State of New Jersey
DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

HAROLD J WIRTHS
Acting Commissioner

MEMORANDUM

November 21, 2013

To: Judges and Case Parties

From: Peter J. Calderone, Director and Chief Judge

Subject: Total Disability Calculations

In consultation with judges and attorneys including Second Injury Fund (Fund) counsel, the following procedures should be utilized in appropriate Total Disability cases. These are not common occurrences but uniform procedures have been requested for when the situations occur.

I. Partial Total Credit on Modification of Award for Total Disability

A. Where the respondent is still paying a partial total award and on a reopener of the claim the petitioner is now found to be totally disabled, the respondent is entitled to a credit for the amount paid before the date of totality. Since the partial award ends on the date of totality, the credit is determined by dividing the dollar amount actually paid on the partial award by the total rate. The credit is in weeks that are subtracted from the respondent's share of the first 450 weeks of the total award.

Example 1: Total case is settled for 50-50 split with Second Injury Fund at max rate for a 2010 injury. Respondent has paid 150 weeks or $55,650.00 in partial total benefits on a 35% partial total award prior to the date of totality. Respondent would pay 155 weeks of total benefits from date of totality ($55,650.00 divided by $794.00 total rate equals 70 weeks subtracted from respondent's 225 week total disability obligation). After 155 weeks of total benefits, Fund begins payments.

B. Where the partial award has been fully paid before the date of totality, the respondent's credit is figured in the same way by dividing the full partial award by the total rate for the credit in weeks.

C. The election of Social Security offset, ordinary disability pension offset and Section 40 liens with respect to the total award are applied from the date of totality.

II. Partial Total Credit for Different Accident or Exposure

A. Where a partial total award for a different accident or exposure with the same or a different respondent is being paid on the date of totality, the petitioner is entitled to begin receiving a total award from the date of totality for the last accident or exposure. The partial award continues to be paid and the respondent on the total award pays the difference between the partial total amount being paid and the total rate until the partial award is paid in full except as outlined in II C below for Social Security Disability recipients. When the partial award is paid in full, the respondent on the total award pays the full total rate subject to offset. There is no offset on the total award differential being paid while the partial award is still in effect. Any offsets with respect to the partial award would continue while the partial award is being paid.

B. The respondent paying the total award will still owe the petitioner the dollar amount of the total award based on its share of the first 450 weeks even though the respondent pays at a reduced rate while the partial award is being paid. This means that the number of weeks for the total award payout can exceed the original number of weeks in the first 450 weeks owed by the respondent. For example, if on the date of totality, the petitioner is still owed 20 weeks of partial total, the total respondent will pay a differential rate during the 20 weeks. The partial award amount paid after the date of totality will be divided by the total rate for additional weeks to be paid by the respondent on the total award.

Example 2: Petitioner is still receiving payments from a 25% partial total award for a 2008 accident at $225.72 a week. Using total disability information from Example 1, on date of totality there are 25 weeks left on the partial award. Total disability pays $568.28 a week for the total differential ($794 - $225.72) for the 25 weeks. Respondent will pay total benefits for an additional 7 weeks ($225.72 X 25 = $5,643.00/$794.00) beyond the 225 weeks. After 232 weeks of total benefits, the Fund will begin paying total benefits.

C. During the period that that petitioner is still receiving partial total benefits and where the petitioner is a Social Security Disability recipient, Social Security should be taking any applicable offset until the partial award is paid in full. Where the petitioner is receiving an amount equal to his or her 80% ACE with the partial award and Social Security, the respondent on the total award would not pay any additional moneys until the partial award is paid in full and the partial award Social Security offset ends. If the partial award and Social Security Disability do not equal the 80% ACE, the respondent on the total award pays an amount when added to partial award and Social Security equals the 80% ACE until the partial award is paid in full and the total award weeks are adjusted pursuant to II B above. After the partial award is paid in full, the respondent pays the total weekly amount and receives any applicable Social Security offset.

While the petitioner is receiving a partial award with either Social Security or ordinary disability pension offset, the total respondent cannot also take an offset. After the partial award is paid in full the respondent may make the election to take either a Social Security Disability offset or an ordinary disability pension offset whichever is more beneficial to the respondent.

With respect to a Section 40 lien on the total award which provides for a lump sum return of counsel fee on a third party recovery, there will be a gap period for total award payments. The counsel fee amount is divided by the total rate for weeks total benefits are not paid. During the gap period only the partial award would continue being paid after the date of totality until the partial award is paid in full. If the gap period ends and the partial award has not been fully paid, the rest of II B above applies.

III. Where a Social Security Disability offset is elected with respect to a petitioner who is also receiving an ordinary disability pension, the respondent is entitled to the ordinary disability pension offset when the Social Security offset ends.

IV. These procedures also apply when the Fund is scheduled to make total disability payments.

X. If you have any questions, please review with Administrative Supervisory Judge Virginia Dietrich.

STATE OF NEW JERSEY
NEW JERSEY DEPARTMENT OF LABOR & WORKFORCE DEVELOPMENT
DIVISION OF WORKER'S COMPENSATION

CLARIBEL PADUA

Petitioner,

vs.

COMMUNITY CORRECTIONS CORP.

Respondent.

NEWARK VICINAGE
CP#: 2004-11053

DECISION ON MOTION OF PETITIONER

Appearances:

Frank DiMarzio, Esq.
Livingstone DiMarzio, LLC
For Petitioner

Vivian Marmaras, Esq.
Schwab, Haddix& Millman
For Respondent

This matter comes before me on a Motion to Conform an Order for the parties. They have reached an agreement that the Petitioner is Permanently and Totally disabled with an onset date of that disability to be September 14, 2016. They have agreed that her weekly wages were $535.35 giving rise to both a Temporary and Permanent Total Disability Rate of $374.75. There has also been an agreement that the Petitioner would pay the outstanding Medicaid and Medicare payments. What has not been agreed upon, and is disputed, is whether the Petitioner should receive 450 weeks of Total and Permanent disability payments from the agreed upon onset date under N.J.S.A. 34:15-12(b), or receive payments only after the expiration of 450 weeks due to the prior payment of Partial Permanent Disability benefits under N.J.S.A. 34:15-12(c) for which the Respondent seeks a credit. As the parties have noted in submitted briefs and at oral argument on this issue, cases that have presented this distinctive factual scenario have not been found in published case law.

By way of some background, the Court records and filings note that the Petitioner was injured while struggling with a client on February 5, 2004. As a consequence of that incident, she had filed a claim petition which resulted in the December 19, 2006 entry of a judgment for 55% of partial permanent disability payable over 330 weeks. Subsequently, the claim was re-opened and a modification of that award was entered on June 30, 2009, to increase her disability to 75% of partial permanent disability, for 450 weeks of benefits payable at $374.75 per week. A second application was filed on March 1, 2013, seeking a second modification of the award.

During the pendency of that latter application, Petitioner's counsel filed a Motion for additional Medical and Temporary Disability benefits. Subsequent to the filing of the re-opener application, the Petitioner underwent numerous significant surgical procedures which included: in 2014, a two-level anterior cervical discectomy and fusion with anterior plating; in 2016, a lumbar laminectomy, a foraminotomy at L4 and L5 and S1, and a lumbar discectomy at L4-5; and separate carpal tunnel release surgeries to each hand in 2015 and 2016. Those medical procedures had been the subject of a further Order of the Court entered on May 17, 2016. The Order required temporary disability benefits to be paid Ms. Padua while she was undergoing medical treatment. Fees on the Motion were approved as denoted in the entry of a March 7, 2017-Order of the Honorable Anthony Minniti. Those fees are no longer a part of this present Motion. The last payment to the Petitioner on her 75% Permanent Partial Disability benefits was made on November 18, 2015.

In light of the multiple causally related surgeries which followed the filing of the Second Application for Review and Modification, the parties obtained medical expert reports in which the doctors opined that the Petitioner was now Totally and Permanently disabled. By agreement, the parties have affixed the Total and Permanent onset date to be September 14, 2016 – approximately ten (10) months after the last permanent partial disability payment. The parties

also agreed that the Petitioner was a recipient of Social Security disability benefits beginning in February of 2005. Her initial entitlement to those benefits was in February of 2005 – a date well preceding the onset date of Total Disability. Her Social Security 80% ACE is $1045.60 and is also not disputed.

The Workers' Compensation Act is recognized to be remedial social legislation which should be liberally construed to accomplish its beneficent purposes. Torres v Trenton Times Newspapers, 64 NJ 458, 461 (1974). Moreover, as noted by the New Jersey Supreme Court, the legislative sponsors were concerned with ensuring that the most severely disabled workers were to receive greater compensation that had been required pre-amendment made in 1979.

> ... [A]ccording to the Joint Statement, the statute's primary goals were to eliminate awards for minor partial disabilities, to increase awards for the more seriously disabled, and to contain the overall cost of workers' compensation. Although such a Joint Statement may be used to ascertain legislative intent, *Brewer v. Porch*, 53 *N.J.* 167, 174 (1969), it is the statute's express language that determines in what manner and to what extent the Legislature sought to attain those goals. In the final analysis it is the statute as written that must govern.

Perez v. Pantasote, Inc., 95 N.J. 105, 114 (1984).

Consequently, the payments section within the statute is the initial source to be reviewed regarding the difference in treatment, if any, between permanent partial and total permanent disability benefits. N.J.S.A. 34:15-12 establishes that there are three (3) forms of benefits potentially payable to an injured worker: temporary disability for injuries producing disability [N.J.S.A. 34:15-12(a)]; total and permanent disability for disability that causes an employee to be unable to obtain wages or earnings equal to those earned at the time of the accident and where "no fundamental or marked improvement in the condition can be reasonably expected" [N.J.S.A. 34:15-12(b), N.J.S.A. 34:15-36]; and permanent partial disability benefits for workers who incurred an injury that restricted the function of the body and materially lessened working ability

[N.J.S.A. 34:15-12(c), N.J.S.A. 34:15-36]. Each of the three sections pertains to distinctly different payment schedules by which an injured worker is to be compensated. Each involves a specific maximum period during which benefits would be potentially payable (temporary disability – 400 weeks; total and permanent disability – 450 weeks; and permanent partial – 600 weeks).[1]

The underlying basis for entitlement to a specific type of benefit payable to an injured worker was discussed by the Appellate court in Portnoff v New Jersey Mfrs. Ins. Co., 392 N.J.Super 377 (AppDiv. 2007). The case was presented in the context of the ability of a defendant auto insurer to utilize the collateral source rule to offset total permanent workers' compensation benefit payments against automobile income continuation benefits of the injured party. The plaintiff had been injured in a work-related automobile accident and had initiated a compensation proceeding. In the compensation matter he had been awarded temporary disability for twenty-six (26) weeks as well as total permanent disability benefits. The auto insurer refused to pay any income continuation payments during the time any compensation benefits were paid. Plaintiff sued to obtain his auto policy benefits.

The defense of the carrier was that workers' compensation total permanent disability benefits were the equivalent of wage loss benefits, and therefore the carrier should have been permitted to set off those benefits against the income continuation benefits of the auto policy. The Appellate court agreed with the arguments and reversed the trial court which had denied offset. In its analysis, the Appellate court made extensive comparisons of the case law and purposes of auto income continuation benefits with workers' compensation disability benefits. Id. at 384. It reaffirmed earlier holdings that the purpose of temporary disability benefits was to afford the injured worker, "a partial substitute for loss of current wages." Id. at 385.

[1] For ease of reference, the Court will dispense with reference to the full statutory citations but rather will utilize 12(b) to refer to N.J.S.A. 34:15-12(b), and 12(c) for reference to N.J.S.A. 34:15-12(c).

Permanent partial disability benefits, however, serve an entirely different purpose. Rather those benefits are payable under workers' compensation law for physical (or psychological/psychiatric) impairment without regard to diminished earning capacity. Id at 387; N.J.S.A. 34:15-36 (... nothing in this definition (permanent in quality and partial in character) shall be construed to preclude benefits to a worker who returns to work following a compensable accident even if there be no reduction in earnings.)

Padilla v Concord Plastics, 221 N.J.Super 301 (App.Div 1987) also emphasized the underlying distinction between permanent partial 12(c) benefits and total permanent 12(b) disability benefits. The Padilla Court relied upon the statutory structure of the legislation and its subject division to restrict amputation enhancement payments otherwise payable under 12(c), from application to benefits payable under 12(b). It held that the amputation enhancement was considered to refer to 12(c) as it was a designated, numbered subparagraph following 12(c) which, in turn, dealt with permanent partial disability, not total and permanent disability benefits. Id. at 310-313.

This Court finds that the Total and Permanent Disability benefit entitlement of the Petitioner will be made under N.J.S.A. 34:15-12(b), and will be for 450 weeks from the September 14, 2016-onset date agreed upon by the parties. That date would be the date following the final temporary disability payment made to the Petitioner. As all permanent partial total disability benefit payments were concluded on November 18, 2015, N.J.S.A. 34:15-16 is not implicated. [2]

However, it remains for the Court to deal with the Respondent's request to receive a credit against the Total and Permanent Disability benefits payable. The credit sought is for the

[2] N.J.S.A. 34:15-16 requires benefits for an injury to be paid consecutively, not concurrently, so that permanent partial disability benefits are paid after temporary disability benefits are concluded, and the total and permanent disability benefits are paid after the conclusion of payments on permanent partial disability benefits.

450 weeks previously paid for the 75% of permanent partial disability which monetarily also calculates to be the same sum payable for total permanent disability, as 75% of 600 weeks is 450 weeks and the rates are the same at that level of permanent partial disability. Specifically, the Respondent has stated at oral argument that because of the benefits it previously paid, it will not be required to pay a single dollar to this admittedly permanently and totally disabled individual for 450 weeks. I am confident that this is not what the legislature intended when it amended the Compensation Act to insure that the most seriously injured workers would receive increased awards. That position also ignores the fact that the nature of its earlier payments differs from the nature of the benefit which it seeks to decrease by offset.

In support of its position, the Respondent relies upon a 2013-Division memo issued by Peter J. Calderone, Prior Director and Chief Judge of the Division, as well as several cases that simply mention in *dicta* that a credit was taken, or are cases which involved a Second Injury Fund claim. However, as stated *supra* the exact factual scenario that is presented in this case is not one that occurs with great frequency in the practice. Very few cases have involved Section 12(c) cases that have been subsequently re-opened and had an ultimate determination that a petitioner has become under Section 12(b), a person who has a total and permanent disability derived from a single incident **and** was a claim with earlier permanent partial disability awards equal to, or greater than, 75% of permanent partial disability. For those cases that do arise with a Petitioner having such a level of permanent partial disability, there are more often pre-existing conditions, subsequent accidents or a Second Injury Fund application has been present.

As for the prior Director's memo, it qualifies its application to "appropriate Total Disability cases." However, the memo makes no effort to distinguish the underlying basis of the physical (or psychiatric) impairment provisions of Section 12(c) from Section 12(b)'s earning/earning capacity lessening. It also fails to address situations such as faced by petitioners

similarly situated to Ms. Padua where their partial permanent disability had reached 75% or greater when Total and Permanent Disability is found. Had it done so, it would have seen the rationale totally collapse in effectuating the delivery of benefits to a more disabled individual, as the memo's logic would necessitate providing a credit that was monetarily larger than the benefit awardable. By way of example, a prior award of 80% of permanent partial disability would be 480 weeks. Following the theory of the Respondent here, a credit of 480 weeks would need to be applied against an award of only 450 weeks. Would the Respondent then argue that it not only has no obligation to pay benefits for the 450 week duration of total and permanent period but also could refuse to pay for 30 more weeks if the Petitioner continued to remain totally disabled? The argument is *reductio ad absurdum* logic.

There are only two statutory references to credits being permitted to be granted a Respondent. N.J.S.A. 34:15-12(d) permits employers to receive credits against permanent partial awards for previous loss of function to the body, head, member or organ where "subsequently an injury" occurs to that same body part. That is not the situation presented by Ms. Padua's case. Here the Respondent seeks to apply a permanent partial disability payment credit against a Total Permanent disability entitlement. The Petitioner in this matter had no accident or functional loss established to exist prior to February 5, 2004, and aside from the accident of that date, no subsequent accident which rendered her totally disabled. Her disability stems entirely from the sequelae of her accident of February 5, 2004.

However, there is a second statutory reference to a credit which does pertain to a totally disabled individual. N.J.S.A. 34:15-95 permits the Second Injury Fund to make payments for such persons entitled to receive total disability (N.J.S.A. 34:15-12(b)) payments "when such persons had ***previously*** been permanently and partially disabled ***from some other cause...***" [Emphasis added]. Simply stated, that provision of the statute would require the Second Injury Fund

to make payments for a disability found to pre-exist the last compensable accident. From a Respondent's perspective, it obtains a "credit" against total disability otherwise payable entirely by it, for such percentage of the total disability found to be compensable by the Second Injury Fund. However, as already stated, Ms. Padua does not present an eligible Second Injury Fund claim and N.J.S.A. 34:15-95 does not apply to her situation. She is totally disabled from the single accident.

Any Respondent reliance upon the case of Paul v Baltimore Upholstering Co., 66 N.J. 11 (1974) is misplaced. The Paul case was decided almost six years prior to the 1979 Worker's Compensation Act amendments which added definitions pertaining to partial permanent and total permanent disabilities. See N.J.S.A. 34:15-36. Furthermore, it was a Second Injury Fund case and involved credits premised upon proven cardiac disability that pre-existed the 1969 fourth myocardial infarction of the petitioner. The Second Injury Fund was held not to have liability under the provisions of N.J.S.A. 34:15-95(b) thus leaving the respondent liable for the ultimate permanent and total disability of the petitioner. The Paul-respondent was able to establish entitlement to the credit benefits of N.J.S.A 34:15-12(d) for the pre-existing cardiac functional loss from the two (2) heart attacks in 1966 and for which 50% of partial total had been previously paid.

Lastly, the Respondent attempts to rely upon a Division form for a Total Disability Order which contains a check-off box for "Re-opener Credit." That reliance is also misplaced. Forms are created, modified and utilized for a variety of factual scenarios. In fact, not every form within the Division has such a check-off box and some forms are lacking check-off boxes for issues for which credits may be taken. Regardless, the presence of a form will not supersede case law nor the statutory language of the Compensation Act. To argue the fact that the presence of a box on a

form may justify no payments to a totally disabled woman for almost nine years, demonstrates the weakness of the proponent's position.

The parties shall be heard on counsel fee entitlement on the Total Disability Order that will be entered in favor of the Petitioner for 450 weeks under N.J.S.A. 34:15-12(b) beginning September 14, 2016 with no credit for payments made under N.J.S.A. 34:15-12(c). At the conclusion of the 450 weeks, the Petitioner shall be subject to examination or assessment by the Rehabilitation Commission to determine if her disability still exists and because of same, can demonstrate that it is impossible for her to obtain wages or earnings equal to those earned at the time of the accident with such conditions as stated within Section 12(b).

Ms. Padua will be produced today to place her physical complaints on the record and to be examined as to the terms of the Order that will be entered.

Dated: December 5, 2017 **D. GAYLE LOFTIS, J.W.C.**

STATE OF NEW JERSEY
NEW JERSEY DEPARTMENT OF LABOR & WORKFORCE DEVELOPMENT
DIVISION OF WORKER'S COMPENSATION

MICHAEL GERITY

Petitioner

v.

NEW JERSEY TRANSIT

Respondent

NEW BRUNSWICK VICINAGE
C.P.: 2006-7745

DECISION

This matter comes before the Court on a remand from the Appellate Division under Docket No. A-2021-17T2 decided December 18, 2018. The remand involves the following legal issues that were raised for the first time on the appeal: (1) On an Application For Review Or Modification of Formal Award where the Petitioner is found to be totally and permanently disabled, whether the Respondent is entitled to a reopener credit for the prior permanent partial disability award (2) Correction of the calculation and application of the Social Security Offset, and (3) Reconsideration and explanation of various expert fees awarded by this Court.

Procedurally, the Petitioner suffered a work related injury on September 30, 2005, and entered into an Order Approving Settlement dated July 8, 2008, wherein he received an award of 66 2/3% of Partial Total. Petitioner subsequently filed an Application For Review Or Modification Of Formal Award pursuant to N.J.S.A. 34:15-27 and as a result entered into an Order Approving Settlement dated October 11, 2011, which increased his disability to 70% of Partial Total and the Respondent received a Reopener credit of 66 2/3% for the prior award. Petitioner then filed his second Application For Review Or Modification Of Formal Award on September 25, 2012, and following a trial this Court entered an Order for Total Disability w/Social Security Offset. The Order awarded the Petitioner 450 weeks at $507.95/week for a total award of $228,577.50 and then gave the Respondent a Reopener Credit for the prior award (70% Partial Total) in the amount of $213,339.00 resulting in a net award to the Petitioner of $15,238.50. This Order also allowed the Petitioner's two medical expert witnesses, Dr. Martin Riss a

fee of $1,150 ($400 report fee and $750 testimony) and Dr. Lawrence Eistenstein a fee of $1,400. ($400 report fee and $1,000 testimony). The Petitioner presented Brian Daley who was admitted by the Court as a vocational expert and the Order allowed him a fee of $2,500. Petitioner's Attorney was allowed a total fee of $3,047 which equaled 20% of the $15,238.50 net award to Petitioner.

With respect to the first and most important issue, whether a Reopener credit is appropriate, the parties and this Court agree that no reported decision has addressed this question. Therefore, attention must be directed to the applicable statutes. It is important to note that the Worker's Compensation Court is an administrative court created by statute and not a constitutional court. As a result, the jurisdiction of this Court is limited to that granted by the Legislature and "cannot be inflated by consent, waiver, estoppel or judicial inclination." Riccioni v. American Cyanamid Co., 26 N.J. Super. 1, 5, 96 A.2d 765 (App. Div. 1953) The New Jersey Supreme Court in Hubbard v. Reed and Kardon, 168 N.J. 387, 774 A.2d 495 (2001) set forth the guidelines that should be followed by the court when confronted with a case involving statutory construction:

> Because this case requires us to engage in statutory construction, our "overriding goal must be to determine the Legislature's intent." State, Dep't of Law & Public Safety v. Gonzalez, 142 N.J. 618, 627, 667 A.2d 684 (1995) (citing Young v. Schering Corp., 141 N.J. 16, 25, 660 A.2d 1153 (1995)). The first step in determining the Legislature's intent is to look at the plain language of the statute. State v. Butler, 89 N.J. 220, 226, 445 A.2d 399 (1982); see also Merin v. Maglaki, 126 N.J. 430, 434-35, 599A.2d 1256 (1992)(holding that statute's "language should be given its ordinary meaning, absent a legislative intent to the contrary"). As a general rule, when the language of a statute is clear on its face, "the sole function of the courts is to enforce it according to its terms." Sheeran v. Nationwide Mut. Ins. Co., 80 N.J. 548, 556, 404 A.2d 625 (1979) (quoting Caminetti v. United States, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442, 452 (1917)). Nevertheless, we also have stressed that "where a literal interpretation would create a manifestly absurd result, contrary to public policy, the spirit of the law should control." Turner v. First Union Nat.Bank, 162 N.J. 75, 84, 740 A.2d 1081 (1999) (citing Watt v. Mayor of Franklin, 21 N.J. 274, 278, 121 A.2d 499 (1956)). Thus, when a "literal interpretation of individual statutory terms or provisions" would lead to results "inconsistent with the overall purpose of the statute" that interpretation should be rejected. Cornblatt v. Barow, 153 N.J. 218, 242, 708 A.2d 401 (1998) (quoting Young, supra, 141 N.J. at 25, 660 A.2d 1153).

More recently, in the matters of The Plastic Surgery Center, PA v. Malouf Chevrolet-Cadillac, Inc., Docket No. A-5597-16T1, The Plastic Surgery Center, PA v. Leone Industries, Docket No. A-5603-16T1, The Woods O.R. v. Leone Industries, Docket No. A-5604-16T1, Steven J. Paragioudakis, M.D. v. Café Bayou, Docket No. A-0151-17T1, and Marc Menkowitz, M.D. v. Café Bayou, Docket No. A-0152-17T1, decided on January 17, 2019, the Appellate Division said:

> When a dispute about a statute's meaning arises, a court's "paramount goal" is to ascertain the legislative intent, the "best indicator of that intent is the statutory language." DiProspero v. Penn, 183 N.J. 477, 492 (2005). In examining a statute for its intended meaning, a court ascribes to the Legislature's words "their ordinary meaning and significance," and, when an enactment is "plainly written," a court will not "rewrite" or "presume that the Legislature intended something other than that expressed by way of the plain language." Ibid.

The Worker's Compensation Act has long been recognized as remedial social legislation which should be liberally construed to accomplish its beneficent purposes. Torres v. Trenton Times Newspapers, 64 NJ 548, 461 (1974). The New Jersey Supreme Court has indicated that the legislative sponsors of the 1979 amendments to the Act wanted to ensure that the most severely injured workers received greater compensation:

> Thus, according to the Joint Statement, the statute's primary goals were to eliminate awards for minor partial disabilities, to increase awards for the more seriously disabled and to contain the overall cost of worker's compensation. Although such a Joint Statement may be used to ascertain legislative intent, Brewer v. Porch, 53 N.J. 167, 174 (1969), it is the statute's express language that determines in what manner and to what extent the Legislature sought to attain those goals. ***In the final analysis it is the statute as written that must govern.*** (Emphasis added) Perez v. Pantasote, Inc., 95 N.J. 105, 114 (1984)

N.J.S.A. 34:15-12(b) sets forth the schedule of payments for total permanent disability:

> 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*** (emphasis added) 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.

N.J.S.A. 34:15-12(c) sets forth the schedule of payment for partial permanent disability:

> For disability partial in character and permanent in quality, weekly compensation shall be paid based upon 70% of the weekly wages received at the time of the injury, subject to a maximum compensation per week of 75% of the Statewide average weekly wage (SAW) earned by all employees covered by the "unemployment compensation law" (R.S. 43:21-1 et seq.) and paid in accordance with the following "Disability Wage and Compensation Schedule" and a minimum of $35.00 per week.

New Jersey has a longstanding policy embodied in both case law and statute against receiving a double recovery for the same injury and therefore, at first glance, it would appear that a credit to the Respondent for a prior partial total award on a Reopener application would be appropriate when the petitioner is thereafter declared totally and permanently disabled. However, a closer and more thorough examination of the differences between a permanent partial total award and a permanent total award is required before a proper decision on this issue can be made. When conducting this analysis, the Court must first look to the wording of the applicable statute (N.J.S.A. 34:15-12(b)) regarding statutory construction as instructed in the cases cited above.

N.J.S.A. 34:15-12(b) clearly mandates that an award for permanent total disability "shall be paid for a period of 450 weeks". The word "shall" means that payment for an award of total disability for a period other than 450 weeks is not an option. In addition, this section of the statute makes absolutely no reference to a credit for a prior award arising out of the same accident. If the legislature had intended that such a credit be allowed then they could have included that wording but they chose not to do so.

In addition, there are several other significant differences between total permanent disability and permanent partial disability as follows: (1) permanent partial disability awards are paid according to the "Disability Wage and Compensation Schedule" and are limited in duration with a maximum of 600 weeks, whereas total permanent disability awards must be paid for 450 weeks at which time the Petitioner is subject to a reevaluation with the potential for lifetime benefits. (2) Partial awards have a minimum

payout of $35/week while total awards have a minimum payment of 20% of the average weekly wages earned by all employees covered by the unemployment compensation law. (3) An award of partial disability does not require proof of earnings impairment or earning capacity while total disability does require such proof and is wage based and not impairment based. (4) Permanent partial awards do not involve the Second Injury Fund whereas permanent total awards may include the Fund. (5) The statutory definitions of permanent partial disability and permanent total disability contained in N.J.S A. 34:15-36 are significantly different. Permanent partial disability is defined as, "a permanent impairment caused by a compensable accident or compensable occupational disease, based upon demonstrable objective medical evidence, which restricts the function of the body or of its members or organs; included in the criteria which shall be considered shall be whether there has been a lessening to a material degree of an employee's working ability. Subject to the above provisions, nothing in this definition shall be construed to preclude benefits to a worker who returns to work following a compensable accident even if there be no reduction in earnings." Total permanent disability is defined as: "a physical or neuropsychiatric total permanent impairment caused by a compensable accident or compensable occupational disease, where no fundamental or marked improvement in such condition can be reasonably expected. Factors other than physical and neuropsychiatric impairments may be considered in the determination of permanent total disability, where such physical and neuropsychiatric impairments constitute at least 75% or higher of total disability."

It is abundantly clear that permanent partial awards and permanent total awards are completely different on many levels. These differences were covered by the Appellate Division in Portnoff v. New Jersey Manufacturers Insurance Company, 392 N.J. Super. 377 (App. Div. 2007) and the Court addressed the issue of double recovery by stating, "A double recovery presupposes congruence of the two benefits implicated." See Skryha v. Pa. Nat'l Mut. Cas. Ins. Co. 206 N.J. Super. 66, 70-71 Since there is a lack of

congruence between permanent partial awards and permanent total awards the Petitioner would not be receiving a double recovery if Respondent did not get a credit for the prior partial total award in this case.

Furthermore, as Petitioner points out in their brief, the Respondent's position that they are entitled to a credit for the prior partial total award could cause an absurd result that is contrary to both public policy and the intent of the Legislature that the most seriously injured workers get the greatest benefits. For example, if the Petitioner's prior partial total award was 75%, which gets paid out over 450 weeks according to the Disability Wage and Compensation Schedule, and then is determined to be totally and permanently disabled from the same work accident on a reopener application, the Petitioner would be awarded 450 weeks of compensation minus 450 weeks for the prior award which equals 0 weeks of compensation. Even more problematic is a situation where the Petitioner's prior award is above 75% of partial total. Assume that the prior partial total award equaled 80%, which would be paid out over the course of 480 weeks, the calculation of a subsequent total award on a reopener application would be 450 weeks minus 480 weeks which equals -30 weeks resulting in the Petitioner either owing the Respondent money or having the payment of his total award delayed for 30 weeks. It is hard to fathom that the Legislature would have intended such a result.

The Respondent's position that they are entitled to a credit for the prior partial total award in this case would require this Court to accept an alternate interpretation of the plain and unambiguous language of N.J.S.A. 34:15-12b and to insert language into the Statute that simply does not exist. If the Court accepted Respondent's position it would not be interpreting the Statute but rather rewriting it and thereby likely altering what the Legislature intended. This Court declines to do so. The proper forum to pursue Respondent's position is not here in a statutory Court, but in the legislative branch.

With respect to the calculation of witness and attorney fees, N.J S.A. 34:15-64 states in pertinent part:

> a. The commissioner, director and the judges of compensation may make such rules and regulations for the conduct of the hearing not inconsistent with the provisions of this chapter as may, in the commissioner's judgment, be necessary. The official conducting any hearing under this chapter may allow to the party in whose favor judgment is entered,

costs of witness fees and a reasonable attorney fee, not exceeding 20% of the judgment; and a reasonable fee not exceeding $400 for any one witness, except that the following fees may be allowed for a medical witness:

(1)(a) A fee of not more than $600 paid to an evaluating physician for an opinion regarding the need for medical treatment or for an estimation of permanent disability, if the physician provides the opinion or estimation in a written report; and

(b) An additional fee of not more than $400 paid to the evaluating physician who makes a court appearance to give testimony;

Both Dr. Riss and Dr. Eisenstein were evaluating physicians who each prepared a written report with an estimation of permanent disability and who both testified at the trial of this matter on behalf of Petitioner. It should also be noted that both of the doctors prepared their written reports prior to January 11, 2016, which is the date that the fees for written reports of evaluating physicians was raised from $400 to $600. I find that these medical witnesses and the services of an attorney were necessary for the proper presentation of Petitioner's case, therefore, in accordance with N.J.S.A. 34:15-64, the Court will allow a total fee of $800 for each of the aforementioned physicians ($400 for the written report plus $400 for testimony). The Court is constrained by the statute to award a fee of $400 to Brian Daley, the petitioner's vocational expert. The Court declines to invoke the authority found in N.J.S.A. 34:15-28.2 to award actual costs as requested by the Petitioner since I do not find any conduct by the Respondent that would warrant same. All of the aforementioned costs shall be split equally by the parties. The Petitioner's attorney is awarded a counsel fee of 20% of the judgment based on the fact that this matter involved a complete trial with the testimony of several experts as well as the Petitioner. The attorney fee shall be paid as follows: 40% by Petitioner and 60% by Respondent. Finally, during oral argument before the Court, the parties stipulated as to the calculation and application of the Social Security Offset.

Petitioner's attorney shall prepare a proposed form of Order for Total Disability w/Social Security Offset and no Reopener credit in accordance with this decision and submit same to the Court with a copy to Respondent's attorney pursuant to Rule 12:235-3.12(x).

Dated: _____

_____

ROBERT D. THURING, J.W.C.

MICHAEL GERITY, Petitioner-Appellant/Cross-Respondent,

v.

NEW JERSEY TRANSIT, Respondent-Respondent/Cross-Appellant.

No. A-2021-17T2.

Superior Court of New Jersey, Appellate Division.

Argued November 28, 2018.
Decided December 18, 2018.

On appeal from the New Jersey Department of Labor and Workplace Development, Division of Workers' Compensation, Claim Petition No. 2006-7745.

Kevin P. Gilmartin argued the cause for appellant/cross-respondent (Rothstein, Mandell, Strohm & Halm, PC, attorneys; Kevin P. Gilmartin, on the briefs).

Stephanie L. Meredith argued the cause for respondent/cross-appellant (Brown & Connery, LLP, attorneys; Stephanie L. Meredith, on the briefs).

Richard B. Rubenstein argued the cause for amicus curiae New Jersey Advisory Council on Safety and Health (COSH) (The Blanco Law Firm, LLC, and Rothenberg, Rubenstein, Berliner & Shinrod, LLC, attorneys; Richard B. Rubenstein and Pablo N. Blanco, on the brief).

Before Judges Nugent and Reisner.

PER CURIAM.

Petitioner Michael Gerity appeals, and respondent New Jersey Transit (NJT) cross-appeals, from a November 15, 2017 order issued by a judge of workers' compensation (JOC).[1] We affirm the JOC's finding that Gerity is totally and permanently disabled. We remand to the workers' compensation court as to several other issues, all of which the parties raised for the first time on appeal.

I

We begin by addressing the issue of petitioner's total and permanent disability. The evidence was addressed in detail in the JOC's two written opinions issued in 2015, and can be summarized more briefly here. In 2005, petitioner was injured when another vehicle struck the bus he was driving for NJT. Through the workers' compensation system, he underwent multiple surgeries on his arms and neck. In two successive settlements, he received an award of sixty-six and two-thirds percent of permanent partial total disability in 2008, and seventy percent of permanent partial total disability in 2011. After still more surgery, he filed a second application for review and modification of the award in September 2012, seeking an award of permanent total disability. See N.J.S.A. 34:15-27; N.J.S.A. 34:15-36.

At the hearing, petitioner testified about his increasingly severe physical limitations in the use of his neck, hands and arms, and his complete inability to work. He presented several expert witnesses who opined as to his increased medical disability

and his inability to work at all.

Petitioner's first expert, Dr. Riss, had examined petitioner several times over the years since his injury. Dr. Riss had always been of the opinion that petitioner was 100 percent disabled. His current findings, that petitioner's condition had continued to deteriorate, confirmed his opinion that petitioner was permanently and totally disabled. Dr. Riss gave detailed testimony explaining the extent to which petitioner's range of motion and hand strength had deteriorated over the years, leaving him completely unable to work.

Brian Daly, a vocational expert, testified that petitioner's physical limitations, combined with his educational limitations[2] and his age (then fifty-five), rendered him unemployable. Mr. Daly confirmed that, even if petitioner did not have problems with his lower back and his legs — issues not caused by the bus accident — he would still be unemployable due to the problems with his neck and arms. Daly explained why petitioner could not work as a security guard, and why petitioner's educational limitations made it unlikely that anyone would hire him for a white collar job.

Finally, petitioner presented testimony from Dr. Lawrence Eisenstein, an expert in neuropsychiatry. Dr. Eisenstein had examined petitioner in 2008, 2010, and 2013. Based on the 2013 examination, Dr. Eisenstein opined that petitioner had neurological deficits and psychiatric problems that, together, rendered him one hundred percent disabled.

Respondent presented testimony from Dr. Ivan Dressner, a neurologist. Dr. Dressner opined, essentially, that petitioner had no disability attributable to the accident; he was entirely capable of working; and petitioner's treating physicians had misdiagnosed him and subjected him to multiple unnecessary operations. However, Dr. Dressner also testified that he had never personally viewed petitioner's MRI films, although it was his usual practice to examine MRI films when diagnosing a patient. He testified that he asked for the films multiple times, but they were not supplied to him.

Respondent also presented testimony from Dr. Arthur Canario, an orthopedic surgeon. Dr. Canario examined petitioner in 2007, 2011, and 2012. While Dr. Canario agreed that petitioner's percentage of disability had increased over the years, he opined that petitioner was not unemployable. For example, he believed petitioner could work in sales, a desk job, or a security job. However, Dr. Canario conceded he was unfamiliar with petitioner's limited educational background. Dr. Canario opined that the surgeries petitioner underwent were not medically necessary.

The JOC found that petitioner proved he was totally and permanently disabled, as set forth in N.J.S.A. 34:15-36, and as construed in Perez v. Pantasote, Inc., 95 N.J. 105, 116-18 (1984). The JOC credited the testimony of petitioner's experts rather than respondent's experts, for reasons he explained in his opinion. He also found that respondent did not present competent or credible evidence to support its position that petitioner "could work in some type of job if he were motivated to do so."

The JOC's detailed decision was based on his evaluation of petitioner's testimony and that of the parties' respective experts. We will not disturb the judge's factual findings so long as they are supported by sufficient credible evidence. Paul v. Baltimore Upholstering Co., 66 N.J. 111, 119 (1974). In applying that test, we owe deference to the judge's expertise and his opportunity to evaluate the credibility of the witnesses. Ibid. We find no basis to second-guess the judge's credibility determinations, and we conclude that the decision is supported by sufficient credible evidence.

We affirm the order finding petitioner totally and permanently disabled. Respondent's arguments on this point are without sufficient merit to warrant further discussion. R. 2:11-3(e)(1)(E).

II

We remand the case to the workers' compensation court as to three issues: the award of credits to the employer attributable to petitioner's prior awards of permanent partial total 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.

Despite a prior remand in 2017, neither side raised any of those issues before the JOC. We delineate them briefly here. First, at oral argument of this appeal, the employer's counsel conceded that the decision contains an error with respect to the social security credits. We decline the employer's invitation to exercise original jurisdiction as to the social security credits. This conceded error requires a remand to correct the award.

Second, petitioner and an amicus curiae, New Jersey Advisory Council on Safety and Health, argue that the JOC erred in awarding the employer credits for petitioner's prior partial disability award. They characterize this as an important and novel issue. In the interests of justice, we will not deem the issue waived because it was not raised in the trial court. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). However, out of deference to the expertise of the JOC and to ensure that we have a proper record in case of a further appeal, we conclude that all parties should have the opportunity to brief the issue before the JOC, and the JOC should decide the issue in the first instance. Accordingly, we also remand for that purpose. Depending upon how the JOC decides the issue on remand, the JOC may also need to recalculate the fee award to petitioner's counsel.

Third, there are issues concerning the fees allowed to some of the expert witnesses. The parties disagree as to whether Daly, petitioner's vocational expert, should have received a $2500 fee award. On its face, the amount of the award seems more appropriate to a medical expert. However, the JOC's opinion gave no explanation for the amount of the award, and as previously noted, neither side brought the issue to the judge's attention, even on the 2017 remand. In addition, NJT contends that the awards to Dr. Eisenstein and Dr. Riss were too high, an issue petitioner's responding brief did not address. Because the case must be remanded in any event, we remand the fee issues for the JOC's reconsideration.

Affirmed in part, remanded in part. We do not retain jurisdiction.

[1] The JOC originally decided this case in 2015, and issued an order on November 20, 2015. Respondent filed an appeal in 2015, and petitioner filed a cross-appeal. Gerity v. New Jersey Transit, No. A-1560-15. According to petitioner's brief, the parties agreed in 2016 that a remand was required to correct certain errors in the judgment. By order dated March 22, 2016, we granted NJT's unopposed motion for a remand and did not retain jurisdiction. The parties filed a new appeal and cross-appeal from the JOC's 2017 order entered after the remand.

[2] Petitioner testified that he attended special education classes in high school and had ADHD.