# WORKERS' COMPENSATION

PRACTICAL SKILLS SERIES

# 2011 Edition Written by

John D. Kovac, Esq. Law Office of John D. Kovac New Brunswick, New Jersey



THE NEW JERSEY INSTITUTE FOR CONTINUING LEGAL EDUCATION One Constitution Square, New Brunswick, New Jersey 08901-1520 (732) 249-5100



# NEW JERSEY INSTITUTE FOR CONTINUING LEGAL EDUCATION CELEBRATING OVER 40 YEARS OF SERVICE TO THE BENCH AND BAR

The New Jersey Institute for Continuing Legal Education was created in 1962 to help lawyers and judges increase their general professional competence, keep abreast of developments in the law, and become more proficient in selected areas of practice. Since 1962, ICLE has served the educational needs of the New Jersey bench and bar and continually strives to respond to their many and varied concerns.

A non-profit, completely self-supporting organization, ICLE is the joint venture of the New Jersey State Bar Association, Rutgers - The State University of New Jersey, and Seton Hall University. Representing a merger of the practicing bar and the academic community, the Institute is governed by an autonomous Board of Trustees, which includes representatives of the State Bar Association, deans of the law schools and officers of the participating universities.

The Institute presents more than 230 seminars each year throughout the State, offers CDs of seminars, markets software programs especially designed for the practicing attorney, and publishes comprehensive practice manuals and lecture handbooks. Its programs and publications must be financially self-supporting since ICLE is not subsidized in any way. The professional staff of attorneys and administrators, aided by a dedicated support staff, is headquartered at the New Jersey Law Center in New Brunswick, along with the State Bar Association, the State Bar Foundation and IOLTA.

The ingredients that contribute most to the stature of the Institute are the talent, time and effort expended by the very best of New Jersey attorneys, representing every field of specialization and every type of practice. The voluntary participation of practicing lawyers and judges as ICLE lecturers, authors, and advisors is appreciated and encouraged, for without their assistance, high quality continuing legal education would not be possible.

The Institute welcomes this opportunity to serve you.

The material contained in this publication is for educational purposes only and is not intended to serve as a substitute for the professional services an attorney would normally provide to a client, including up to the minute legal research.

 $\begin{array}{c} \textbf{Copyright} \ ^{\circ} \ \textbf{2011 by} \\ \textbf{New Jersey Institute For Continuing Legal Education} \\ \textbf{All Rights Reserved} \end{array}$ 

#### TABLE OF CONTENTS

Corre	#0.GC				
A.	overageWho is Covered				
A.					
	1.			ployees	
	2.			t Covered	
n	XX 71 .	a.	-	loyee or Independent Contractor	
В.	_			. D 1	
	1.		_	oming Rule	•••
	2.		Premises	,	
				of Duties, Personal Comfort, and Paid Travel Time	
		a.		op v. City of Ventnor (Minor Deviation Exception)	
		b.		no and Sager (Complusion Exception)	
		c.		v. Foodarama Supermarkets (Travel-time exception)	•••
		d.		per v. Barnickel Enterprises, Inc. (Basic Needs/ Personal	
				fort Exception)	· • •
		e.		goz v. New Jersey Turnpike Authority (Employer's	
				rol of Accident Location)	
	3.			Suicide and Assaults in a No-Fault System	
	4.			gainst Employer Retaliation	
C.	Recovery for Accidents and Occupational Diseases				
	1.		•		
	2.	Causa			
		a.	Causa	ation Involving Accidents	٠.
			(i)	Arising out of and in the Course of Employment	
			(ii)	Subsequent Injuries	
			(iii)	Idiopathic Events	
			(iv)	Employment as a Contributing Cause but not the	
				Sole Cause	
			(v)	Aggravation of a Preexisting Condition	
		b.	Causa	tion Involving Occupational Disease	
			(i)	Lindquist—Application of a Liberal Standard to	
				Occupational Causation	
				(a) Causation in Light of the "Original Bargain"	
				(b) Fiore is Inapplicable to Pulmonary Claims	
				(c) Scientific Studies	
				(d) The Preponderance of Evidence Standard	
				(e) Submission of Proofs	
				(f) Presumption of Pulmonary Disease Favors all	•
				Firefighters	
					• • • •

## ii / Workers' Compensation

				(III)	reterson and Kozyński (Applying the Material			
					Degree" Standard to Preexisting Conditions)	. 34		
					(a) Recent Developments			
				(iv)	Level of Risk			
				(v)	Objective Medical Evidence			
				(vi)	Bond (Manifestation of Previously Undetected	. 51		
				(11)	Disease)	30		
				(vii)	When Bond Does Not Apply: Levas and the	. 39		
				(VII)		20		
			_	C	Apportionment of Occupational Disease	. 39		
			C.	Causai	ion Involving Treatment Recommended After	41		
		2	TT .	G 11	Settlement			
		3.			ns			
		4.	Stress		se of Action			
			a.		ary			
		5.			f Awards			
		6.						
	D.	Notice	e, Statut	es of Lin	nitations and Jurisdiction	. 54		
		1.	Occup	oational C	Claims	. 55		
			a.	Notice.		. 55		
				(i) Broo	ck and Bollerer (Employer Knowledge)	. 55		
			b.		of Limitations in Occupational Claims			
				(i)	Employee Knowledge (Earl)			
				(ii)	The Meaning of "Compensation" (Scheffield)			
				(iii)	Continued Exposure (Earl and Brooks)			
			c.	` /	ction in Occupational Cases			
		2.			T			
			a.					
			b.		of Limitations			
			c.		nts with Delayed Onset of Injury (Burnell and Adams)			
			d.		etion in Cases of Accidents			
	E.	The H			yer's Fund			
	Ľ.	THE	misure	a Employ	/CI S I'uliu	. 09		
Ш.	Modi	cal and L	Icanital	Carrias	and Treatment	71		
ш.						71		
	A.	Medical Benefits Defined						
	В.	Duration of Benefits						
	C.	Respondent Controls Choice of Physician						
	D.		Excessive Medical Bills					
	E.		Medical Benefits are Compensation Benefits					
	F.		Hernia Cases					
	G.							
	H.				edical and Surgical Treatment			
	I.							
	J.	Medic	al Provi	der Clair	ns	.78		

IV.	Ten	porary Disability	84					
	A.	Temporary Disability Defined	84					
	B.	The Seven-Day Waiting Period	84					
	C.	Duration of Temporary Disability	85					
		1. Introduction						
		2. Restricted Duty	86					
		3. Right to Keep Job	87					
		4. Sick Leave	87					
	D.	Disqualification of Right to Receive Temporary Disability Benefits	88					
	E.	Wages Defined	89					
		1. Rate of Wage Fixed by Output	90					
		2. Hourly Wage	90					
		3. Gratuities	90					
		4. Board and Lodging	90					
	F.	Calculating Temporary Disability Payments	91					
	G.	State and Private Temporary Disability Benefits	92					
	H.	Relationship to Permanent Disability	94					
	I.	Scheduling Permanent Disability Examinations	94					
	J.	Unemployment Benefits	95					
V.	Pern	Permanent Partial Disability						
	A.	<b>,</b>						
	B.	Objective Evidence Requirements	97					
	C.	Medical Examinations						
	D.	Rate of Payment Depends on Body Part Injured	99					
	E.	New Jersey Manufacturers Insurance Company Charts						
	F.	Stacking Multiple Injuries	111					
		1. Kaneh: Stacking of Multiple Related Occupational Injuries and the Date						
		of Manifestation	114					
	G.	Schedule of Payment	115					
	H.	Delays	116					
	I.	Hernia Cases	116					
	J.	Setting Up Permanency Examinations	117					
VI.	Perm	nanent Total Disability	121					
	A.	Permanent Total Disability Defined						
	B.	Pre-Existing Conditions						
	C.	Odd Lot Doctrine						
	D.	Schedule of Payment						
VII.	Secti	on 20 ("Lump Sum") Settlements	124					
	A.	Medicare and Section 20 Settlements						
		1. The Problem						
		2. Obligations of Settling Parties; Risks for Failure to Comply						

## iv / Workers' Compensation

		3.	Pre-ap	pproval of Settlements	127		
		4.	Set As	side Arrangements	127		
		5.	Medic	care Procedures	129		
VIII.	Second Injury Fund						
	A.	A. The Second Injury Fund Defined					
	В.	Lim	itations	of Second Injury Fund	142		
	C.			Payment			
	D.			e Second Injury Fund into the Case			
	E.			vement When the Preexisting Injury is Part of An Active le Claim			
IX.	Empl	lover C	redits fo	or Pre-Existing Injuries	146		
	A.			Credit Under the 1980 Reform Act			
	В.	-		Abdullah Credits with the NJM Charts			
	<b>D</b> .	1.	_	Rates			
		••	2011	1.440	110		
X.	Offse			Compensation Benefits			
	A.	Sect	tion 40 L	Liens: Third Party Claims	153		
		1.		oduction			
		2.		d-Party Award Exceeds Compensation Liability			
		3.		pensation Liability Exceeds Third-Party Award			
		4.		otiating Section 40 Liens			
		5.	Secti	ion 40 Liens Apply to Civil Suits Against the Worker's Own			
				Employer			
		6.	•	ng Petitioner's Share of Section 40 Liens			
	B.			lving Social Security			
		1.		oduction			
		2.	Prep	aring a Long-Form Order with Social Security Offsets in a Second Injury Fund Case			
		3.	Secti	ion 20 Settlements			
			a.	Rodlin (Step 2 is Upheld)			
			b.	Rivera (Medical Expenses)			
			c.	Sciarotta (Step 3 May Not Be Applied)			
			d.	Conclusion			
		4.	Secti	ion 40 Liens	172		
		5.	Socia	al Security Offsets Terminate Upon Petitioner's Death	172		
		6.	Socia	al Security Offset Does Not Apply to Dependents	173		
	C.	Offs	ets Invol	lving Pensions	173		
	D.	Chil	d Suppo	ort Liens	176		
XI.	Comr	ensati	on for D	Death	177		
11.	A.			its Defined			
	В.			165 Defined			
	₽.	- Cp	y	•••••••••••••••••••••••••••••••••••••••	1 / /		

	C.	Compensation Payments to Dependents	179							
	D.	Partial Dependency	180							
	E.	Dismissal Procedures, Lump Sum Settlements and Their Effect Upon the								
		Rights of Dependents	181							
XII.	Over	coming the Exclusivity Rule: When An Employer May Also Face Civil								
ΛЦ.	Over	Liability								
	A.	Millison and Laidlow								
	В.	Crippen, Mull, and Tomeo								
	C.	Violent Acts								
	D.	Other Exceptions to the Exclusivity Rule								
	E.	Conclusion								
	F.	Subsequent Developments—Van Dunk								
	1.	Subsequent Developments— van Dunk	1 50							
ХШ.		dures								
	A.	Initial Client Interview								
		1. Introduction								
		2. Form File								
		3. Initial Interview	193							
		a. How to Obtain a Record of Petitioner's Previous Loss of	40.5							
		Function								
	-	b. Information to be Obtained at Initial Interview								
	B.	The Claim Petition								
	C.	Dependency Claim Petition								
	D.	Application for Review								
	E.	Answering the Claim Petition								
	F.	Answer the Dependency Claim Petition								
	G.	Motions for Temporary Disability and/or Medical Treatment	201							
		1. Changes to Administrative Code Sections Governing Med-Temp.	202							
		Motions								
	TT	2. Emergent Motions for Medical Treatment								
	Н.	Other Motions								
	I.	Certification								
	J.	Discovery	207							
	K.	Penalties, Enforcement of Orders, and Civil Claims against Compensation	200							
		Carriers and Related Parties								
	L.	Pre-trial Conference								
	M.	Conduct of Formal Hearing								
	N.	Evidentiary Procedures								
		1. Videotaped Evidence								
	O.	Order Approving Settlement								
	P.	Order Approving Settlement with the Dismissal: N.J.S.A. 34:15-20								
	Q.	Second Injury Fund Cases								
	R.	Commutations	232							

## vi / Workers' Compensation

	S.	Informal Hearing	233			
	T.	Answer the Application for Review	234			
	U.	The Trial	234			
	V.	Settlements	236			
	W.	Attorney Fees	236			
		1. Introduction				
		2. Med/Temp Motions	237			
		3. Section 40 Liens	237			
		4. Voluntary Tenders	238			
XIV.	Appe	endices				
	A.	Forms	241			
	B.	Fact Patterns	311			
	C.	New Jersey Administrative Code, Chapter 235,				
		Rules of the Division of Workers Compensation	374			
	D.	Disability Schedules				
	E.	Important Addresses and Telephone Numbers				