

Navigating the Waters of a Motion for Med and Temp

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Practitioners of workers' compensation in New Jersey will at some point encounter a motion for medical and/or temporary total disability benefits, otherwise known as the "motion for med and temp." It may be that the respondent questions whether the requested treatment is related to the compensable condition, or it may be that the respondent questions whether the petitioner is entitled to temporary total disability benefits. Either way, the parties must figure out how to prepare to either prosecute or defend the motion. Much like a captain preparing to navigate a ship, a practitioner must prepare to handle a motion for medical and/or temporary total disability benefits issues within the New Jersey workers' compensation system.

The Waters: The NJ Workers' Compensation System

Before casting your sail, know the issues you are looking to tackle. Are you seeking medical treatment, temporary total disability benefits, or both? Know the facts of your claim but also know the law. The law is like your captain's gear; it guides you in how to handle your claim.

N.J.A.C.12:235-3.2 is the court rule governing motions for medical and temp. The rule provides the procedural guidelines for submissions. Become familiar with the procedural requirements, but also become familiar with the case law, which will give you insight into how judges have interpreted the underlying issue of entitlement to either or both benefits. Case law is your tool in navigating the waters.

The Tools: Recent Cases

There are many recent cases that can guide you in preparing for a motion for medical and/or temporary disability benefits litigation. It is important to become familiar with these cases. The following are just a few of the key decisions.

(1) *There must be actual wage loss to support a motion for temporary total disability benefits.*

As a practitioner, you will inevitably hear references to the *Cunningham* case. *Cunningham v. Atlantic States Cast Iron Pipe Co.*, 386 N.J. Super. 423 (App. Div.), cert. denied, 188 N.J. 492 (2006). It is a 2006 Appellate Division decision that is very much relevant at this time. In this case, the petitioner sought temporary total disability benefits after he had been terminated. There was a gap, albeit a short one, between the termination of the petitioner's employment and a doctor's rendering him temporarily and totally unable to work.

During the litigation, the issue was raised as to whether the basis for the termination was relevant to the issue of entitlement to temporary total disability benefits. The Appellate Division held that it was not. Instead, the court held that the relevant issue is whether the petitioner sustained any actual wage loss, as temporary total disability benefits constitute a replacement for actual lost wages. Because the petitioner had not sustained his burden of proving an actual wage loss between the time that he was terminated

and the time that he was rendered unable to work by the medical provider, the court reversed and remanded the judge of workers' compensation (JWC) decision granting the benefits in order to allow petitioner the opportunity to prove actual wage loss, if any. Therefore, it is not enough to have a doctor indicate that a petitioner is temporarily and totally disabled from work. The petitioner must also prove actual loss of wages.

(2) There must also be credible medical proof to support a claim of temporary and total disability.

Another case that dealt with entitlement to temporary total disability benefits is *Condi v. CompuCom*, 2010 N.J. Super., Unpub. LEXIS 831; App.Div., April 16, 2010. Specifically, there was a gap in time between the conclusion of the petitioner's initial period of treatment and the later determination by a medical provider that there was a need for treatment as well as inability to work. The petitioner did not submit any proof that she had any lost wages during this gap in time. The Appellate Division affirmed the decision of the JWC denying the petitioner's motion for the benefits for the same reasons as outlined in the *Cunningham* case (no showing of loss of wages). But *Condi* is also important in that the JWC did not find the supplemental report of the petitioner's medical expert—attempting to retroactively provide an opinion as to inability to work—credible. It was noted that the expert had evaluated the petitioner and provided two prior reports that did not address work ability during the relevant gap in time. It was not until a day prior to the hearing on the issue that the doctor drafted a short supplemental report addressing that issue.

(3) The proofs submitted in support of a motion must be credible.

Proof issues also arise in motion for medical and/or temporary total disability benefits litigation. These proof issues were addressed by the court in the 2011 case of *Moscoso v. Chief*

Fire Equipment & Service Co., 09-1472. In that case, the petitioner had received a prior award of disability in 2009 for injuries related to the work incident. After receipt of the award, the petitioner filed an Application for Review and/or Modification of the Formal Award (reopener petition), seeking additional treatment. The respondent denied the request for treatment, and the petitioner filed the motion for benefits. This case is important because the judge made determinations as to the credibility of proofs submitted. Specifically, the court found that although a petitioner's testimony is relevant, the issue of need for treatment is determined by medical evidence.

Moreover, the medical treatment being sought must be reasonable, necessary and must improve the medical condition.

In addressing these issues, the court compared the petitioner's testimony at the hearing of the entry of the formal award in 2009 to the testimony provided on the motion for benefits in 2011. The case is also important in that the judge reiterated the well established precedents that re-examinations should be done by prior authorized treating doctors, as their opinions will carry more weight than that of a one-time evaluator. The judge ultimately held that the petitioner failed to prove a substantial worsening of subjective complaints of functionality since the entry of award; the petitioner's physical complaints were the same as at the time of the entry of formal award; and there was no objective proof of worsening since the entry of formal award. The court dismissed not only the motion but the entire reopener petition with prejudice, finding that the petitioner failed to prove that his condition had substantially worsened.

(4) It remains that there must be actual wage loss to support a motion for temporary total disability benefits.

In a recent September 2015 decision, the issue of entitlement to temporary total disability

benefits was again addressed in the matter of *Hulitt v. Farm-Rite*, 12-18007. Like the petitioners in *Cunningham* and *Condi*, there was a gap between the time that the petitioner initially received temporary total disability benefits, and when a doctor rendered the petitioner temporarily and totally disabled from working. Both parties relied upon the *Cunningham* case. However, the respondent argued that the petitioner was not entitled to temporary total disability benefits due to failure to prove by a credible preponderance of evidence any anticipation of employment as well as wage loss during the period between last receipt of benefits (placement at maximum medical improvement) and current rendering of disability. On the other hand, the petitioner argued that he was terminated and did not voluntarily remove himself from the workforce and thus is entitled to temporary total disability benefits retroactive to the date of last receipt of the benefits (placement at maximum medical improvement) until such time that he is medically able to return to the workforce.

The JWC denied the petitioner's motion on multiple bases. First, the petitioner's argument regarding the reason for termination is irrelevant. The *Cunningham* decision indicated as much and this decision continues that precedent. Second, the determination as to entitlement to temporary total disability benefits is based upon whether the petitioner

can prove actual wage loss from the point that the doctor restored him to the point that he was able to return to work (placement at maximum medical improvement) to the point that a doctor later renders him temporarily and totally disabled. The JWC found that this petitioner failed to sustain that burden.

Casting Your Sail: Summary

Now that you have prepared, you are ready to cast your sail into navigating the waters of a New Jersey workers' compensation motion for medical and/or temporary disability. Although the information and case law cited here is not all-inclusive or dispositive as to all of the issues that you may encounter, it provides some basic rules and guidelines to assist you. In addition to adhering to the procedural rules for preparing and responding to a motion, remember that there must be proof of actual wage loss to support a motion for temporary total disability benefits. Additionally, the medical evidence presented to support or defend a motion must be credible. Using this information as your compass, you are now ready to sail away!



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