability award in its Brief.

The Petitioner-Respondent was deemed permanently and totally disabled for his left shoulder condition as of February 1, 2009, after which the Respondent-Appellant was liable for 150 weeks of permanent total disability benefits, with the Second Injury Fund liable for 300 weeks. Ra.20-26. Also on November 29, 2010, in a consolidated hearing of Claim Petitions 2007-16972 and 2009-7914, the Petitioner-Respondent received a second Order Approving Settlement regarding Claim Petition 2007-16972, in the amount of 30% permanent partial disability with a credit for preexisting condition in the amount of 7½% permanent partial

disability. Ra. 11-12. This represented a 2½% increase of the Petitioner's compensable low back disability.[2] Ra. 11-12.

This award entitled the Petitioner-Respondent to permanent partial total disability benefit payments in the amount of 143.265 weeks of compensation running from approximately March 18, 2006 through December 12, 2008, at a rate of $225.40 per week for a total of gross amount of $32,292.00 or $4,722.00 of new compensation. Ra. 11-12. The payment of this award was as follows: each of the first accrued 126.893 weeks of benefits were raised from the rate of the prior award, $217.27 per week to $225.40 per week, and the remaining 16.372 weeks were paid at $225.40 per week. Ra. 11-12.

At the time of that November 29, 2010 hearing, Mr. Petro, counsel for the Petitioner-Respondent, advised Petitioner-Respondent of his statutory right to reopen his claim within two years from the date of the last indemnity payment. T5 at 9:1-7[3]. The Court further questioned Petitioner-Respondent as to his understanding of his right to reopen. T5 26:24. The Respondent-Appellant, Bally's Park Place, and the Second Injury Fund were represented at the aforementioned November 29, 2010

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[2] It should be noted that the Honorable Carmine J. Taglialatella, J.W.C. was the Judge who presided over said hearing, and entered all Orders in connection with that date, despite the fact that the Honorable Arthur J. Marchand, J.W.C.'s name appears, in error, on the Order Approving Settlement in connection with Claim Petition 2007-16972.

[3] The transcript of Domenick Catrambone's November 29, 2010 Consolidated Hearing will hereinafter be referred to as T5.

consolidated hearing, and neither party objected to the Petitioner's right to reopen Claim Petition 2007-16972. T5.

In light of the worsening of his compensable lumbar spine condition, the Petitioner-Respondent, once again timely reopened Claim Petition 2007-16972. Ra.27-28. Respondent-Appellant thereafter, authorized further medical care for the Petitioner-Respondent's worsened low back condition. Ra.27-28. T4 at 3:21-25. Petitioner-Respondent's authorized treatment included a course of treatment with Dr. Andrew Glass, M.D., a neurosurgeon, who discussed "at great length" with the Petitioner-Respondent, testing and management alternatives, "both surgical and non-surgical." Ra.96. He counseled the Petitioner-Respondent regarding the potential need for "future spinal operative intervention." Ra96. The last compensable authorized treatment occurred on July 26, 2012, at which time Dr. Glass deemed the Petitioner-Respondent to have reached maximum medical improvement. Ra.124.

The trial of Petitioner's entitlement to increased permanent partial disability benefits for his worsened low back condition commenced on October 16, 2013, as Respondent-Appellant denied any worsening of the compensable low back disability as compared to the 30% permanent partial disability rating awarded on November 29, 2010. T1. Petitioner-Respondent was put to his proofs to establish any material worsening. T1, T2, T3. A full

trial occurred with all relevant factual and medical evidence considered by Judge Taglialatella. T4 at 10:2-21.

On March 19, 2014, a Judgment was entered finding that Petitioner-Respondent's compensable low back disability was now 35% permanent partial total (a worsening of 5% permanent partial total). Ra.178-179. Judge Taglialatella further found that this would normally have resulted in 184.29 weeks of permanent partial disability benefits, running from approximately March 18, 2006 through September 27, 2009, with each week paid at a rate of $322.00, consistent with the approach taken in the previous two orders. Ra.5-6; Ra.11-12; Ra.178-179. This would have entitled the Petitioner-Respondent to a gross amount of $59,340.00, less $32,292.00 previously paid to the Petitioner-Respondent on the prior reopener applications, for a balance due of $27,048.00. Ra. 179. However, the Court recognized that the Petitioner-Respondent was adjudicated totally and permanently disabled as of February 1, 2009 due to his subsequent compensable left shoulder injury, and had been paid maximum weekly benefits since that date pursuant to the previous Order for Permanent Total Disability. Ra. 179. The Court, therefore, limited the new compensation actually paid to the Petitioner-Respondent to the time period from March 18, 2006 through January 31, 2009 (the day before the date of totality). Ra. 179. This represented 150 1/7 weeks, of accrued compensation prior to

the date of totality, which was paid at rate of $322.00 per week less the previous benefits paid at $225.40 per week. Ra. 179. New compensation for this period totaled $16,054.00. Ra. 179. The remaining permanent partial disability benefits beginning on February 1, 2009 through September 27, 2009 were not paid to the Petitioner-Respondent, and were instead paid to the Second Injury Fund, which had been making payments on the Claim Petition 2009-7914 since December 18, 2011. Ra. 179.

LEGAL ARGUMENT

THE JUDGE OF COMPENSATION DID NOT ERR IN AWARDING INCREASED PERMANENT PARTIAL DISABILITY TO PETITIONER-RESPONDENT, DOMENICK CATRAMBONE, IN CONNECTION WITH CLAIM PETITION 2007-16972

I. THE NEW JERSEY WORKERS' COMPENSATION ACT ("ACT"), N.J.S.A. 35:15-1 et seq., SHOULD BE LIBERALLY CONSTRUED IN FAVOR OF THE EMPLOYEE

The Honorable Carmine J. Taglialatella, J.W.C.'s Opinion of March 12, 2014 and Order of March 19, 2014 should be affirmed as His Honor's factual findings and application of law are entirely consistent with the preponderance of the credible evidence in this case and the beneficent purposes of the New Jersey Workers' Compensation Act ("Act"). N.J.S.A. 35:15-1 et seq. Advancing Respondent-Appellant's position would effectively dismiss the Petitioner-Respondent's claim with prejudice, and deny the Petitioner-Respondent essential, cornerstone statutory rights.

An "axiomatic principle" of the New Jersey Workers' Compensation Act ("Act") is that "the language of the workmen's compensation act must be liberally construed in favor of the claimant." Close v. Kordulak Bros., 44 N.J. 589, 604 (1965). Repeatedly, the Supreme Court has emphasized that the Act is remedial, social legislation and as such, it should be liberally construed so that its beneficent purposes are accomplished. Cannuscio v. Claridge Hotel and Casino, 319 N.J. Super. 342,

349, 725 A.2d 135 (App. Div. 1999) (citing Fiore v. Consol. Freightways, 140 N.J. 452, 465, 659 A.2d 436 (1995)).

This liberal construction principle is designed "to implement the legislative policy of affording coverage to as many workers as possible." Lindquist v. City of Jersey City Fire Department, 175 N.J. 244, 258, 814 A.2d 1069 (2003) (citing Brower v. ICT Group, 164 N.J. 367, 373, 753 A.2d 1045 (2000)).

The Act is "humane legislation designed to place the cost of work-connected injury on the employer who may readily provide for it as an operating expense." Livingstone v. Abraham & Strauss, Inc., 111 N.J. 89, 94-95 (1988) (quoting Hornywak v. The Great Atl. & Pac. Tea Co., 63 N.J. 99, 101 (1973)). Accordingly, it is axiomatic that the provisions of the Act be construed with this broad remedial purpose in mind. Id.

At the heart of the instant matter is a person who seriously injured his lumbar spine while in the course and scope of his employment for the Respondent-Appellant, who seeks the full protection of the Act for a worsened medical condition. He received an original permanent partial disability award on May 15, 2008 in the amount of 27 ½% referable to his low back, and an increase of disability to 30% permanent partial disability on November 29, 2010. Judge Taglialatella, then adjudicated the Petitioner-Respondent as 35% permanently partially disabled for his lumbar spine on March 12, 2014. Judge Taglialatella's

findings of fact are essentially uncontested; the Petitioner-Respondent's lumbar spine claim had significantly worsened as a matter of law since the entry of the prior Order Approving Settlement of 30% permanent partial total, entered on November 29, 2010. The condition worsened to the point that staged surgery was recommended by the treating neurosurgeon, authorized by the Respondent-Appellant, Dr. Andrew Glass, and was declined by the Petitioner-Respondent in light of an unrelated cardiac condition, and accordingly, the fear of surgical outcome. (emphasis added).

As stated above, the Act must be "liberally construed in favor of the claimant," and as such a limitation, or in this case, denial of rights or entitlements guaranteed by the Act should be narrowly construed. The Respondent-Appellant urges that Petitioner-Respondent should be barred from any further medical or indemnity benefits for his compensable, severe low back condition due to the mere "fortuity" that he was involved in a subsequent work related accident, which in turn resulted in permanent and total disability with Second Injury Fund liability. It is respectfully submitted that this position is untenable. It is based upon a casual or cursory interpretation of the Act and case law cited. It would have the practical effect of extinguishing any future indemnity, and more importantly, medical benefits that the Petitioner-Respondent is

statutorily entitled to receive, and which are inextricably tied to the finding of increased disability. This position belies the legislative history and remedial nature of the Act.

II. THERE IS NO STATUTORY OR LEGAL PROHIBITION PLACED ON A PETITIONER CLAIMING AND RECEIVING AN INCREASE OF DISABILITY PURSUANT TO A TIMELY APPLICATION FOR REVIEW OR MODIFICATION UNDER N.J.S.A. 34:15-27, SOLELY BECAUSE HE OR SHE WAS ADJUDICATED AS PERMANENTLY AND TOTALLY DISABLED IN A SUBSEQUENT CLAIM FOR A SEPARATE AND DISTINCT CONDITION

The Respondent-Appellant has not provided this Court with any statutory provision or legal precedent in support of its aforementioned position. As Judge Taglialatella stated in His Honor's Opinion of March 12, 2014, "As the statute has been in existence for over one hundred years, it is clear that the Legislature has had ample opportunity to visit the specific issue in this case and make any adjustments to the Act, it has not done so." T4, 11:14-18. Additionally, the Compensation Judge noted that there is no indication that the "Legislature has ever considered the provision of later permanency benefits under another claim to operate as a bar to a petitioner's rights under [N.J.S.A. 34:15-27]." T4, 11:18-22.

Under N.J.S.A. 34:15-27:

> Upon the application of any party, a formal award, determination, judgment or order approving settlement may be reviewed within two years from the date when the injured person last received a payment on the ground that the incapacity of the injured employee has subsequently increased.

The language of N.J.S.A. 34:15-27 places no restriction, nor has Respondent-Appellant pointed to any legal precedent which restricts an Application for Review or Modification of an award of compensation for either indemnity or medical treatment other than a statute of limitations of two years from the date of last indemnity benefit paid or authorized medical treatment (whichever date is later). This statutory scheme recognizes that a modest compensable disability can worsen and become a very significant loss of function at a later time, which is exactly what has occurred in this case.

Respondent-Appellant has not provided this Court with any legal authority limiting the number of Applications for Review or Modification that a petitioner may file in connection with a specific claim that is timely made. Additionally, Respondent-Appellant has not provided this Court with any statutory limitation on the amount of medical treatment which may be provided by a respondent, so long as the treatment is authorized, reasonable and necessary relative to the compensable

medical condition. Here, Petitioner-Respondent has filed, and successfully prosecuted, not only his original claim for permanent partial disability, but also two timely Applications for Review or Modification of his award consistent with the provisions of N.J.S.A. 34:15-27.

A. The Result of a Denial of Any Increased Permanent Partial Disability in Connection with Claim Petition 2007-16972, As Respondent-Appellant Has Urged, Would Have the Practical Effect of a Dismissal With Prejudice, Denying Petitioner-Appellant Further Rights to Both Compensable Indemnity and Medical Treatment as the Statute of Limitations Would Have Run, Which is Inconsistent with the Act's Broad Remedial Purposes and the 1979 Amendments

The primary objectives of the Act's 1979 Amendments "were to eliminate awards for minor disabilities, to increase awards for the more seriously disabled, and to contain the overall cost of workers' compensation." Perez v. Panatoste, Inc., 95 N.J. 105, 114 (1984).

In the case before this Court, it is unquestioned that the Petitioner-Respondent suffers from a very serious, compensable lumbar spine condition for which significant ongoing medical treatment has occurred over the years, and for which there have been current recommendations for further significant surgical intervention, which has been postponed primarily because of a cardiac condition and the Petitioner-Respondent's fear of surgical outcome. Here, it is obvious that Petitioner-

Respondent's low back condition has materially worsened since the entry of the aforementioned November 29, 2010 Order Approving Settlement. As evidenced by the eight years of progressive worsening, it is likely that this condition will continue to deteriorate as time goes on. As such, he is precisely the person the Act was designed to protect to the fullest extent possible. He is entitled to the full benefits of the Workers' Compensation statute in no less measure for his permanent partial disability relative to his low back condition than he is with respect to his subsequent award for permanent total disability in connection with Claim Petition 2009-7914.

If the Petitioner-Respondent's underlying, twice successfully reopened Claim Petition were to be dismissed on the basis urged by the Respondent-Appellant (i.e. no additional benefits whatsoever paid), the Petitioner-Respondent would have no further rights for medical treatment and/or indemnity benefits as the Statute of Limitations would then bar any future reopening of this claim since more than two years have elapsed since the date of last indemnity paid or last authorized medical treatment (July 26, 2012). His right to future medical treatment for a worsened, compensable condition, a fundamental right under the Act, would become a nullity.

Respondent-Appellant has not raised this practical nullification effect in its brief. Judge Taglialatella's

decision expressly preserves and protects this cornerstone right. Respondent-Appellant's position is an overly restrictive construction of the Act's remedial intent. Respondent-Appellant's position seeks to shirk its statutory liability to this seriously injured Petitioner-Respondent by absolving itself from any further liability for this Petitioner-Respondent's compensable, low back condition merely because he suffered a subsequent left shoulder injury giving rise to 33 1/3% permanent total disability. The Respondent-Appellant has only referenced cases and statutory language that state a petitioner cannot receive more than 100% permanent total disability as to the rate of payment on that specific claim or condition. Respondent-Appellant has not cited any relevant case law which states that a petitioner is not entitled to disability benefits for multiple conditions so long as the payments are paid within the maximum total disability rate even after the date of totality, as the Court held in Paul v. Baltimore Upholstering Co., 66 N.J. 111 (1974) (superseded on other grounds).

The Act's statutory scheme inextricably ties indemnity and medical benefits together, as evidenced by the Statute of Limitations of N.J.S.A. 34:15-27. By attempting to avoid any obligation for payment of any amount of increased permanent partial disability, the Respondent-Appellant seeks a concomitant, premature avoidance of any further liability for

medical treatment for the Petitioner-Respondent's compensable low back disability because the running of the statute of limitations bars both benefits.

This obvious unacceptable consequence of Respondent-Appellant's position was a significant factor considered by Judge Taglialatella, as expressly stated in His Honor's decision. The Court's carefully reasoned decision attempted a fair balance between the Act's intent to fully compensate a seriously injured petitioner for all of his or her compensation benefits (indemnity and medical), while simultaneously making certain that there was no double recovery or unjust enrichment by way of receipt of concurrent indemnity benefits above the maximum rate payable. While the Respondent-Appellant describes the Compensation Court's decision as "unconscionable," it completely ignores the practical impact of its avoidance of any future medical liability to the Petitioner-Respondent if its position is advanced, which position is in complete opposition to the aforementioned legislative history behind the Act.

III. JUDGE TAGLIALATELLA'S ORDER OF MARCH 12, 2014 HAS NO IMPACT WHATSOEVER ON THE APPORTIONMENT OF LIABILITY BETWEEN RESPONDENT-APPELLANT AND THE SECOND INJURY FUND IN CONNECTION WITH CLAIM PETITION 2009-7914

As Judge Taglialatella stated in His Honor's Opinion, there is no language in N.J.S.A. 34:15-95, the section of the Act that deals with eligibility for permanent and total disability

benefits with Second Injury Fund involvement, "proscribing a petitioner's right to modify a different claim petition." T5 11:22-12:3.

The Second Injury Fund was enacted as remedial legislation to provide incentive for employers to hire disabled workers by relieving that employer from sole liability if a compensable accident in and of itself does not result in permanent and total disability. There must be sufficient preexisting disability at the time of the last compensable accident to render a Petitioner permanent and totally disabled.[4] Di Bernard v. Great Atlantic and Pacific Tea Co., 303 N.J. Super. 280, 285-286; 696 A.2d 764 (App. Div. 1997); Walsh v. RCA/General Electric Corp., 334 N.J. Super. 1, 756 A.2d 1012, (App. Div. 2000). In such a situation, the Second Injury Fund benefits an employer by limiting that employer's liability to the portion of the incapacity produced solely by the last work related accident, with the balance charged to the Second Injury Fund. Belth v. Anthony Ferrante & Son, 47 N.J. 38, 45-48, 219 A.2d 168 (1966). Prior to the enactment of N.J.S.A. 34:15-95, an employer was obligated to pay permanent and total disability benefits for the entirety of an employee's lifetime regardless of whether the permanent and total disability was partially caused by a preexisting

[4] It should be noted that the 1979 Amendments to N.J.S.A. 34:15-95 expanded the basis for Second Injury Fund liability to allow potential liability for an aggravation of a preexisting compensable and non-compensable conditions.

condition. Id. The only criterion, presently, which must be met for Second Injury Fund liability is whether or not at the time of the compensable accident, there was compensable disability in combination with preexisting disability which rendered an individual permanently and totally disabled. N.J.S.A. 34:15-95; Lewicki v. New Jersey Art Foundry, 88 N.J. 75, 83, 438 A.2d 544 (1981). A preexisting condition or disability need not be static to form a basis for Fund Liability; the conditions need not be "fixed, measurable and arrested" preceding the occurrence of the compensable accident. Id. At 85-86. This is a recognition that in reality, preexisting disabilities can and often do worsen over time, especially more significant ones. Id.

Analysis for Second Injury Fund liability always begins with the last compensable accident. If that accident in and of itself renders an individual permanently and totally disabled, there is no Second Injury Fund liability, regardless of the amount of preexisting disabilities. N.J.S.A. 34:15-95(a). It is only when that last compensable accident in and of itself is insufficient to render an individual permanently and totally disabled, that a Second Injury Fund analysis begins. Id.

In such a situation, the Court must consider all of the preexisting disabilities in existence at the time of the last compensable accident to decide whether they give rise to sufficient combined disability to render a petitioner 100%

permanently and totally disabled once the compensable disability from the last compensable accident is first determined. Total and permanent disability extends for a period of 450 weeks, and once this period expires, the Second Injury Fund is responsible for paying continuing lifetime benefits pursuant to N.J.S.A. 34:15-12(b). This determination has nothing to do with altering or supplanting the specific benefits which might be payable with any of those prior claims which comprise the Second Injury Fund's percentage of disability. It is simply a "relief fund," which exists strictly for the payment of additional permanent and total disability benefits when the last compensable disability in and of itself is insufficient to render a petitioner permanently and totally disabled.

The apportionment between the Second Injury Fund and the employer for permanent total disability is a very specific and distinct benefit, having nothing whatsoever to do with the potential amount of preexisting compensation which a Petitioner may have previously received. In many situations, the aggregate preexisting disability for Second Injury Fund purposes is far less than the actual disability existing at the time of the last compensable accident. For example, if a last compensable accident is adjudicated as 75% permanent partial disability, and a petitioner had a prior disability award of 50% permanent partial disability, the Second Injury Fund's liability would

only be 25% permanent total disability, since 25% is the residual disability once 75% is subtracted from 100%. The converse is not necessarily true. If preexisting disabilities do not at least equal the difference between the compensable disability and 100%, there is no entitlement to total disability benefits, and therefore, no Second Injury Fund liability. A petitioner would then only receive permanent partial disability for his or her last compensable accident.

That very analysis had previously occurred in the instant case. On November 29, 2010, the Petitioner-Respondent received an award of permanent total disability in connection with C.P 2009-7914 for 33 1/3% as to a shoulder disability, and 66 2/3% aggregate preexisting disability as a result of a host of serious medical conditions existing at the time of the last compensable accident, including, but not limited to Petitioner-Respondent's prior workers' compensation permanent partial disability awards totaling 55% permanent partial disability. When these compensable disabilities were combined with the Petitioner-Respondent's other, serious non-compensable conditions which existed at the time of the June 14, 2008 compensable accident, it could certainly be argued that the Petitioner's actual aggregate disability was far greater than 66 2/3%. However, under N.J.S.A. 34:15-95, the Second Injury Fund pays the balance of residual disability for permanent total

disability, once liability for the last compensable accident is established regardless of how much actual preexisting disability may have been in existence. There was no apportionment of the liability between the various preexisting conditions in connection with Claim Petition 2009-7914, nor does the law require same. The only disability relevant to impose potential liability on the Second Injury Fund, is the aggregate disability of the preexisting medical conditions which existed on the date of the subsequent compensable accident, June 14, 2008. There is no other date which is relevant for this consideration which determines the fixed apportionment of liability between a Respondent and the Second Injury Fund. The preexisting medical conditions may be compensable or non-compensable, and may be limited to one condition or a multitude of conditions, so long as that prior disability, acting together with the later occupational condition cause the total and permanent disability. Walsh v. RCA/General Electric Corp., 334 N.J. Super. at 11. However, once this apportionment is made and permanent total disability awarded, the apportionment of liability for permanent total disability is never altered regardless of what happens with respect to these medical conditions. Even subsequent medical disabilities, for that matter, are irrelevant so long as the petitioner remains permanently and totally disabled. This is true because the only relevant point in time for

apportionment for Second Injury Fund liability is at the time of the last compensable accident. That date acts as a "snapshot" in time for Second Injury Fund liability. Once that apportionment is made, it is fixed for the entirety of the permanent total disability claim. It is of critical importance that Judge Taglialatella's decision did nothing to undermine the integrity of the permanent total disability award or apportionment of liability between the Respondent-Appellant and Second Injury Fund.

Moreover, under the New Jersey Workers' Compensation Act ("Act"), N.J.S.A. 34:15-1 et seq., there is no bar to an individual having multiple permanent partial disability awards, the aggregate of which could exceed the numerical rating of 100%. The Act has always permitted aggregate benefits exceeding this 100% figure. The determination of permanent total disability is a completely distinct and distinct disability under the Act. N.J.S.A. 34:15-12(b). For example, if an individual has received three 25% permanent partial disability awards for a right shoulder disability, left shoulder disability, and hip fracture, respectively, so long as the person resumes employment, there is no statutory provision or legal precedent limiting any remaining compensable disability to a 25% permanent partial disability rating.

It is therefore, respectfully submitted that apportioning liability between the Respondent-Appellant and the Second Injury Fund regarding Claim Petition 2009-7914, in no way adjudicates Respondent-Appellant's liability for the Petitioner-Respondent's low back condition regarding continued permanency or medical treatment despite that condition contributing in part to the Second Injury Fund liability for permanent total disability.

IV. JUDGE TAGLIALATELLA'S FACTUAL FINDINGS REGARDING WORSENING OF PETITIONER-RESPONDENT'S COMPENSABLE CONDITION ARE ENTITILED TO DEFERENCE

The Judge of Compensation's, March 12, 2014 Opinion should be afforded great deference in this case, as Judge Taglialatella's findings of fact are not contested by the Respondent-Appellant, and his conclusions of law are entitled to deference absent a clear error of law or showing of abuse of discretion.

"Courts generally give 'substantial deference' to administrative decisions." Earl v. Johnson & Johnson, 158 N.J. 155, 161, 728 A.2d 820 (1999) (quoting R & R Marketing, L.L.C. v. Brown-Forman Corp., 158 N.J. 170, 175, 729 A.2d 1 (1999)). Our Supreme Court in In Re Hermann, 192 N.J. 19, 27-28, 926 A.2d 350 (2007), addressed the limited standard of review that governs appeals of final decisions by state administrative agencies. The Court noted that an administrative agency's decision will be sustained unless there is a clear showing that

the decision is arbitrary, capricious or unreasonable, or that it lacks fair support in the record. Id. The Court observed, "three channels of inquiry" which "inform the appellate review function." Id. These are:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors. Id. (quoting Mazza v. Board of Trustees, Police and Firemen's Retirement System, 143 N.J. 22, 25, 667 A. 2d 1052 (1995)).

"When an agency's decision meets [these] criteria, then a court owes substantial deference to the agency's expertise and superior knowledge of a particular field." Id.

The scope of appellate review of workers' compensation cases is "limited to determining whether the findings of the Judge of Compensation could reasonably have been reached on sufficient credible evidence present in the whole record, after giving due weight to his expertise and his opportunity of hearing and seeing the witnesses." Singletary v. Wawa, 406 N.J. Super. 558, 561 (App. Div. 2009) (quoting Kozinsky v. Edison Prods. Co., 222 N.J. Super. 530, 537 (App. Div. 1988), and citing Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)).

The Appellate Division should not weigh evidence anew and make independent factual findings; rather the function is to determine whether there is adequate evidence to support the judgment rendered below. Zahner v. Pathmark Stores, Inc., 321 N.J. Super. 471, 476 (App. Div. 1999) (citing State v. Johnson, 42 N.J. 146, 161, 199 A.2d 809 (1964)). Accordingly, deference is given to the findings of the trial judge which are influenced by his or her ability to hear and see competent evidence. Id. "When the reviewing court is satisfied that the findings meet this criterion, its task is complete and it should not disturb the result, even though it has the feeling it might have reached a different conclusion were it the trial tribunal." Johnson supra 442 N.J. at 162.

Here, the Petitioner-Respondent has proven, by demonstrable, objective medical evidence, a material worsening of his compensable lumbar spine condition, and that material worsening is not in serious dispute by Respondent-Appellant. Judge Taglialatella was very familiar with this matter, having heard testimony from not only the Petitioner-Respondent, but also, Drs. Gaffney and Paharia, the respective permanency evaluating physicians. Additionally, Judge Taglialatella was the Judge who presided over the previously referenced November 29, 2010 Order Approving Settlement and Order for Permanent and Total Disability with Second Injury Fund liability in connection

with this underlying claim and Claim Petition 2009-7914. In His Honor's well-reasoned Opinion of March 12, 2014, Judge Taglialatella carefully described the medical and factual basis for the increase in disability from 30% permanent partial total disability to 35% permanent partial total disability. His Honor described that in deciding this case, all credible and competent evidence, inclusive of testimonial and documentary evidence, was considered, and further described that His Honor applied His Honor's own experience and expertise in order to reach the conclusion. T4 at 10:7-21.

This finding of a material worsening of the Petitioner-Respondent's compensable lumbar spine condition, and increased disability is precisely what gives rise to the legal entitlement to benefits under the Act. A higher rating of disability also quantifies the seriousness of a claim, and extends the time period for payment of a permanent partial disability award for statute of limitations purposes, even where all weeks are not directly paid to a petitioner. Thus, a more seriously injured worker with a greater percentage of disability will be awarded more weeks of compensation, and therefore a greater period of time to reopen a claim. The legal entitlement to indemnity and medical benefits results from the Compensation Judge's factual finding of an increase of the Petitioner-Respondent's lumbar spine disability due to a material worsening of his condition.

Respondent-Appellant's assertion that the Judge's decision was an "error of law" completely ignores the basic premise that there must first be a determination that a compensable medical condition has worsened. Once this determination occurs, there is then a determination as to the extent of benefits paid and manner of payment. In recognizing these considerations, the Trial Court noted that to extinguish a Petitioner's "right to modify an award under which he was not adjudged as permanently and totally disabled would be contrary to both the strict construction and spirit of our law." T4 at 12:22-25, 13:1

V. THE WORKERS' COMPENSATION ACT AND WORKERS' COMPENSATION BENEFITS ARE PRIMARY TO COLLATERAL SOURCE MEDICAL COVERAGE, AND WITH CERTAIN LIMITED EXCEPTIONS, THE EXCLUSIVE REMEDY FOR AN EMPLOYEE WHO SUFFERS A WORK RELATED INJURY

With certain limited exceptions, the Workers' Compensation Act is the exclusive remedy for an employee who suffers a work-related injury. N.J.S.A. 34:15-7, N.J.S.A. 34:15-8. Under the Act, an employer is required to provide necessary medical treatment to a worker injured in the course of employment. Benson v. Coca Cola Co., 120 N.J. Super. 60, 66 (App. Div. 1972).

In a situation where there are different types of benefits available, the law has long held, under the Collateral Source Rule, that losses resulting from work-related accidents should be borne by the employer. N.J.S.A. 39:6A-4 and-10; Portnoff v.

New Jersey Manufacturers Insurance Company, 392 N.J. Super. 377, 383, 920 A.2d 761 (App. Div. 2007). This reflects a legislative policy that such losses should be borne by the "ultimate consumers of the goods and services in whose production they incurred" rather than the general population. Id. (quoting Lefkin v. Venturini, 229 N.J. Super 1, 12, 550 A.2d 985 (App. Div. 1988.)

A. Workers' Compensation Benefits are Primary Coverage to Medicare Pursuant to the Medicare Secondary Payer Statute, 42 U.S.C. 1395(y)(b)(2)

Furthermore, the Medicare Secondary Payer ("MSP") Statute, 42 U.S.C. 1395(y)(b)(2) assigns primary responsibilities for medical bills of Medicare recipients to collateral sources when available. Workers' compensation has always been primary to Medicare. The MSP statutory provisions state that the Medicare Program will not pay for medical items and services if "payment has been made or can reasonably expected to be made" under the following primary plans: (i) workers; compensation; (ii) liability insurance policy; or (iii) no fault insurance. 42 U.S.C. 1395(b)(2)(Aii); 42 C.F.R. 411.20(a)(2). While the MSP provisions permit the Medicare program to pay for covered items and services if a plan described above cannot reasonably be expected to make payment promptly, the MSP provisions make clear that any such payment is "conditioned on reimbursement to the

appropriate Trust Fund", and that any primary plans or entities receiving payment from a primary plan are required to reimburse the Trust Fund for "any payment made by the secretary" if it is determined that such primary plan has or had a responsibility to make payment. 42 U.S.C. 1395y(b)(2)(B)(ii)

As it relates to workers' compensation, the Center for Medicare-Medicaid Services' ("CMS") regulations specify that Medicare does not pay for any service for which payment has been made, or can reasonably be expected to be made under a workers' compensation law, or plan of the United States or a state. 42 U.S.C. 411.40. If CMS is notified that a proper workers' compensation claim has been made by an injured worker who also happens to be a Medicare beneficiary, as is the case with the Petitioner-Respondent, CMS may pay conditionally for any disputed medical items and services at issue in the claim, however, those payments are then subject to recovery once the workers' compensation case is settled or a judgment or award has been rendered. 42 C.F.R. 411.45.

Here, Petitioner-Respondent is a Medicare beneficiary. As indicated above, should Respondent-Appellant's position that the Petitioner-Respondent is not entitled to any increased disability be advanced, the Petitioner-Respondent would not be entitled to any further authorized treatment for his serious, compensable lumbar spine condition because the statute of

limitations will have run as the last authorized treatment was more than two years ago (July 26, 2012). Accordingly, in the event that his condition further worsens and he seeks the staged spinal surgery previously recommended as compensable, he would have to attempt to utilize Medicare as a collateral source to seek treatment for this compensable condition. This would be in direct conflict with both New Jersey and Federal law. Again, as applied to workers' compensation, CMS's regulations specify that Medicare does not pay for any services for which payment has been made, or can reasonably expect to be made, under a workers' compensation law, or plan of the United States or a state. 42 U.S.C. 411.40. Advancing Respondent-Appellant's position would have the improper effect of placing the burden of the Petitioner-Respondent's future medical care for his admittedly compensable lumbar spine condition on the Federal taxpayer. This is the precise situation that the MSP statutory provisions were enacted to avoid, and results in a windfall to the Respondent-Appellant who would circumvent having to provide the Petitioner-Respondent with continuing, otherwise compensable medical treatment and care for his clearly compensable and worsened low back condition. It is respectfully submitted that the Federal Government would be hard-pressed to accept Respondent-Appellant's reasoning that a subsequent compensable accident for a left shoulder condition, which gave rise to

permanent total disability, releases it from continued liability for a low back condition.

VI. JUDGE TAGLIALATELLA'S RULING OF MARCH 12, 2014 DOES NOT CREATE A "WINDFALL" FOR THE PETITIONER-RESPONDENT

A. The Applicability of Paul v. Baltimore Upholstering Co., 66 N.J. 111 (1974) (*superseded on other grounds*), to the Case at Bar

The Supreme Court decision in Paul v. Baltimore Upholstering Co., 66. N.J. 111, 135-136 (1974) (*Superseded on other grounds)* serves as precedent for Judge Taglialatella's decision. The Supreme Court, in Paul, underscored the importance and integrity of a prior permanent partial disability award, payable for a separate part of the body, at the time of a determination of permanent total disability for a subsequent unrelated medical condition. Id. In Paul, the Respondent sought to delay payment of any permanent total disability benefits beyond the Court determination of the date of permanent total disability because the Petitioner was receiving a lesser prior permanent partial disability award, payable at a lower rate than the permanent total disability rate. Id. The Respondent argued that the literal reading of the statute expressly prohibited the payment of concurrent compensation and, as such, the Petitioner would have to "wait" until the expiration of the permanent partial disability award, paid a lower weekly rate, before the Respondent's actual obligation for permanent and total disability could legally commence. Id.

However, the Supreme Court, in Paul, clearly stated that where a literal interpretation of the Act (i.e., no current permanency indemnity benefits payable until permanent partial disability benefits are fully paid) would undermine a more compelling compensation benefit payable (i.e., a Petitioner receiving full statutory rate benefits once adjudicated as permanently and totally disabled), a solution would be fashioned by the courts to make certain that the larger purpose of the Act (to significantly compensate those individuals significantly disabled) was accomplished. Id. Furthermore, the Court in Paul, cited the Supreme Court in Combination Rubber Mfg. Co. v. Obser., 95 N.J.L. 43, 45 (1920) which stated that "the spirit should not be killed by the letter [of the law]." Paul v. Baltimore Upholstering Co., 66 N.J. at 136.

Paul's holding permits a simultaneous payment of separate disability awards with overlap of both permanent partial disability and permanent total disability. Id. It allows for a prior permanent partial disability award to be paid in full. It requires a respondent's obligation to pay permanent total disability to start at the date permanent and total disability is determined, however, the permanent total disability rate is reduced to accommodate the ongoing permanent partial disability award. Id. By reducing the weekly rate of permanent total disability in this fashion, a petitioner receives his or her

maximum weekly benefits and is fully paid for both pending claims. The Court in Paul sought to achieve a proper result, making certain that the Petitioner was fully compensated for his respective unrelated disabilities, while recognizing that he could not receive more than the total disability benefit rate once there was a simultaneous payment of both benefits. Id.

In a Second Injury Fund situation, this "Paul overlap" results in a respondent paying for a longer period of time, but still confining its total dollar payment to a petitioner to that which was awarded without regard to the change of its weekly rate. Id. While there was no statutory provision allowing for such a duplication of benefits under the Act, the Supreme Court fashioned a form of relief that allowed a partial concurrence of indemnity benefits which did not offend the basic notion that an individual should not be receiving greater than his or her maximum weekly compensation benefits from multiple sources. Id. In doing so, the Court recognized that even though "cold logic" may favor the workers' compensation insurance carrier, Courts have not hesitated to construe the Act so as to comport with its beneficent and remedial objectives in favor of the injured worker, rather than be bound by its "coldly literal import." Id.

The Paul Court did not hold that the Petitioner's prior partial disability payments stopped immediately on the date that he became permanently and totally disabled as the Respondent-

Appellant has urged in the instant case. Id. At 135-136. Nor did the Paul Court hold that once the Petitioner became permanently and totally disabled, all rights under the prior award were extinguished. Id. In Paul, the Petitioner was still adjudicated permanently and totally disabled even though the partial disability award continued by way of payment. Id. The Paul Court recognized the integrity of the prior permanent partial award and the significant benefits which attach to it. Id. It did not foreclose that Petitioner from receiving continued medical treatment running from the last date of permanency paid, nor did it expressly foreclose the Petitioner from having the right to file a timely Application for Review or Modification, if necessary. The Paul Court simply recognized that an individual may receive concurrent payments under the Act where it was fair and equitable to do so to make certain that the Petitioner received the full benefits afforded to him in connection with multiple claims, even if the last claim is for permanent total disability. Id. While the Paul Court did not expressly address the need for further medical treatment, this is an inseparable part of the total compensation benefits paid to the Petitioner-Respondent in connection with a permanent partial disability award, and is one of the reasons why there is no statutory extinguishment of the right to ongoing medical treatment, absent a subsequent trauma which aggravates the

medical condition such that further medical treatment is no longer deemed compensable or more than two years run from the late date of indemnity paid or authorized medical treatment provided (whichever date is later), thereby causing any claim to be barred by the statute of limitations.

In the instant matter, the Petitioner-Respondent is entitled to the same protection for his multiple compensable conditions under the Act as was the Petitioner in Paul.

1. Hypothetical Paul Calculation

To illustrate how the Paul calculations work in practice in the Workers' Compensation Court, the Petitioner-Respondent submits the following hypothetical example:

If a Petitioner met with a compensable injury to his or her lumbar spine resulting in a determined date of permanent and total disability as of February 1, 2010 at the maximum disability rate ($794.00), with an apportionment of 50% permanent partial disability compensable and payable by a Respondent, and 50% preexisting, that Petitioner would be entitled to 225 weeks of disability payable by the Respondent starting on February 1, 2010, payable until May 25, 2014 at a rate of $794.00 totaling $178,650.00, after which the Second Injury Fund would begin payments at that statutory rate as of May 26, 2014. Apportionment for permanent total disability is

based upon the initial statutory period of 450 weeks. N.J.S.A. 34:15-12(b).

If in that same scenario, the Petitioner also received a prior award for 75% permanent partial total disability for a serious compensable cervical spine condition occurring on February 1, 2005, such that the Petitioner would have been awarded 450 weeks of disability[5] at a weekly maximum rate of $666.00, for a gross award of $299,700.00, payable from February 1, 2005 through September 16, 2013 (assuming no temporary disability benefits were paid).

In this situation, Petitioner would have been entitled to five years of accrued permanent partial disability benefits awarded until the date of totality in the permanent and total disability case (from Feb. 1, 2005 through Feb 1, 2010). Under the Paul analysis, the Petitioner would continue to receive the remainder of the permanent partial disability award (189 1/7 weeks from February 1, 2010 through September 16, 2013) payable by the Respondent in the February 1, 2005 accident at the continued rate of $666.00. Additionally, the Respondent in the permanent and total disability matter would contribute $128.00 per week, the difference between the 2010 permanent total disability rate ($794.00) and the 2005 permanent partial

[5] Permanent partial disability is based upon a 600 week "sliding scale" basis wherein permanent total disability is an initial statutory period of 450 weeks.

disability rate ($666.00). This would yield accrued benefits approximately $24,210.28 payable by the permanent total disability Respondent (189 1/7 x $128.00), leaving a balance due and owing to the Petitioner in the amount of $154,439.72 ($178,650.00 - $24,210.28) as of September 16, 2013. The permanent and total disability Respondent would then pay 194.5085 weeks ($154,439.72/$794.00) at $794.00 per week in order to fulfill its indemnity obligation. This obligation would be fulfilled on June 8, 2017 (194.5085 weeks from September 16, 2013), after which the Second Injury Fund would commence its payments on June 9, 2017 instead of May 26, 2014.

Thus, in a Paul situation, the Respondent still fulfills its dollar obligation, but it delays when the Second Injury Fund begins payment. In every Paul situation, Second Injury Fund liability begins at a later date, and therefore its indemnity liability is less than if there was no "overlap." This practical impact is the basis for Judge Taglialatella's having the "overlapped," post-permanent total disability payments reimbursed to the Second Injury Fund rather than to the Respondent-Appellant, since the Second Injury Fund would be the ultimate "dollar beneficiary" in a strict Paul situation.

B. Judge Taglialatella's Order for Judgment of March 19, 2014 Does Not Result In a "Double Recovery" For the Petitioner-Respondent

Following the Paul logic, if payment for a permanent partial disability ongoing in an original claim is not an impediment to the payment of permanent total disability as a result of a subsequent accident, then the increased disability payments for a concededly worsened pre-existing medical condition resulting in an entitlement to increased permanent partial disability should not be an impediment to payment so long as the Petitioner-Respondent does not receive a "double recovery" for payments made subsequent to the date he is legally entitled to the maximum statutory benefit for permanent total disability. In short, Judge Taglialatella's Order represents a logical extension of the Paul analysis.

Here, the Respondent-Appellant has not challenged the Compensation Judge's conclusion that there is a clear worsening of the Petitioner-Respondent's overall compensable, low back condition. The Compensation Judge reached a fair balance between the Act's intent to fully compensate a seriously injured petitioner for all of his compensation benefits, inclusive of medical and indemnity, while simultaneously making certain that there was no double recovery or unjust enrichment by way of receipt of concurrent indemnity benefits. Specifically, the

permanent partial disability Judgment by the Compensation Judge gave rise to increased permanent partial disability payments only for those weeks of disability predating the subsequent determination of permanent total disability (February 1, 2009) due to the Petitioner-Respondent's subsequent unrelated shoulder condition, the subject matter of Claim Petition 2009-7914. Thus as to these retroactive benefits, there was no "double recovery." Rather, these benefits represent Petitioner-Respondent's legal entitlement to indemnity payments once it was determined that his compensable low back disability had worsened consistent with his previous, unchallenged award.

Despite the fact that the primary principle set forth in the Respondent-Appellant's brief is a prevention of double recovery, Respondent-Appellant has not clearly set forth the manner of payment in Petitioner-Respondent's awards. Had it done so, it would be readily apparent to this Court, that the Compensation Judge's Order did not provide the Petitioner-Respondent with a "windfall" or "double-recovery" as Respondent-Appellant claims.

But for the subsequent permanent total disability award under Claim Petition No. 2009-7914, the Petitioner-Respondent's lumbar spine disability Order for Judgment of March 19, 2014 in the amount of 35% permanent partial disability with a 7.5% credit for preexisting condition, would have resulted in 184.29

weeks of permanent partial disability benefits, running from March 18, 2006 (the date of the compensable accident) through approximately September 27, 2009, with each week paid at a rate of $322.00. This would have entitled the Petitioner-Respondent to a gross amount of $59,340.00, less $32,292.00 previously paid to the Petitioner-Respondent on the prior reopener applications, for a balance due of $27,048.00. However, Judge Taglialatella's Order for Judgment of March 19, 2014, recognizing that the Petitioner-Respondent was adjudicated to have been entitled to permanent and total disability benefits as of February 1, 2009 by way of a subsequent compensable left shoulder injury, and recognizing that the maximum payable rate of compensation cannot be exceeded, limited the Petitioner-Respondent's new accrued compensation to the time period from March 18, 2006 through January 31, 2009 (the day before the date of totality). This represented 150 1/7 weeks, of accrued compensation prior to that February 1, 2009 date of totality, which was paid at rate of $322.00 per week less the previous benefits paid at $225.40 per week. Permanency benefits beginning on February 1, 2009 through September 27, 2009 were not paid to the Petitioner-Respondent, and were instead credited to the Second Injury Fund, which had been making payments on the Claim Petition 2009-7914 since December 18, 2011, and which, pursuant to N.J.S.A. 34:15-12(b) is responsible for paying continuing lifetime benefits to the

Petitioner-Respondent. This would have been the practical result under Paul if the 35% permanent partial total disability award and the 100% permanent total disability award would have been made simultaneously. Technically, Respondent-Appellant's permanent total disability weekly rate would have been reduced to accommodate the overlap, but it would still have eventually paid its actual dollar obligation to Petitioner-Respondent. Thereafter, the Second Injury Fund's liability would have been deferred, thus entitling the Second Injury Fund to a credit in the instant matter.

The Petitioner-Respondent's first award in connection with this underlying claim was entered on May 15, 2008, for an amount of 27.5% permanent partial total disability, with a credit for 7.5% permanent partial disability. This award entitled Petitioner-Respondent to permanent partial disability benefits in the amount of 126.893 weeks of disability, running from approximately March 18, 2006 through approximately August 21, 2008, at a rate of $217.27 per week, for a gross amount of $27,570.00.

On November 29, 2010, the Petitioner received a second award after reopening his claim, in the amount of 30% permanent partial disability with a credit for preexisting condition in the amount of 7.5% permanent partial disability. This equaled payments in the amount of 143.265 weeks of compensation, at a

rate of $225.40 per week for a total of gross amount of $32,292.00 less the $27,570.00 paid on the prior award. Once this award was paid, the first 126.893 weeks were raised from the rate of the prior award, $217.27 per week to $225.40 per week, and the remaining weeks were paid at $225.40 per week.

The Petitioner-Respondent concedes, and has always conceded, that he is not entitled to any duplicative benefits for permanency in excess of his maximum permanent total disability rate. What makes this claim unusual is that subsequent to February 1, 2009, Petitioner-Respondent had already received a separate disability award that paid him maximum weekly benefits for those separate conditions and therefore payment to him of approximately 34 1/7 weeks without regard to the permanent total disability award would have exceeded the weekly maximum permanent total disability rate. Judge Taglialatella's carefully structured Order of March 19, 2014, assures that the Petitioner-Respondent did not receive any duplicative benefits, as no monetary benefit went to him beyond February 1, 2009, because by then, he received the maximum weekly aggregate benefit under the statute.

The Compensation Judge's Order for Judgment was very circumspect. The Petitioner-Respondent was only awarded those accrued weeks of permanent partial disability at the retroactive rate differential to be paid to him until the date he became

entitled to permanent total disability benefits (February 1, 2009). The Order recognizes that the Petitioner-Respondent had already been paid maximum total disability benefits as of that date. It is only that portion of the retroactive accrued benefits resulting from the increased weekly permanent partial disability benefit rate prior to February 1, 2009 for which the Petitioner-Respondent seeks payment, and that is all that was awarded.

In this case, the Petitioner-Respondent, is only receiving a period of permanent partial disability payments where he is not otherwise receiving permanent total disability payments from either the Second Injury Fund or the last paying Respondent. The additional payments after that date go to the Second Injury Fund, thus allowing the basic principles of Paul to be followed and thereby ensuring that the Petitioner-Respondent will receive the appropriate maximum protection to which he is entitled under the Act.

The decision of the Compensation Judge results in no windfall to the Petitioner-Respondent, nor does it disrupt in any way, shape or form the importance of stability with respect to a Respondent and Second Injury Fund in connection with permanent total disability awards. Furthermore, it is ironic that Respondent-Appellant argues against the Petitioner-Respondent obtaining "double recovery," when it would be the party

obtaining an unjust enrichment should that argument be accepted, by avoiding any future medical treatment for the Petitioner-Respondent's materially worsened, compensable lumbar spine disability as clearly found by the Court. Furthermore, payment to Respondent-Appellant is inconsistent with the Paul analysis. The Respondent-Appellant should not be otherwise relieved of its responsibility simply because there may be an overlapping of benefits between the two aforementioned awards when such overlap does not result in a "double recovery."

VII. THE DOCTRINES OF COLLATERAL ESTOPPEL AND RES JUDICATA ARE INAPPLICABLE TO PRECLUDE THE PETITIONER-RESPONDENT FROM RECEIVING AN INCREASE IN PARTIAL TOTAL DISABILITY; RATHER, THE DOCTRINES SHOULD BAR RESPONDENT-APPELLANT'S APPEAL IN THE INSTANT CASE

Respondent-Appellant's arguments that the doctrines of res judicata and collateral estoppel preclude the Petitioner from receiving increased disability benefits in the instant case, are without merit and inapplicable to deny the Petitioner-Respondent increased compensation in the underlying case.

Contrarily, it is Respondent-Appellant's argument which should be estopped and accordingly its appeal dismissed. The issue and parties involved in the underlying Appeal of Judge Taglialatella's Order of March 19, 2014 are the same as existed when the first Application for Review or Modification was concluded on November 29, 2010. At that time, the Petitioner-

Respondent received a 2 ½% increase of permanent partial disability for his low back condition, notwithstanding, that on the very same date, in a consolidated hearing, regarding a subsequent permanent and total disability claim, Claim Petition 2009-7914, the Petitioner-Respondent was adjudicated as entitled to permanent and total disability as of February 1, 2009, approximately twenty-two months prior to the entry of the award.

Thus, the parties accepted a compensable worsening of the Petitioner-Respondent's low back condition approximately twenty-two months after the date that he became eligible for permanent and total disability. Now that it has been established by a preponderance of the credible evidence that the Petitioner-Respondent's compensable low back condition has materially worsened even further, the same Respondent-Appellant, who had previously conceded increased permanency, argues that the February 1, 2009 date of totality bars any further worsening. This argument is completely in opposite of the November 29, 2010 Order Approving Settlement, which was agreed to without any reservations or restrictions of the Petitioner-Respondent's statutory rights, which he exercised in this case. In essence, the time for the Respondent-Appellant to make the argument that it is now making was at the time of that hearing. At that time, neither the Respondent-Appellant nor the Second Injury Fund objected to the increased disability, and the Petitioner-

Respondent was specifically advised of his continuing reopener rights, inclusive of medical treatment for a worsening of his condition.

Here, Petitioner-Respondent has met the test necessary to bar Respondent-Appellant's arguments under the notion of estoppel:

> (1) The issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party or in privity with a party to the earlier proceeding. Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 522 (2006).

There is no factual distinction between the further increase which Judge Taglialatella Ordered on March 19, 2014, the subject matter of this Appeal (from 30% permanent partial disability to 35% permanent partial disability) than that which existed on November 29, 2010, when the award was increased from 27 ½% permanent partial disability to 30% permanent partial disability relative to the Respondent-Appellant and/or subsequent permanent total disability. There is no change in circumstances between the March 19, 2014 Order for Judgment and the November 29, 2010 Order Approving Settlement for increased disability after the adjudicated date of permanent total

disability in Claim Petition 2009-7914, other than in this particular instance, the amount of increased disability now, in part, goes beyond the date of total disability, by approximately 34 1/7 weeks of the 184.29 weeks awarded, so that a credit must be given, to ensure that the Petitioner-Respondent does not receive more than the maximum rate payable for permanent total disability, following February 1, 2009, just as the Supreme Court deemed necessary in Paul.

The permanent total disability award was not affected by the prior increase from 27 ½% permanent partial disability to 30% permanent partial disability, and it is not affected by the further increase found by the Compensation Court on March 19, 2014. The Petitioner is still receiving his award for permanent and total disability, and the apportionment between the Respondent-Appellant and the Second Injury Fund was not disrupted. As such, Respondent-Appellant should be estopped from raising this issue again, and the underlying Appeal should be dismissed.

VIII. THE CASES CITED BY RESPONDENT-APPELLANT ARE DISTINGUISHABLE FROM THE CASE AT BAR

The cases relied upon by the Appellant-Respondent, Taylor v. Engelhard Industries, 230 N.J. Super. 245 (App. Div. 1989) and Mayti v. Singer Manufacturing Co., 76 N.J. Super. 379 (Law Div. 1962) and Bunk v. Port Authority of New York and New

Jersey, 279 N.J.Super. 613 (App Div. 1995) reversed on other grounds 144 N.J. 176 (1996), are distinguishable from the case at bar.

Specifically, these cases do not address a Petitioner's entitlements under a prior permanent partial disability award wherein payments have been made, and there has already been an adjudication of increased permanent partial disability benefits. Those cases do not address the ongoing benefits, both medical and indemnity, to which a petitioner is entitled to under the Act for his or her compensable pre-existing conditions. Furthermore, these cases do not expressly foreclose those rights under the unusual factual circumstances presented here, as Respondent-Appellant urges.

Mayti and Taylor specifically deal with a Petitioner who was deemed permanently and totally disabled on a singular claim petition, seeking additional compensation on that same claim petition.

In Taylor, an appellant widow challenged the ruling of the Division of Workers' Compensation denying her application to increase the percentage of disability awarded to her late husband and dismissing her application for dependency benefits. Taylor, supra, 230 N.J. Super. at 247-248. An award for total and permanent disability with Second Injury Fund liability was entered on November 29, 1977, with 55% permanent partial

disability payable by the Respondent, and 45% permanent partial disability attributed to the Second Injury Fund. Id. It is of relevance that this award was entered prior to the 1979 Amendments which significantly altered Second Injury Fund liability. Prior to the commencement of Second Injury Fund payments, the decedent died. Id. The decedent's wife's application for an increase of the same compensable disability for which the decedent was awarded permanent and total disability, was denied. Id. at 247-248.

In denying the appellant widow's application for an increase of benefits, the Court noted that while it "defies logic that a person could be more than 100 percent disabled, an award of 100 percent total disability only means that 'his disabilities as an economic working unit are such as to entitle him to the maximum statutory compensation.'" Id. (quoting Mayti, 76 N.J. Super. at 382.) In relying on Mayti, the Court in Taylor distinguished a permanently and totally disabled employee seeking a further award due to an increase of the effects of the same injury, from an employee deemed permanently and totally disabled and seeking compensation from a second injury. Id. A person who has been awarded compensation for 100% total permanent disability may engage in gainful employment pursuant to N.J.S.A. 34:15-12(b), and if reinjured, that person should be entitled to compensation for the second injury. Id.

The Court noted that "[O]n the other hand, an award of compensation for 100% total permanent disability should preclude any further award for any increase in the effects of the same injury." (emphasis added) Mayti, 76 N.J. Super. at 382. The reason for precluding any further award after an award of 100% total permanent disability is not because the effects of the injury may not increase, but rather because the employee has received all of the compensation that the law allows as to permanent and total disability. (emphasis added) Id. at 383.

Essentially, Taylor and Mayti stand for the notion that in a singular claim, wherein a petitioner has been adjudicated 100% permanently and totally disabled, that total disability award cannot be modified, and a petitioner cannot have more than 100% permanent and total disability for that singular exposure. This fundamental concept has never been argued by Petitioner-Respondent, and is not the issue of this case.

In the instant matter, the Petitioner-Respondent, Mr. Catrambone, did not attempt to modify his permanent and total award, nor did he seek an increase of disability for the same injury for which he received 100% permanent and total disability as was the case is Taylor and Mayti. He received 100% permanent and total disability with respect to Claim Petition 2009-7914, which involved a compensable work related injury to his left shoulder which occurred on June 14, 2008, combined with various

other disabilities which existed at the time of that injury. He received all of the compensation or benefits that the law allowed with respect to that specific claim petition and that claim petition only. He did not receive all the benefits that the law allows with respect to the case at bar.

Further, although the underlying injury is not an injury subsequent to Petitioner-Respondent's award of permanent and total disability it is in fact a "second injury," and not the same injury for which he received the permanent and total disability award. Taylor, supra, 230 N.J. Super. at 250-251. Petitioner-Respondent has never received the maximum statutory compensation with respect to the underlying injury. Mayti, supra, 76 N.J. Super. at 382.

Moreover, as a matter of law, the employer which is responsible for permanent total disability is also responsible for lifetime medical treatment for the compensable condition. If the compensable disability for which a Petitioner was adjudicated permanently and totally disabled was the same condition for which a Petitioner was seeking an increase of disability, as was the case in Taylor, the Petitioner's entitlement to increased medical treatment on an Application for Review or Modification under N.J.S.A. 34:15-27 would be irrelevant, since the employer would already be responsible for lifetime medical. However, if one of the aggregate preexisting

medical conditions is permanent partial disability, and is a completely separate and distinct medical condition, as exists here, then the mere fact that the Petitioner-Respondent thereafter received permanent total disability for a completely unrelated compensable medical condition, should not preclude the Petitioner-Respondent from being able to avail himself to the maximum period of time that he can receive medical treatment under N.J.S.A. 34:15-27, even if he does not receive the actual indemnity benefits awarded after the date of permanent and total disability. A subsequent accident which in and of itself has rendered, or combines with preexisting conditions to render a Petitioner permanently and totally disabled, should not proscribe a Petitioner from being able to reopen a preexisting, unrelated, compensable medical condition on the basis of a worsening of that condition.

Moreover, Bunk v. Port Authority of New York and New Jersey, 279 N.J. Super. 613 (App. Div. 1995) reversed on other grounds 144 N.J. 176 (1996), is not analogous to the case at bar. It should be noted that the main issue discussed in Bunk dealt with whether a Petitioner was barred from receiving New Jersey workers' compensation benefits at the same time as a New York Pension. The Bunk Court, briefly addressed the issue of whether or not a petitioner is entitled to recovery for different injuries sustained during the same employment period

in excess of 100%. Id. at 625. The limited available facts contained in the Bunk decision provide for an apparent unusual circumstance wherein the Bunk Court felt as though all of the Bunk's claims (inclusive of the orthopedic, neurologic and pulmonary conditions) could have been addressed through a singular claim petition. Id. In Bunk there was no Second Injury Fund involvement, and the permanent total disability award was solely borne by the employer.

Contrary to the facts in Bunk, in the instant matter, the Petitioner-Respondent's adjudication of permanent and total disability made in connection with Claim Petition 2009-7914, was not for a single compensable accident. Nor did the adjudication of permanent and total disability refer to "several different injuries and exposures sustained during a single period of employment." Id. The Petitioner-Respondent's employer does not bear the burden of Petitioner-Respondent's entire permanent-total disability as was the case in Bunk. Here, the employer was only responsible for 33 1/3% of the initial 450 weeks, or 150 weeks of permanency benefits, with the Second Injury Fund paying not only the remaining 300 weeks of the initial 450 week period, but also the Petitioner's subsequent lifetime benefits. Again, this was not the case in Bunk, wherein the employer was presumably responsible for 100% of the 450 weeks, in addition to lifetime benefits.

These cases relied upon by Appellant-Respondent are distinguishable from the Petitioner-Respondent's situation, and are not precedential. It is respectfully submitted that these cases cannot be used to extinguish the Petitioner-Respondent's statutory right to review or modify an award under which he was not adjudged as permanently and totally disabled.

CONCLUSION

In conclusion, the case before this Court involves a serious compensable lumbar spine injury, which has materially worsened as a matter of fact and law. With that compensable worsening, the Petitioner-Respondent is entitled to the full benefits of the Act, as prescribed by N.J.S.A. 34:15-1 et seq., in no less measure than he was entitled to the full benefits of the Act with respect to his subsequent permanent and total disability claim, his initial claim for low back permanent partial disability, and/or his first Application for Review or Modification of that claim.

Claim Petition No. 2007-16972 is a wholly and distinct claim from Claim Petition No. 2009-7914, the claim for which Petitioner-Respondent was adjudicated permanently and totally disabled. The two cases involve wholly and distinct accidents, with wholly and distinct disabilities, giving rise to wholly and distinct rights and payments.

In short, the Petitioner's claim for a low back disability is entitled to due deference regarding all of the benefits payable under the Workers' Compensation Act, including indemnity and medical treatment.

Advancing the Respondent-Appellant's position would be contrary to the beneficent purpose behind the Act, and would have the effect of a dismissal with prejudice, vanquishing the

Petitioner-Appellant's statutory rights and entitlement to continuing medical and indemnity payments for the reasons as previously set forth in the Petitioner-Respondent's brief.

Should the Petitioner-Respondent be barred from seeking further medical treatment for his compensable worsened low back condition (which would be the practical result of barring or denying any indemnity to Petitioner-Respondent), he would have to turn to Medicare, in contravention of both New Jersey and Federal law.

The underlying second Application for Review or Modification, just as the first one in this case, does not have any impact whatsoever as to the integrity of the apportionment of liability between the Respondent-Appellant and the Second Injury Fund relative to Claim Petition No. 2009-7914. The aggregate, pre-existing disability for Second Injury fund liability is separate and distinct from the underlying permanent partial disability award and the benefits payable with respect thereto. The Second Injury Fund was not a party to the trial of the Petitioner's second Application for Review or Modification because that Claim Petition has nothing whatever to do with Claim Petition No. 2009-7914, which was the only claim giving rise to Second Injury Fund liability. The only possible impact upon the Second Injury Fund, should the Court affirm Judge Taglialatella's decision, is the receipt of additional benefits

awarded that would otherwise go to the Petitioner-Respondent had he not already been adjudicated as permanently and totally disability as a result of his subsequent accident.

Furthermore, as the Supreme Court in Paul expressly permitted a simultaneous payment with an overlap of both permanent partial and permanent total disability payments to reach the "right" result, Judge Taglialatella's Order strikes a well-reasoned and fair balance between the Act's intent to fully compensate the seriously injured Petitioner-Respondent and preserve his fundamental right to apply for Review or Modification in the event of a further worsening of his condition, while concurrently assuring that the Petitioner-Respondent did not receive "unjust enrichment" or an impermissible "double recovery" by receiving rate payments which would exceed the maximum rate payable under the permanent total disability award.

The Respondent-Appellant has not provided any precedential statutory authority or case law refuting Judge Taglialatella's decision relative to the specific circumstances of the instant case. Respondent-Appellant urges this Court to contravene the well-entrenched legislative policy of affording full workers' compensation coverage to as many workers as possible under the protective umbrella of the Act, which has been in place for over 100 years. It seeks a conclusion that merely because the

Petitioner-Respondent suffered a subsequent compensable accident which when combined with the conditions which existed at the time of that accident rendered him permanently and totally disabled, he is somehow not entitled to any further indemnity or future medical benefits for his prior low back condition. Moreover, it argues that the Petitioner-Respondent was not even entitled to receive the increase in indemnity benefits prior to the date of his permanent total disability award on February 1, 2009.

Not only is the Respondent's-Appellant's position contrary to the legislative intent of the Act of the Supreme Court's decision in Paul, but it is also contrary to the precedent in this very case, as the Petitioner-Respondent on November 29, 2010, received an increase in permanent partial disability for this low back condition approximately 22 months after February 1, 2009, the date that the Petitioner-Respondent was deemed entitled to permanent and total disability benefits in connection with Claim Petition No. 2009-7914. No reservations or any restrictions whatsoever were placed on the Petitioner-Respondent's rights or entitlements under the Act at the time of his hearing on November 29, 2010. There was no objection by any party to the increase in disability which was entered at that time. The time for the Respondent-Appellant to make the argument which it now asks this Court to accept was at that time.

Respondent-Appellant has not provided any basis to disturb that portion of the Petitioner-Respondent's award representing the accrued weeks of increased permanency benefits prior to February 1, 2009. The Petitioner-Respondent's low back condition has worsened and his overall loss of function has increased. This in turn entitles him to retroactive permanency increase for those weeks awarded prior to the date of permanent total disability on February 1, 2009. This payment also has the further beneficent purpose of extending the statute of limitations for future reopening of this claim to its maximum potential (two years from last date of payment to the Petitioner-Respondent).[6] The benefits awarded to the Petitioner-Respondent are entirely consistent with the required liberal construction of the Act, which is intended to maximum benefits to seriously injured workers.

Again, this portion of payment prior to the date of total disability has no impact whatsoever with respect to the permanent total disability payments made by the Respondent or the Second Injury Fund.

It is the Petitioner-Respondent's position that the main issue, for which there is no clear precedent, is the determination of manner of payment of that portion of the

[6] As of this date, Respondent has still not made any payment regarding Judge Taglialatella's award of March 2014, despite its failure to apply for a stay either with the Division of Workers' Compensation or the Appellate Division.

Petitioner-Respondent's award which represents payments subsequent to February 1, 2009, rather than challenging the entitlement to any part of the award in the first place or, secondly, that portion of the award prior to February 1, 2009.

This narrow issue requires a determination of the manner of payment, if any, of the award for the approximate 34 1/7 weeks of permanent partial disability payments for the Petitioner-Respondent's increased low back condition which follow February 1, 2009. Judge Taglialatella's determination of payment to the Second Injury Fund merely reflected the practical effect of a Paul calculation (benefit to the Second Injury Fund) for the reasons previously set forth in this brief.

The Court could also deem that those weeks awarded after February 1, 2009 could be offset by the permanent total disability payments as the Petitioner-Respondent already received the maximum weekly benefit. In such a situation, the Petitioner-Respondent would not receive payment, but the Petitioner-Respondent would still have the benefit of the weeks for Statute of limitations purposes so that he could maintain any future reopener rights.

The award of additional benefits could be an important future consideration in a different fact situation where there were substantial additional weeks awarded such that the statute of limitations might be even further extended beyond the date

the Petitioner-Respondent was paid in connection with the entry of the Order, even though he would not actually receive dollar payments for the weeks awarded subsequent to the date of total disability. This would simply be one slight variation of the Court's reasoning, which would be theoretically consistent with the Paul analysis, all other factors considered. It is the award which is paramount. So long as payment of the same does not represent weekly payments exceeding the statutory maximum, then there is no error under the statute.

Under the unusual and rare circumstances presented in the instant case, it is respectfully submitted that for all of the foregoing reasons, the Court should affirm the March 19, 2014 the Order of the Honorable Carmine J. Taglialatella, J.W.C.

PETRO COHEN PETRO MATARAZZO, PC

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