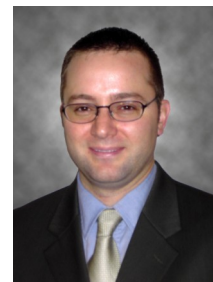


ONCE AGAIN, THERE IS NO PAIN OR SUFFERING—DAMAGES THAT IS—IN NEW JERSEY'S WORKERS' COMPENSATION

BY ROBERT J. FITZGERALD, ESQ.*

KEY POINTS:

- The new amendments do NOT provide damages for pain or suffering in New Jersey workers' compensation for delayed payment of benefits.
- The determination of sanctions or penalties rests solely with the New Jersey Workers' Compensation Judge.
- The enforcement of an order for financial sanctions or penalties in New Jersey workers' compensation can rest with the Superior Court.



In *Stancil v. Ace USA*, 418 N.J. Super. 79 (February 1, 2011), the New Jersey Appellate Division has once again concluded that there are no damages for pain or suffering in New Jersey workers' compensation. In *Stancil*, the petitioner sustained a compensable work injury in May 1995. On September 12, 2007, the compensation judge ordered the respondent to pay certain outstanding medical expenses as required by prior orders. The judge also awarded a counsel fee of \$2,000 to the petitioner for services rendered in procuring such enforcement relief. Subsequently, on October 29, 2007, the judge conducted a hearing on the petitioner's motion to compel compliance with the orders. The respondent's counsel conceded that the respondent knew of its obligations under the orders but had not complied.

The judge found that the respondent's defalcation was blatantly willful and clearly intentional. However, he felt constrained because he lacked contempt powers. Although the judge acknowledged that he had some ability to impose fines and sanctions, he did not do so. The judge awarded the petitioner's counsel an additional fee of \$1,500 and referred him to the Superior Court for further relief.

The petitioner then filed his Superior Court complaint. He alleged that the respondent wantonly refused to comply with orders of the compensation court, resulting in a delay or denial of necessary medical treatment and causing him pain and suffering and a worsening of his medical condition. The Superior Court found that the petitioner had exhausted his administrative remedies and the matter was properly be-

fore the Superior Court. However, the Superior Court concluded that amendments to the enforcement scheme made it clear that the remedies specified in the Act and regulations were exclusive, no common law claim was permitted and the role of the Superior Court was limited to enforcement proceedings. Therefore, the Superior Court dismissed the complaint with prejudice.

On Appeal, the petitioner argued that the new amendments authorized a civil action for pain and suffering damages. However, the Appellate Division upheld the dismissal of the civil complaint in a lengthy decision analyzing the history of the recent amendments to the New Jersey Workers' Compensation Act dealing with penalties. The court first looked at Section 28.2 which increased the powers of compensation judges:

If any employer, insurer, claimant, or counsel to the employer, insurer, or claimant, or other party to a claim for compensation, fails to comply with any order of a judge of compensation or with the requirements of any statute or regulation regarding workers' compensation, a judge of compensation may, in addition to any other remedies provided by law:

- (a) impose costs, simple interest on any moneys due, an addi-

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- tional assessment not to exceed 25 percent of moneys due for unreasonable payment delay, and reasonable legal fees, to enforce the order, statute or regulation;
- (b) impose additional fines and other penalties on parties or counsel in an amount not exceeding \$5,000 for unreasonable delay, with the proceeds of the penalties paid into the Second Injury Fund;
 - (c) close proofs, dismiss a claim or suppress a defense as to any party;
 - (d) exclude evidence or witnesses;
 - (e) *hold a separate hearing on any issue of contempt and, upon a finding of contempt by the judge of compensation, the successful party or the judge of compensation may file a motion with the Superior Court for enforcement of those contempt proceedings; and*
 - (f) Take other actions deemed appropriate by the judge of compensation with respect to the claim.

[N.J.S.A. 34:15-28.2]

Subsection (e) conferred contempt authority on compensation judges and specified that, upon a finding of contempt, a motion for **enforcement** could be made in Superior Court. The Appellate Court then looked at the legislative history behind the amendment, including a discussion of the series of newspaper articles published in the *Star-Ledger* in April 2008 and the New Jersey Legislative hearings in May 2008. The Appellate Division specifically noted that there were several proposed amendments that would have

more greatly expanded the contempt powers of the compensation judge to refer cases to Superior Court for contempt proceedings, rather than just enforcement:

This series of events makes clear that the Legislature added *N.J.S.A. 34:15-28.2* to the statutory scheme to address circumstances in which insurance carriers flout compensation judges' orders and refuse to pay for employees' medical expenses. It is equally clear that in considering the remedy for this problem, the Legislature considered and expressly rejected the broader remedy of referring the matter to the Superior Court for other administrative, civil, and criminal proceedings. Instead, the Legislature replaced that proposed provision with the enacted provision relating to contempt proceedings.

Critical to the Appellate Division's analysis was that the associated new rule, N.J.A.C. 12:235-3.16, also added provisions pertaining to contempt powers and Superior Court proceedings. This replaced the more general provision in the old rule authorizing compensation judges to simply "refer matters for other administrative, civil or criminal proceedings." The Appellate Division concluded that under the new framework, the new Section 28.2 and associated new rule fully addressed the petitioner's situation:

Specific and clearly defined procedures and remedies are now provided. They were developed by the Legislature and Division to address and reform shortcomings in the previous scheme. The general provision authorizing referral to Superior Court for "other... civil...proceedings," which could conceivably be interpreted as authorizing a common law action, has been eliminated.

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These changes persuade us that the beefed-up enforcement measures were intended by the Legislature to fall within the Act's exclusivity scheme. In considering and enacting the reform measures, the Legislature was undoubtedly aware of the concerns we had recently expressed. If authorization of a common law action was intended as a remedy for an insurer's willful noncompliance with a compensation court order, we think the Legislature would have said so. Instead, it authorized stricter sanctions and prescribed a clear line of authority for enforcement.

The Appellate Division also rejected the petitioner's argument that willful noncompliance with an order should fall within the "intentional wrong" exception of the Act. The court reasoned that the exception has been consistently applied only to conduct by an employer or co-employee in the workplace, not to a party's conduct after the claim occurs.

This is the court's first significant decision regarding the Act's amendments pertaining to penalties and enforcement. The decision makes clear that the determination of sanctions for contemptuous behavior, and the amount of the financial penalties asso-

ciated with such behavior, remains the sole purview of the Workers' Compensation Judge. While the number of workers' compensation cases dealing with the issue of contempt or sanctions is relatively small, carriers and self-insureds, as well as their legal representatives, should remain vigilant to ensure that the timely payment of benefits is accomplished. Failure to do so can lead to significant and unnecessary financial exposure.

Further, in recent years, the court has become increasingly sensitive when dealing with issues of non-compliance. Therefore, carriers and self-insureds should be equally sensitive and implement procedures to avoid late payments, as mere negligence on behalf of the employer (as opposed to intentional conduct) is enough for imposition of a penalty. If you have any questions regarding whether your organization's benefit payment procedures are in compliance with the new amendments to the New Jersey workers' compensation law, contact your defense counsel immediately.

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The Supreme Court acknowledged that allowing the mother to sue would have been "a more sympathetic result." However, it is noted that N.J.S.A. 39:6A-4.5(a) places a strong incentive on drivers to buy auto insurance to protect not just themselves, but also their family members. Thus, it was not the law that punished the family, but the driver who failed to obey that law.

Needless to say, this case will have limited ap-

plication because of the simple fact that few fatal claims involve uninsured drivers. However, it serves as a prime example of the Supreme Court looking past the sympathy and instead applying a common sense logic to the goals of N.J.S.A. 39:6A-4.5(a).

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