YOU DON'T KNOW WHERE YOU ARE—OR WHERE YOU ARE GOING---UNLESS YOU KNOW WHERE YOU HAVE BEEN: GERITY, PADUA, AND PAUL.

The 1979 Reform of the Workers' Compensation Act has been cited in every Appellate Brief as the reason behind every argument for both Petitioners and Respondents for more than 40 years. The only phrase cited by Petitioners more often is "beneficent and remedial," and the only phrase cited by Respondents more often is "Close v. Kordulak." The stated goal? The dominant theme motivating the legislation in the Statement appended to the original bill: "[was] to make available additional dollars for benefits to seriously disabled workers while eliminating, clarifying, or tightening awards of compensation based upon minor permanent partial disabilities not related to the employment." As we approach a day when no practitioners, let alone jurists, remember the pre-1979 Act in practice, it is a great time to review the pre-1979 landscape.

In sum: The schedule of disablities was flat. The Second Injury Fund did not pay for aggravations, accelerations, and activations of pre-existing conditions. Credits were given to Respondents ONLY for pre-existing compensable conditions for which awards had been rendered. The Odd-Lot Doctrine permitted awards of permanent total disability where the last compensable accident made up a small proportion of permanent total disability overall. The old Act did not delineate the proofs necessary for permanent partial and permanent total disability as it does in 2026. The old Act fixed the rate at 66 2/3% not 70%. The Legislative History of the 1979 Act expressed that: *"This legislation would benefit employers by: (1) allowing credits for pre-existing disabilities to employers in the determination of awards for permanent partial and permanent total disability claims;"* This rather vague statement is first the foundation for our understanding of the credit for pre-existing functional loss under the new N.J.S.A. 34:15-12(d); it is secondarily the basis for expanded Fund liability under the new Act, where a panoply of prior conditions would be recognized. There is an argument that the reference to giving employers credits for "pre-existing disabilities" in the determination of permanent total disability claims mandates a credit for permanent partial disability paid within the same claim on a reopener. But nowhere else in our jurisprudence is the ***instant*** disability in question in a case reopened for totality spoken of as a "pre-existing" condition. That term is used instead to refer to a non-compensable or compensable condition extraneous to the case at Bar.

The thrust of the 1979 Act is that a different rate and scale for permanent partial and permanent total disability will apply in all cases as a result of the reform. The yardstick for permanent partial became 600 weeks, and for permanent total, 450 weeks. The definitions for each benefit changed radically, as well as the calculation of rate and maximum and minimum. The post-1979 jurisprudence under *Portnoff v. NJM* 392 N.J. Super 377 (2007)

and *Lentini v. Lentini* 236 N.J. Super. 233 (App. Div. 1989) confirmed that the permanent total disability benefit was a remedy for wage loss, and permanent partial disability was compensation for personal loss independent of wage loss as a necessary proof. The holding in *Perez v. Monmouth Cablevision 278 N.J.Super. 275 (App. Div. 1994)* once again confirmed that partial permanency was personal, could be proved by personal loss and diminution, and was distinguished from permanent total disability. In fact, an injured worker could lose the capacity to perform 99% of his/her out of work pursuits, and collect a high degree of permanent partial disability, while in no sense qualifying for permanent total disability under N.J.S.A. 34:15-36 and 12(b).

feature	**Pre-1979 Version**	**Modern Version (Post-1/1/1980)**
Wage Percentage	66 2/3% of weekly wages	70% of weekly wages
PPD Max Cap	Fixed at **$40.00**	Calculated as % of **SAWW**
Min. Payment	$10.00 or $15.00	20% of **SAWW** (approx. $35 min)
Total Weeks (Temp)	300 weeks	400 weeks
Permanent Partial	550 weeks @40/per	600 weeks @75% SAWW
MAX Permanent Partial Rate v. Permanent Total Rate	$40/66.667%/wage	SAME

The quantitative changes in the table above are matched by the qualitative changes in the Act. The definition of occupational disease was broadened. The going-and-coming rules were codified, although not without opacity, as later litigation made evident. Perhaps most importantly, the very definition of permanent partial disability was encoded. Previously, the Courts adhered to the *Everhardt* definition, which spoke to the reduction of the efficiency of the industrial "unit." 119 N.J.L. 108, 194 A. 294 (1937) In an effort to define permanent partial disability in line with the goals of the 1979 Act, a statutory definition was adopted, and contrasted with the definition of permanent total disability, which was also finally described in the new Act. Gone was the "take the Petitioner as you find him/her" principle articulated in *Belth v. Anthony Ferrante & Son, Inc.*, 47 N.J. 38, 219 A.2d 168 (1966).

The history of credits on reopened claims, pre-1979 is bizarre and contradictory. In *Maier v. Union,* 155 N.J. Super 467 (App. Div. 1977) an Appellate Division panel reviewed a cardiac case in which a Petitioner received an award of 33.333% of partial total on June 21,1973 by way of Order Approving Settlement. He reopened the case thirteen months later, citing his

lack of employability under the Odd Lot Doctrine as the basis for a finding of 100% of permanent total disability. The Court found that the Petitioner was, indeed, totally disabled, and had been so since before the first adjudication, going all the way back to the last date of temporary total disability. Faced with a clear violation of Section 27, a sort of "reconsideration" or "nunc pro tunc" appeal by a WCJ, the Appellate Division performed a de novo review of the case, and found that the Petitioner had indeed worsened and was 100% disabled after the original award was rendered, preserving a credit awarded by the WCJ. This directly contradicts the holding of another Appellate Division panel in *Svec v. Westfield Motor Sales,* 105 N.J. Super. 226(1969) where a Respondent was denied a credit or reimbursement for partial-total paid on a reopener for permanent total disability. There is no way to reconcile these two cases, unless one considers an Odd-Lot award some different kind of creature under the Act in terms of arithmetic, a proposition for which there is no legal foundation. Another explanation could be that the credit was not appealed from, and thus the Appellate Division in *Maier* did not reach the issue. In contrast, the credit in *Svec* was quite distinctly a point on appeal. It is certainly easier to dismiss both decisions as irrelevant to a new statute in a new compensation landscape after 1979.

In sum: The Legislature radically re-defined permanent partial vs. permanent total disability both arithmetically and in terms of purpose and proofs in 1979. The Legislature redefined the concept of a credit in 1979, placing the burden upon the employer as to proofs, requiring objective evidence to found the credit, and imposing a credit for non-compensable and compensable pre-existing disabilities upon employers and the Second Injury Fund, even when aggravation, acceleration, or activation was the basis for the pre-existing disability, whether compensable or not. The rationale of the *Paul* case was based upon a multitude of factors. It is submitted that the only one that survives is the determination by the Court that a permanently totally disabled worker should receive the benefit of the rate of permanent total disability from the date of totality, to avoid imposed poverty. The only way that could be accomplished under the old definitions and schedules was a "Paul calculation." In 2026, when an award of permanent partial disability is made and then reopened pursuant to Section 27, different values and priorities have set Paul aside. Following the 1979 Reform, the Legislature has widened the gap between permanent partial and permanent total disability arithmetically, qualitatively, and in terms of the "reinsurance" that the Second Injury Fund affords. When a worker has worsened and cannot work, the values inherent in the 1979 Act, differentiating permanent partial and permanent total disability are different, and are applied differently. And of course, as to the fulfillment of the stated aims of the reform Act, does a reading of the statute place more money in the hands of the most injured workers?

Are permanent partial and permanent total disabilities apples and oranges? Most certainly, they have different values, scales, purposes, effects on Social Security entitlements, and statutory definitions. Does that mitigate the application of not only a credit of dissimilar benefits, but also a *Paul v. Baltimore* scheme for calculating the effect of a finding of totality on a reopener for permanent total disability? *Paul,* at 118 founds its rationale upon the differential that existed between permanent partial and permanent total disability maximum rates, which no longer is the law. *Paul* did not pass upon the effect of a reopener, but rather successive cardiac events that resulted in a non-Fund totality.

Two Trial Court decisions have held that a reopened case resulting in an award of permanent total disability should not implicate a credit to the Respondent for partial disability previously paid on the same CP, namely *Gerity* and *Padua*. Not a single post-1980 case has been decided differently. The ultimate outcome of these two cases would have the following effects:

1. The Court would be behaving consistently with the post-1979 changes, recognizing the manifold differences between permanent partial and permanent total disability;
2. Respondents would be incentivized to pay totally disabled workers permanent total disability when that disability actually exists, instead of paying an approximation of permanent total (66 2/3 to 75%), leveraging a catastrophically injured worker to kick the can down the road for 8 or 9 years since their would be little dollar effect, taking into account offsets, capped rates, and trial costs which often minimize any additional benefits to the most injured workers;
3. The most injured workers would protect their families with additional weeks of permanent total disability which are vested up to 450 weeks, instead of a much shorter period when subjected to a credit;
4. Petitioner's counsel would be fairly compensated for bringing a complex and risky permanent total disability case to Trial to vindicate the rights of the Petitioner, where under the other interpretation, a Petitioner who has received 75% of partial total and gotten worse cannot compensate his attorney for trying his case for totality, as no new vested benefits will be gained, even in the event of a finding of permanent total disability;
5. Finally, this interpretation corrects the anomalous and irrational situation where a high partial total worker who struggles and returns to work, receiving 75% or more in partial disability, worsens—and the anti-Gerity/Padua advocate maintains Petitioner would owe Respondent money if paid more than 450 weeks of permanent partial disability, even if now totally disabled.

The Petitioner asks, "Why should I, in effect, have to pay back money to my employer which was paid to me for a different purpose, so I can receive a different benefit to which I only became entitled to later?" The Respondent asks, "Why should we have to pay this worker for the same injury twice?" The first question is framed accurately. The second ignores the differences between every aspect of the benefits except their original cause. Curiously, an honest evaluation of *Paul* in 2026 raises the question of whether the case is still good law at all, or whether Petitioners should be paid out their permanent partial disability awards from differing cases completely, while also collecting permanent total disability benefits from their date of totality. NJSA 34:15-16 is opaque as to concurrency of payments for differing cases, but seems clear with respect to payments made in a single case. *Paul*, after all, turned upon successive and different claims, not a reopened case. So are the opponents of *Gerity* and *Padua* really asking for the application of an anachronistic computation to solve an inapposite problem? Certainly, the memorandum circulated by a prior Director, publishing that procedure, bore no statutory or common law justification or even citation. The pernicious effect of incentivizing partial total awards for totally disabled workers is certainly a substantial offense to public policy. A careful and honest appraisal of the statutory language and the outcomes generated by rejection of the Gerity/Padua rationale should be conducted by the stakeholders to our system.

Interpreting NJSA 34:15-12b

The Legislature's intent is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the statutory language. *Frugis v. Bracigliano*, 177 *N.J.* 250, 280, 827 *A.*2d 1040 (2003). We ascribe to the statutory words their ordinary meaning and significance, *Lane v. Holderman*, 23 *N.J.* 304, 313, 129 *A.*2d 8 (1957), and read them in context with related provisions so as to give sense to the legislation as a whole, *Chasin v. Montclair State Univ.*, 159 *N.J.* 418, 426-27, 732 *A.*2d 457 (1999). Courts cannot "write in an additional qualification which the Legislature pointedly omitted in drafting its own enactment," *Craster v. Bd. of Comm'rs of Newark*, 9 *N.J.* 225, 230, 87 *A.*2d 721 (1952), or "engage in conjecture or surmise which will circumvent the plain meaning of the act," *In re Closing of Jamesburg High School*, 83 *N.J.* 540, 548, 416 *A.*2d 896 (1980). "Our duty is to construe and apply the statute as enacted." *Ibid.*

A court should not "resort to extrinsic interpretative aids" when "the statutory language is clear and unambiguous, and susceptible to only one interpretation...." *Lozano v. Frank DeLuca Const.*, 178 *N.J.* 513, 522, 842 *A.*2d 156 (2004) (internal quotations omitted). On the other hand, if there is ambiguity in the statutory language that leads to more than one plausible interpretation, we may turn to extrinsic evidence, "including legislative 1049*1049 history, committee reports, and contemporaneous construction." *Cherry Hill Manor Assocs. v. Faugno*, 182 *N.J.* 64, 75, 861 *A.*2d 123 (2004) (internal quotations omitted). We may also resort to extrinsic evidence if a plain reading of the statute leads to an absurd result or if the overall statutory scheme is at odds with the plain language. *See Hubbard ex rel. Hubbard v. Reed*, 168 *N.J.* 387, 392-93, 774 *A.*2d 495 (2001).

A court may turn to a statute's preamble as an aid in determining legislative intent. *Bass v. Allen Home Improvement Co.*, 8 *N.J.* 219, 225, 84 *A.*2d 720 (1951). The preamble, however, should be read in harmony with the statute that it introduces, whenever possible. *See In re Passaic County Utils. Auth.*, 164 *N.J.* 270, 300, 753 *A.*2d 661 (2000) ("` [E]ach part or section [of the statute] should be construed in connection with every other part or section so as to produce a harmonious whole' . . ." (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.05 at 103 (5th ed. 1992))); *State v. Green*, 62 *N.J.* 547, 554, 303 *A.*2d 312 (1973) ("It is basic in the construction of legislation that every effort should be made to harmonize the law relating to the same subject matter.").

So first looking at the plain language of the statute in question:

NJ SA 15:12(b) states:

b. For disability total in character and permanent in quality, 70% of the weekly wages received at the time of injury, subject to a maximum and a minimum compensation as stated in subsection a. of this section. This compensation shall be paid for a period of 450 weeks, at which time compensation payments shall cease unless the employee shall have submitted to such physical or educational rehabilitation as may have been ordered by the rehabilitation commission, and can show that because of such disability it is impossible for the employee to obtain wages or earnings equal to those earned at the time of the accident, in which case further weekly payments shall be made during the period of such disability, the amount thereof to be the previous weekly compensation payment diminished by that portion thereof that the wage, or earnings, the employee is then able to earn, bears to the wages received at the time of the accident. If the employee's wages or earnings equal or exceed wages received at the time of the accident, then the compensation rate shall be reduced to $5.00. In calculating compensation for this extension beyond 450 weeks the above minimum provision shall not apply. This extension of compensation payments beyond 450 weeks shall be subject to such periodic reconsiderations and extensions as the case may require, and shall apply only to disability total in character and permanent in quality, and shall not apply to any accident occurring prior to July 4, 1923.

The relevant part of the sentence in debate clearly states:

"This compensation shall be paid for a period of 450 weeks, at which time compensation payments shall cease unless the employee shall have submitted to such physical or educational rehabilitation..." It does NOT state that this is a "new" or "additional" 450 weeks. It is most important to note that this specific language of the statute was not changed by the 1979 amendments. If the intent was to create a new or additional period of weeks for total disability, why not just say so?

Now we read this section within the context of the other sections of NJSA 34:15-12.

Subsection c addresses permanent partial payments. While perm total and perm partial benefits are not the same, the statute clearly contemplates benefits in excess of 450 weeks (the time that the vocational rehabilitation exam is meant to occur) up to 600 weeks. Which begs the question how can one be 100% partially disabled? The logical follow up is that the 450 week period referenced in subsection b applies to what the rest of the

sentence actually says "at which time compensation payments shall cease unless the employee shall have submitted to such physical or educational rehabilitation as may have been ordered by the rehabilitation commission..."

Subsection d. addresses previous loss of function and explicitly states:

> If previous loss of function to the body, head, a member or an organ is established by competent evidence, and subsequently an injury or occupational disease arising out of and in the course of an employment occurs to that part of the body, head, member or organ, where there was a previous loss of function, then the employer or the employer's insurance carrier at the time of the subsequent injury or occupational disease shall not be liable for any such loss and credit shall be given the employer or the employer's insurance carrier for the previous loss of function and the burden of proof in such matters shall rest on the employer.

Respondent employers are expressly permitted credits for prior functional loss. This credit is not limited to partial permanency awards. Which begs the immediate question why would those suffering prior unrelated losses be subject to credit where those whose disability has increased would not? Of particular note, employers are explicitly referenced as receiving credit and not just SIF.

Finally, subsection e also specifically references the 450 week limitation contained in sub b.

> e. In case of the death of the person from any cause other than the accident or occupational disease, during the period of payments for permanent injury, the remaining payments shall be paid to such of the deceased person's dependents as are included in the provisions of R.S.34:15-13 or, if no dependents, the remaining amount due, but not exceeding $5,000, shall be paid in a lump sum to the proper person for burial and funeral expenses; but no compensation shall be due any other person than the injured employee on account of compensation being paid in excess of 450 weeks on account of disability total in character and permanent in quality as provided by subsection b. of this section.

Reading sub b and sub e further clarifies the legislatures intent to limit the payment of benefits again to the 450 week mark when petitioner should be subject to the vocational rehabilitation examination.

Having completed a comprehensive review of the actual statutory language we next turn to the legislative history in 1979 when the statute was amended. In other words..."What were they thinking?"

In 1979, the New Jersey Legislature enacted significant amendments to our Workers Compensation Act. The purpose of these amendments can be found on the Joint Statement of the Senate and Assembly Labor, Industry and Professions Committee. Of particular note:

"The bill would be *significantly* more money into the hands of the more seriously injured workers, while providing genuine reform and *meaningful cost containment* for New Jersey employers from unjustified workers compensation costs that are *presently the highest in the nation."* (emphasis added).

So, cost containment for employers in the most expensive state in the nation for workers compensation was a priority. Given this impetus, it defies logic and critical thinking to assume that language which remained unchanged now actually creates a new period of benefits and denies respondent credit for benefits already paid. Again, if the legislature intended a "new" or "additional" period of benefits they would have expressly stated just that.

"The legislation would benefit employers by (1) allowing credits for pre-existing disabilities to employers in the determination of awards for permanent partial *and permanent total disability claims"* (emphasis added)

The words speak for themselves. Employers would receive credit for pre-existing disabilities for partial and perm total awards.

"The Senate Labor, Industry and Professions Committee and the Assembly Labor Committee expressed their feeling that rehabilitation is a *priority issue*..." (emphasis added).

The 450 week period at issue does have a purpose and in fact addresses this self-described "priority issue" of rehabilitation. At 450 weeks before the spigot of benefits for life is opened wide, petitioners "shall have submitted to such physical or educational rehabilitation as may have been ordered by the rehabilitation commission, and can show that because of such disability it is impossible for the employee to obtain wages or earnings equal to those earned at the time of the accident". NJ SA 34:15-12b. Only when this hurdle is cleared will lifetime benefits ensue.

Finally the sponsors statement for the revised bill states:

The bill would put more money in the hands of the more seriously injured worker while providing some relief to New Jersey employers from workers compensations costs that are presently among the highest in the nation.

If one of the motivations for the revision of the statute was to provide New Jersey employers relief for some of the highest cost systems in the nation would denial of credit for benefits previously paid be contemplated much less inferred.

Padua & Gerrity remain the only two trial court decisions regarding this issue. With Gerrity being the most cited as it was the subject of an appeal. There is no controlling case on this issue.

A few notes on the Gerrity appeal:

First and foremost, it was an appeal filed by respondent regarding the courts determination that the petitioner is totally and completely disabled. The order from which the appeal was taken *included a reopener credit to respondent.* This fact is significant as petitioner did NOT file a cross appeal as to the "new" 450 weeks and did not argue that respondent be denied a reopener credit below. In the Appellate Division s decision it was specifically noted that "Despite a prior remand in 2017, neither side raised any of those issues before the JOC". The case was specifically remanded to address three issues "the award of credits to the employer attributable to petitioner's prior awards of permanent partial disability, the award of credits to the employer for petitioner's receipt of social security benefits and the amounts of fees awarded to various expert witnesses."

Practical Considerations:

The most frequent statement in support of the "new 450" is that petitioners previously judged to 75% or more permanent partially disabled will "owe" money and receive no benefit. No benefit means no attorney fee.

Not exactly, if a petitioner is adjudged to be totally and permanent disabled after receiving an award of 75%PPT reopens their cases. Wouldn't the petitioner be put to proof to show an increase in disability? Further, there is no prohibition that counsel file regular post judgement motions to recoup fees on benefits paid.

Of greater concern is the unequal treatment of petitioners based on their circumstances:

For example, a petitioner who is determined to be totally and completely disabled from one reopened accident would under this new construction receive a "new" 450 weeks and respondent would receive no credit for benefits previously paid. But a petitioner in the same situation who suffered previous injury to the body part who is determined to be total with SIF contribution would result in the respondent receiving credit in the form of SIF

participation. There is no way that the Legislature intended similarly situated respondents and petitioners be treated so disparately.

Lets look at who benefits from the "new" or "additional" 450 weeks- not the petitioner who will receive lifetime benefits. Certainly not respondents who will be paying benefits without credit for benefits previously paid. Perhaps the SIF who will come on the risk at a later date. Definitely the petitioner's attorney- so do we really think that the intent of the Legislature in 1979 was to provide "some relief to New Jersey employers from workers compensations costs that are presently among the highest in the nation" or enrich counsel for the petitioner?

This idea of a "new" or "additional" 450 weeks is a relatively recent construction and while doing things the same way because that's just they way we do it is a terrible argument- when there has been no change to the statute then there is no reason to change. Our court is a creation of Legislature. We are a court of statutory construction. If the Legislature has not deemed it prudent to expressly create a "new" or "additional" period we should not. The proper forum to pursue the "new" 450 is not here in a statutory court, but in the legislative branch.

110 N.J. Super. 225 (1970)
265 A.2d 157

PAUL SVEC, PETITIONER-RESPONDENT,

v.

WESTFIELD MOTOR SALES CO., INC., RESPONDENT-APPELLANT.

Superior Court of New Jersey, Appellate Division.

Argued February 9, 1970.
Decided April 29, 1970.

227 *227 Before Judges CONFORD, COLLESTER and KOLOVSKY.

Mr. Roland Vreeland argued the cause for appellant (*Mr. Isidor Kalisch,* attorney).

Mr. Otto C. Staubach argued the cause for respondent (*Messrs. Weiner, Weiner* and *Glennon,* attorneys).

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

The nature of this litigation is indicated in the opinion of the Union County Court, reported at 105 *N.J. Super.* 226 (1969).

The principal ground of appeal is that the judge of compensation was without "jurisdiction" to ignore the finding of fact by the "referee, formal hearings" in the earlier section 22 proceeding (*N.J.S.A.* 34:15-22) that there was no causal connection between the accident and any impairment of the eye itself, as distinguished from the injury to the eyebrow or forehead. The contention is that the stated earlier finding was *res judicata* and therefore precluded the later finding, even though made in a section 27 proceeding (*N.J.S.A.* 34:15-27), that the claimed injury to the eye was causally related to the same accident, and the consequent conclusion that petitioner's disability from the accident had increased since the first award.

228 *228 We are in essential agreement with the reasons given by Judge Di Buono in the County Court for rejecting respondent's argument. We add the following. The fact that a different bodily unit or function is implicated in the increased overall disability from that involved in the earlier award does not derogate from the appropriateness of section 27 relief. See *Yeomans v. Jersey City,* 27 N.J. 496, 509 (1958). Moreover, the fact that the judge of compensation in the later proceeding did not articulate his conclusions in terms of degree of increase of disability, as strictly as he should have, is not material since the substance of his determination amounted to such a finding, and the County Court placed its affirmance on that basis. See the County Court opinion, 105 *N.J. Super.,* at 232-233.

On this appeal respondent raises for the first time the contention that it should have been credited in the final judgment for the $673.75 initially awarded against it for the injury to the right eyebrow. We could well ignore the belated argument. *Baginsky v. American Smelting & Refining Co.,* 88 N.J. Super. 69, 83 (App. Div. 1965), certif. den. 45 N.J. 588 (1965). It will suffice to say we have considered and find no merit in the contention.

Respondent also argues that the compensation court erred in allowing $40 per week for the scheduled 200 weeks for loss of sight of the eye contrary to the rate of $35 per week fixed by the statute as it stood as of the date of the accident. *N.J.S.A.* 34:15-12(c).[1] This point was raised in the County Court by simple assertion in the respondent's brief but was not dealt with in the opinion of that court, probably because not supported by argument. We deal with it because the question is important, has not been ruled upon before, and should be settled.

229 *229 In allowing petitioner $40 per week against respondent for the scheduled 200 weeks of loss of sight of the eye the judge of compensation said:

* * * the rate being determined by the fact that his visual disability is a significant and necessary part of his total disability; and that being totally disabled as a result of this accident in conjunction with other pre-existing but non-aggravated disabilities — namely heart and nephritis — he should be paid at the rate applicable for total disability at the time of his accident.

The allusion to the heart and nephritis conditions is related to the fact that after filing his petition for increased disability petitioner had also filed a petition for Fund (formerly known as the One Percent Fund) benefits pursuant to *N.J.S.A.* 34:15-95 based on the allegation that the combined effect of his employment-connected injury and other previous nonconnected ailments rendered him permanently and totally disabled. The judge of compensation found that this was so and that the heart disability and the nephritis disability were each 25% of total. No contention to the contrary has been made by anyone. Although the Attorney General, presumably representing the Fund, was present before the Compensation Division, he did not appear before the County Court or on this appeal. His nonparticipation will not, however, prejudice the Fund, for we have concluded that although petitioner is entitled to the $40 rate for the scheduled 200-week period, it is payable in entirety by respondent-employer and not to any extent by the Fund.

The issue presented, from the standpoint of petitioner, is merely whether he is entitled to $40 per week for the 200 weeks in question or only $35. But determination thereof is hardly separable, as a matter of statutory construction, from the question as to who is liable for the $5 difference, if petitioner prevails, as between respondent and the Fund. This is so because petitioner's whole position is premised on the provisions of the Fund Act, specifically, *N.J.S.A.* 34:15-95.

230 *230 The general purposes and objects of the Fund Act have been frequently reviewed by the courts and need not be detailed here. It will suffice to say that if a person already suffering partial permanent disability from a noncompensable condition or accident sustains a work-connected accident and becomes totally and permanently incapacitated from the combined effect of the two disabilities, he is entitled under section 95 to compensation for the full disability, but in such case the employer's liability is limited to the portion of the incapacity produced by the employment accident, and the balance is charged to the statutory fund (except for certain situations specified in paragraphs (a) to (d) of section 95 not here claimed to be applicable). Belth v. Anthony Ferrante & Son, Inc., 47 N.J. 38, 48 (1966); Balash v. Harper, 3 N.J. 437, 442 (1950).

We address our attention first to whether petitioner is entitled to $40 a week rather than $35 for the 200 weeks scheduled for loss of sight of an eye in section 12(c) from *someone,* whether the $5 difference is due from the employer or the Fund. We think it hardly debatable but that he is entitled to the $40 rate. Section 95 expressly states that where a Fund situation is implicated, compensation payments shall be made "in accordance with the provisions of paragraph (b) of section 34:15-12." That paragraph deals with "disability total in character and permanent in quality" and fixes a maximum allowance of $40 per week (it is not questioned that petitioner was entitled to the maximum as against the lesser rates specified in "Wage and Compensation Schedule" of section 12). It is therefore clear to us that the limitation of a $35 maximum rate in paragraph (c) of section 12 for such scheduled losses as the loss of sight of an eye is intended not to be applicable when that loss is an integral part of the combined disabilities equating total and permanent disability which render operative the Fund provisions of section 95. Otherwise the workman-beneficiary of section 95 would realize less than the full maximum rate expressly
231 specified in that section. We can only conclude that *231 the scheduled limitation of $35 a week in section 12 (c), relied upon here by respondent, applies only when a claim for Fund benefits under section 95 is not implicated.

This brings us to the issue as to who is liable for the $5 weekly difference for the 200 weeks — the employer or the Fund.

Prior to the adoption of the amendment of section 95 by *L.* 1940, *c.* 133, the section read, in pertinent part:

In such cases [total disablement from the combined conditions or accidents] the compensation payable from such fund shall cover that *portion of the period* for which the employer is not legally responsible due to the permanent and partial disability suffered or possessed by the employee at the time that the employee sustained the injury as a result of which the employee became totally and permanently disabled. [Emphasis added]. See *L.* 1938, *c.* 198.

In the process of a rather sweeping revision and amendment of section 95 the Legislature, by *L.* 1940, *c.* 133, omitted the sentence quoted immediately hereinabove. But it inserted, in a different location of the revamped section, the following new language:

Upon the approval of an application for benefits, the compensation payable from such fund shall be made from the date when the final payment of compensation by the employer is or was payable for the injury or injuries sustained in the employment wherein the employee became totally and permanently disabled * * *.

This provision continued effective as of the date of the instant accident and down to the present time.

In Toohey v. Gorman, 125 N.J.L. 41 (E. & A. 1940), dealing with the statute as of prior to the 1940 amendment, the court stated (at 44) that "[t]he evident design of section 34:15-95 of the Revision * * * was to relieve the the employer of the

obligation to render compensation for the portion of the period of disability for which he was `not legally responsible due' to the permanent and partial disability suffered by the employe [*sic*] at the time the wholly disabling compensable injury was sustained."

232 *232 In the instant case the *period* of disability for which the employer is responsible obviously includes the 200 weeks specified by the statute for loss of the sight of an eye sustained in an accident at work. Under the rationale of the statute as expounded in the *Gorman* case, *supra,* accordingly, whatever money the employee is entitled to for the stated period of 200 weeks is allocable as the responsibility of the employer, not the Fund.

We find no basis for a different conclusion in the legislative revision of section 95 by *L.* 1940, *c.* 133, mentioned above. The new language added thereto and quoted above was, in our view, essentially a substitute for that omitted from the section as it previously stood. No intent for a substantive alteration in the respective responsibilities of the employer and the Fund is discernible to us from the change or argued by respondent. No clue of any such intent appears in the Statement of the introducers of the bill which was enacted into law as *L.* 1940, *c.* 133. To the contrary, the present statutory direction that compensation from the Fund does not begin until the final payment by the employer is made or payable strongly indicates that whatever payments appertain to the 200 weeks for the eye are to be met by the employer and are thus removed from any responsibility of the Fund.

Our ultimate conclusion that the employer must pay the additional $5 per week for the 200 weeks is not incompatible with the basic philosophy of the Fund legislation. Were it not for the Fund Act, as was demonstrated in *Belth v. Anthony Ferrante & Son, Inc., supra,* 47 *N.J.*, at 45-48, employers would continue to be, as they previously were, responsible for the entirety of the total and permanent disability consequent upon an accident at work even though the disability would not have been permanent and total had it not been for a previous partial disability not attributable to the employment. See *Combination Rubber Mfg. Co. v. Obser,* 95 *N.J.L.* 43 (Sup. Ct. 1920), aff'd o.b. 96 *N.J.L.* 544 (E. & A. 1921). Respondent continues,
233 notwithstanding today's decision of the present case, to retain the basic benefit *233 of the Fund Act in that the Fund takes over liability for that period of disability (here, for the heart and nephritis conditions) distinct from the period of disability for the eye which is the exclusive responsibility of the employer. That it must pay for that period at the permanent and total rate does not undermine the basic benefit it retains under the Fund scheme.

Judgment affirmed.

[1] The rate was increased to $40 per week by *L.* 1962, *c.* 57, § 1, but this fact was not the basis for the award in the compensation court and is here irrelevant.