



State of New Jersey

DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT
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MEMORANDUM

May 3, 2011

To: All Judges and Attorneys

From: Peter J. Calderone, Director and Chief Judge

Subject: May 2, 2011 Centennial Seminar

We had over 500 attorneys signed up for the Seminar. Your feedback on the evaluation forms will be helpful to determine the benefits of the Seminar and whether future Division seminars would be supported.

The CLE Certificates are being sent to Trenton Central Office to be officially stamped as required for the credits and then returned to the local vicinages for distribution to the attorneys and judges who participated in the Seminar.

Enclosed with this memorandum is the Seminar Syllabus that was developed by Judge Renee Ricciardelli, Julius Feinson, Esq., Jeffrey Monaghan, Esq. and Jerry Rotella, Esq. We appreciated their time and assistance in developing the Seminar materials.

Enclosure

New Jersey Is An Equal Opportunity Employer



DIVISION OF WORKERS' COMPENSATION
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AD-18.14 (R 05-10)

**SYLLABUS FOR WORKERS' COMPENSATION CENTENNIAL SEMINAR
MAY 2, 2011**

I. Establishing Disability from a Work Related Accident or Occupational Condition

- A. Petitioner has burden of establishing permanent disability from a work related injury or occupational condition and must prove by demonstrable objective medical evidence a disability that restricts the function of the body, its members or organs.
- B. In addition to proving objective medical evidence of permanent disability, Petitioner must also establish that because of the disability he or she has suffered a lessening to a material degree of his or her working ability and/or that the injury has impaired the Petitioner in carrying out "Ordinary Pursuits of Life." Impairment of Earning Capacity is not a necessary prerequisite to a finding of partial permanent disability.
- C. The burden of proving all these elements is on the Petitioner. Objective medical evidence is defined as evidence exceeding the subjective statement of the Petitioner. Extent and manner to which a professional analysis must go beyond the subjective complaints to constitute demonstrable objective evidence depends on the nature of the disability.

Perez v. Pantasote, 95 N.J. 105 (1984)

Perez v. Monmouth Cable Vision, 278 N.J. Super 275 (App. Div., 1994), certif. denied 140 N.J. 277(1995)

Saunderlin v. E.I. DuPont Company, 102 N.J. 402 (1986)

D. Application for Review or Modification requires same analysis for increase.

II. Second Injury Fund

A. N.J.S.A. 34:15-95

B. Burden of Proof

Katz v Howell, 68 N.J. 125 (1975)

In order for liability of the New Jersey Second Injury Fund to attach (1) the ultimate condition of the workman must be one of permanent and total disability; (2) the prior disability must have been partial and permanent; and inter alia, (3) the prior condition and the subsequent employment-connected accident must "in conjunction" result in permanent total disability.

The New Jersey Second Injury Fund is statutorily exempt from liability if the disability resulting from the injury caused by his last compensable accident in itself and irrespective of any previous condition or disability constitutes total and permanent disability.

The burden is upon those (the employer or the petitioner) who seek to impose liability on the New Jersey Second Injury Fund to establish the statutory criteria.

Paul v. Baltimore Upholstery Co., 66 N.J. 111 (1974)

Where the Second Injury Fund is held liable, while the employee receives compensation for total permanent disability, the employer at the time of the second injury is liable for the percentage of disability attributable to that injury and the balance of the award due the worker is payable by the Fund.

C. Pre-existing Disability established pursuant to N.J.S.A. 34:15-36 and

Perez standards.

III. Respondent's Burden of Proof as to Prior Loss of Function

A. N.J.S.A. 34:15-12(d)

B. Abdullah v. S.B. Thomas, Inc., 190 N.J. Super. 26 (App. Div. 1983)

Calculation of overall disability less credit percentage

Credit at rate for current loss

C. Proof of Prior Loss

1. Prior Award

2. Prior medical records and expert opinion to
establish objective medical evidence of prior loss

Perez v. Pantasote, Inc., 95 N.J. 105 (1984)

3. Proofs similar to proving prior manifestation in occupational

Bond v. Rose Ribbon & Carbon Mfg. Co., 42 N.J. 308 (1964)

IV. Ethical Considerations in Attorney-Client Relationship

A. Competent Representation

1. R.P.C. 1.1 requires lawyer to provide competent representation to a client. Competent representation requires:

2. Legal knowledge and skill preparation necessary for the representation. Standard of violation of R.P.C. 1.1 is gross negligence or a repeated pattern of negligence or neglect.

3. Examples of gross negligence or a pattern of negligence.

a. In re Goldstaub, 90 N.J. 1 (1982)

b. In re Barrett, 88 N.J. 450 (1982)

c. In re Getchius, 88 N.J. 269 (1982)

B. Diligence

1. R.P.C. 1.3 requires that lawyer act with reasonable diligence and promptness in representing a client. Within the limits of professional discretion lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

2. R.P.C. 1.3 discourages procrastination in handling a client's matter since client's rights can be affected by the passage of time.

The comments recommend that a lawyer's work load be controlled so that each matter can be handled adequately.

In re Yetman, 113 N.J. 556 (1989)

3. R.P.C. 1.4 imposes four obligations on an attorney:

a) Lawyer must inform a prospective client of when, where and how the client may communicate with the attorney.

b) Lawyer must keep client reasonably informed regarding the status of a matter and must comply with reasonable requests for information.

c) Lawyer must explain a matter to the extent necessary to permit the client to make an informed decision.

d) When a lawyer knows the client expects assistance that is not permitted by the rules of professional conduct, he or she must advise the client of the limitation .

In re Loring 73 N.J. 282 (1977)

C. Continuing Obligation

1. A lawyer's obligation to keep the client informed continues after a client indicates that he or she is no longer interested in pursuing the matter.

In re Rosenthal, 90 N.J. 12 (1982)

2. Even if a client tells an attorney that he or she no longer intends to prosecute a claim, the attorney must inform the client of an imminent dismissal. It is always possible for the client to change his or her mind.

D. Respondent ethical Issues

1. Representing both carriers and insureds

Attorney may represent both carrier and insured where their interests are closely aligned.

Montanez v. Irizzary-Rodriguez, 273 N.J. Super. 276 (App. Div. 1994)

The triadic relationship of insurer, insured, and counsel creates difficult ethical problems. It is clear that insurance counsel is required to represent the insured's interest as if the insured hired counsel directly. Indeed, insurance counsel's loyalty to the insured may actually be paramount. Permitting insurance counsel to impeach the credibility of an insured places counsel in a position of representing conflicting interests, and actually permits counsel to elevate the insurer's interest over the insured's. Such practice cannot be condoned. When the interest of the insurer and the insured differ, the insurance defense lawyer's ethical duty of undivided loyalty to the client is owed to the insured..

Burd v. Sussex Mutual Ins. Co., 56 N.J. 383 (1970)

Whenever the carrier's position so diverges from the insured's that the carrier cannot defend the action with complete fidelity to the insured, there must be a proceeding in which the carrier and the insured, represented by counsel of their own choice, may fight out their differences. That action may follow the trial of the third party's suit against the insured. Or, unless for special reasons it would be unfair to do so, a declaratory judgment proceeding may be brought in advance of that trial by the carrier or the insured, to the end that the third-party action may be defended by the party ultimately liable.

Schmidt v. Smith, 294 N.J. Super. 569, (App. Div. 1996)aff. 155 N.J. 44(1998)

Under that circumstance attorney owes a duty of loyalty to both.

Gray v. Commercial Union Ins. Co., 191 N.J. Super. 590 (App. Div. 1983)
A defense lawyer is counsel to both the insurer and the insured. He owes to each a duty to preserve the confidences and secrets imparted to him during the course of representation

2. Possible conflict between carrier and insured

- a) Primary duty to insured
- b) Coverage issues require separate counsel for Carrier and Insured.
- c) Attorney may have to withdraw completely depending upon circumstances
- d) Settlement issues

If carrier and insured disagree - attorney's primary duty is to the insured.

- e) Attorney may have to withdraw

Lieberman v. Employers Insurance of Wausau, 84 N.J. 325 (1980);
Insurance defense counsel routinely and necessarily represent two clients: the insurer and the insured. Nevertheless, the intrusion of the insurance contract does not alter the fact that the relationship with the insured is that of attorney and client. It cannot be overemphasized that the relationship is the same as if the attorney were hired and paid directly by the insured. In such a situation, defense counsel owes the insured the same unqualified loyalty as if he had been personally retained by the insured. The loyalty to the insured may actually even be paramount since that defense is the sole reason for the attorney's representation. There is no diminishment in the

ethical obligations and standard of care applicable to insurance defense counsel.

D. Petitioner and respondent attorneys duties of candor and fairness.

1. R.P.C. 3.3 Candor toward tribunal.

2. R.P.C. 3.4 Fairness to Opposing Party and Counsel