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BE CAREFUL USING THE "WE ARE NOT THE LAST EMPLOYER" DEFENSE

Courtesy of Kristy N. Olivo, Esq.*
Marshall, Dennehey, Warner, Coleman & Goggin.

Arguably, the most litigated issue in New Jersey workers' compensation court is whether additional permanent disability is caused by a petitioner's continued employment or by the natural progression of an earlier work-related accident. The Superior Court of New Jersey, Appellate Division circulated two decisions in April 2009, including the published case of Geraldine Singletary v. Wawa, 406 N.J. Super. 558, and the unpublished case of Ivo Zrno v. Wegman's, (Docket No. A-4025-07T1). Both cases were similar in that they included prior accepted traumatic claims followed by claims alleging subsequent occupational exposure causing additional permanent disability. Since in neither case the petitioners sustained subsequent traumatic injuries, the court properly analyzed both matters under N.J.S.A 34:15-31.

Specifically, N.J.S.A 34:15-31 provides that a "compensable occupational disease shall include all disease arising out of and in the course of employment, which are due in a material degree to causes and conditions which are or were characteristic of or peculiar to a particular trade, occupation, process or place of employment." Although employers prematurely leap with relief and shout in defense, "WE ARE NOT LAST!" (last employer or last carrier to provide insurance coverage), these two above-mentioned cases illustrate the seminal case of Peterson v. Hermann Forwarding, Co., 267 N.J. Super. 493 (App. Div. 1993) and reiterate that just because you are the last employer or carrier, it does not mean you are automatically the responsible party and are without a valid defense. Peterson clarified N.J.S.A 34:15-31, holding that in order to show a worsening to a "material degree" and receive an award for occupational disease, a petitioner must show that the alleged occupational exposure contributed to the resultant disability by an appreciable degree or a degree substantially greater than de minimis.

In Singletary, three years after an award for permanent disability for a single traumatic injury sustained while working at Wawa as insured by an insurance carrier, the petitioner filed both a reopener claim and an occupational exposure claim. The petitioner was still employed by Wawa during this alleged period of occupational exposure; however, Wawa had become self-insured. The petitioner testified she was performing the same job duties as she was prior to the original work injury and that her pain had worsened since the original award. Her expert testified that a subsequent MRI provided objective medical evidence of worsening pathology and that, although her prior condition did not require surgery, the progression of the degenerative process now necessitated surgery. He further testified that if the petitioner had stopped working, or taken a sedentary job after the original accident, she probably would not have needed the surgery. The Judge found the additional disability was related to the occupational claim rather then the original work injury.

The Appellate Division affirmed the Judge of Workers' Compensation's (JWC) decision, holding that the petitioner's duties legally and materially caused her latest disability, citing that her testimony revealed that she became unable to perform some of the required job duties that she was performing even after the permanent disability award. The Appellate Division

distinguished this case from Peterson. In Peterson, the petitioner had a brief period of subsequent employment. In Singletary, the Appellate Division found it significant that the petitioner worked continuously for almost five years before seeking more medical treatment. They also pointed out that her expert testified that the surgery would not have been required if she had retired or taken a sedentary position after the original accident. Based on this testimony, the Appellate Division found that the Judge's findings were supported: that her subsequent/continued employment accelerated the degenerative process rather than it being the natural progression of the earlier injury.

In Zrno v. Wegman's, rather than placing liability on the last employer, as in Singletary, the appellate court reversed the JWC's holding and ultimately placed liability on the original injury. The relevant facts of this case were somewhat different than in Singletary. Zrno sustained an initial traumatic injury while working for Wakefern Food Corporation and was awarded permanent disability at a later time. It is noteworthy to mention that when the disability award came down, the petitioner was under the employment of Wegman's. However, Wegman's had no liability regarding that disability. The petitioner only continued to work for Wegman's for an additional fifteen days after this award. A year-and-a-half later, the petitioner filed a reopener claim regarding the injury sustained while working at Wakefern and also an occupational exposure claim against Wegman's alleging an aggravation. Just like in Singletary, Zrno performed the same duties immediately following the original award of disability. However, unlike Singletary, who continued performing the similar or the same job duties for over three years subsequent to the original order for permanent disability, Zrno only continued working with Wegman's in a similar position for an additional 15 days after the permanent disability award. After he left Wegman's, he took a position with a different employer performing completely different job duties than those performed at Wakefern and Wegman's. However, none of those employers were parties to this litigation. The WCJ placed liability on Wegman's.

The Appellate Division found that the facts and legal analysis set forth in Peterson squarely applied to this matter in that the record contained insufficient medical evidence to support a material change in condition. Particularly, they pointed to the medical experts who consistently testified that the petitioner's continued discomfort was due to a progressive change from the original work injury, along with the post-operative build-up of scar tissue. It was noted that the petitioner himself testified that only his pain increased from the prior award and that there was no change in the MRI study. The Appellate Division also cited that, although the petitioner's experts testified that his condition worsened while working at Wegman's, they could not separate the degree or specifically apportion liability. They also noted that the petitioner's experts also did not take into consideration employment after Wegman's.

While it may be the tendency to assume that the last employer will bear the responsibility, it is prudent that employers review the specific facts and medical records surrounding a claim where there is a prior work injury rather than just sighing in relief that they are not the last alleged injury. Fortunately, Wegman's attorneys in the matter of Zrno v. Wegman's (notably from Marshall, Dennehey, Warner, Coleman & Goggin) did not automatically assume that, because their client was the last employer, they were more than likely to be the liable party. They analyzed the facts of the case and used and applied Peterson to support their position that there was no material worsening of the prior condition, and the Appellate Division ultimately agreed.

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