OCCUPATIONAL DISEASE CLAIMS UNDER THE WORKERS' COMPENSATION REFORMS

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The workers' compensation amendments of 1979[1] represent the most comprehensive reforms in the history of New Jersey's workers' compensation laws.[2] Five revisions in particular will have the effect of greatly restricting the compensability of occupational disease claims. While it is axiomatic that this legislation cannot be construed except within the context of the factual setting in an actual case, as of this writing no reported decisions have interpreted the amendments as they pertain to this type of compensation claim.[3] For this reason, many questions raised by the language in the reform Act remain unanswered.[4] Cognizance of these issues is, however, central to any determination regarding the breadth of reform. This article will examine the principal revisions concerning the compensability of occupational disease claims brought under the new law. In turn, the amended definition of "compensable occupational disease"[5] and the new definition of "permanent partial disability"[6] will be discussed. Consideration will then be given to the revised jurisdiction of the workers' compensation court,[7] and to the supplementary employer

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[1] 1979 N.J. Pub. L. Nos. 283, 285 (codified as amended at N.J. STAT. ANN. § 34:15-7 to :15-95 (West Cum. Supp. 1981-1982)).

[2] New Jersey's first workers' compensation system was approved by Governor Woodrow Wilson on April 4, 1911, with an effective date of July 4, 1911. Although there have been many significant changes since the passage of that Act, none were on such a scale as the recent amendments formulated through the cooperative activity of state legislators and representatives of both the business and labor communities. The dominant theme of this legislation is to "make available additional dollars for benefits to seriously disabled workers while eliminating, clarifying, or tightening awards of compensation based upon minor permanent partial disabilities not related to the employment." SENATE LABOR, INDUSTRY, AND PROFESSIONS COMM., JOINT STATEMENT TO SENATE COMM. SUBSTITUTE FOR N.J. SENATE No. 802 AND ASSEMBLY COMM. SUBSTITUTE FOR N.J. ASSEMBLY No. 840 (Nov. 13, 1979) [hereinafter referred to as JOINT STATEMENT].

[3] Williams v. Western Elec. Co., 178 N.J. Super. 571, 421 A.2d 1063 (App. Div. 1981), a recent case concerning the compensability of an occupational disease claim, was decided under the prior statutory language.

[4] In fact, through the first fifteen months following the inception of the amendments, only two percent of all formal compensation case determinations were based on the new law. NEW JERSEY DEP'T OF LABOR AND INDUSTRY, A REPORT ON THE WORKERS' COMPENSATION AMENDMENTS OF 1979, at 7 (July 1, 1981).

[5] *See* notes 9-37 *infra* and accompanying text.

[6] *See* notes 43-50 *infra* and accompanying text.

[7] *See* notes 51-67 *infra* and accompanying text.

defenses provided by the reform Act.[8] Finally, the application of the new schedule to multiple occupational disabilities will be contrasted with the schedule's application to disabilities flowing from a single accident.[9]

COMPENSABLE OCCUPATIONAL DISEASE REDEFINED

The amendment of section 34:15-31 of the New Jersey Statutes Annotated[9] may substantially reduce the conditions recognized as occupational diseases, and will require a reexamination of each of the conditions previously assumed to be compensable as a matter of course. Each alleged occupational disease must now be measured against a new and more restrictive yardstick of compensability.[10]

Formerly, the statute recognized two types of occupational diseases: those which were "due to causes and conditions which are or were characteristic of or peculiar to a particular trade, occupation, process or employment," and those which were "due to the exposure of any employee to a cause thereof arising out of and in the course of his employment."[11] Most significantly, under the amended definition of occupational disease, the latter category of diseases is entirely eliminated from the statute.[12] Additionally, the remaining category has been altered in two prominent respects. An occupational disease must now be "due in a material degree to causes and conditions which are or were characteristic of our peculiar to a particular trade, occupation or place of employment,"[13] and degenerative changes of body tissues or organs "due to the natural aging process" are expressly excluded.[14]

It is unlikely that these changes will affect the doctrine of liberal construction which our courts have applied to the concept of occupational disease.[15] Nor will the reforms militate against the broadly

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[8] *See* notes 68-69 *infra* and accompanying text.

[9] *See* notes 70-71 *infra* and accompanying text.

[10] N.J. STAT. ANN. § 34:15-31 (West Cum. Supp. 1981-1982).

[11] *Id.* § 34:15-31 (West 1959) (amended 1980).

[12] *Id.* § 34:15-31 (West Cum. Supp. 1981-1982). This section now provides:

> a. For the purposes of this article, the phrase "compensable occupational disease" shall include all diseases arising out of and in the course of employment, which are due in material degree to causes and conditions which are or were characteristic of or peculiar to a particular trade, occupation, process or place of employment.
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> b. Deterioration of a tissue, organ or part of the body in which the functioning of such tissue, organ or part of the body is diminished due to the natural aging process theory is not compensable.

Id.

[13] *Id.* § 34:15-31(a).

[14] *Id.* § 34:15-31(b).

[15] *See, e.g.*, Bond v. Rose Ribbon & Carbon Mfg. Co., 78 N.J. Super. 505, 513, 187 A.2d 353, 358 (App. Div. 1963).

developed definition of "disease" as " 'any departure from the state of health presenting marked symptons.' "[16] Nevertheless, the coverage afforded occupational claims will be substantially circumscribed. This is especially evident as a result of the statutory deletion.

Many previously recognized compensable conditions were found to be occupational diseases under the portion of the definition which has been eliminated. These include most of the cases dealing with the aggravation of latent defects such as Dupuytren's Contracture,[17] allergic bronchial asthma,[18] and dermititis.[19] Indeed, the decision in *Bond v. Rose Ribbon & Carbon Manufacturing Co.*,[20] which recognized as compensable the activation of an employee's latent tuberculosis, relied on cases in which the diseases were found compensable under the deleted portion of the definition.[21] Such authority has been statutorily abrogated.

The remaining portion of the definition, which compensates those diseases due to conditions peculiar to or characteristic of an employment, describes a compensation policy philosophically similar to the New York approach to occupational diseases.[22] The practical effect of the revision is best presented by an example. If an employee contracted pneumonia as a result of working in a freezer as a packer, the condition would be a compensable occupational disease because it would be due to cause which is peculiar to the employment. If the same employee contracted pneumonia as a result of incidental exposure to a fellow employee with pneumonia, however, this might not be compensable because the condition may not be due to a condition

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[16] Giambattista v. Thomas A. Edison, Inc., 32 N.J. Super. 103, 113, 107 A.2d 801, 806 (App. Div. 1954) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed.)).

[17] *See, e.g.*, Duncan v. T. I. McCormack Trucking Co., 43 N.J. Super. 352, 128 A.2d 722 (App. Div. 1956); Walsh v. Kotler, 43 N.J. Super. 139, 127 A.2d 918 (Law Div. 1956), *aff'd*, 46 N.J. Super. 206, 134 A.2d 458 (App. Div. 1957) (Dupuytren's Contracture compensable despite employee's predisposition for contraction).

[18] *See, e.g.*, Bober v. Independent Plating Corp., 28 N.J. 160, 145 A.2d 463 (1958) (employee with latent predisposition to allergic bronchial asthma activated by exposure to chrome dust entitled to compensation).

[19] *See, e.g.*, Giambattista v. Thomas A. Edison, Inc., 32 N.J. Super. 103, 107 A.2d 801 (App. Div. 1954) (preexisting nonoccupational fungal condition aggravated by continual immersion in benzene held compensable).

[20] 78 N.J. Super. 505, 189 A.2d 459 (App. Div. 1963), *aff'd*, 42 N.J. 308, 200 A.2d 322 (1964).

[21] *Id.* at 513-14, 189 A.2d at 463-64 (citing Bober v. Independent Plating Co., 28 N.J. 160, 145 A.2d 463 (1958)); Reynolds v. General Motors Corp., 40 N.J. Super. 484, 123 A.2d 555 (App. Div. 1956); Giambattista v. Thomas A. Edison, Inc., 32 N.J. Super. 103, 107 A.2d 89 (App. Div. 1954)).

[22] *Cf.* Bolger v. Chris Anderson Roofing Co., 112 N.J. Super. 383, 393-95, 271 A.2d 451, 457-58 (Law Div. 1970), *aff'd*, 117 N.J. Super. 497, 285 A.2d 228 (App. Div. 1971) (distinguishing prior New Jersey rule with provisions of New York law).

characteristic of or peculiar to the employment. Such a condition would have been compensable, of course, under the eliminated portion of the definition in the old Act. Therefore, beyond the requirement that an occupational disease arise out of and in the course of employment, it must also be peculiar to or characteristic of the employment.

Moreover, occupational disease is redefined by mandating that it be "due in a material degree" to the employment conditions "or place of employment."[23] Although no definition of "material degree" is provided by section 34:15-31, the term is defined in section 34:15-7.2 of the New Jersey Statutes Annotated,[24] the new heart claim provision, to mean "an appreciable degree or a degree substantially greater than de minimis."[25] Using accepted rules of statutory construction, the term will probably be given the same meaning in section 34:15-31.[26] In any event, there is a further requirement of proof beyond that previously demanded. Now, a petitioner must presumably show a greater nexus between the malady and the employment. Exactly how much greater remains to be determined, but it was certainly intended that many disabilities resulting from an employee's individual intolerances be removed from coverage under the Act.[27] The amended definition also expressly excludes from compensability degenerative changes due to the natural process of aging.[28] This does not apply to the situation in which disability has been triggered by a specific traumatic event. Rather, it addresses the case where a worker has had a history of possibly arduous employment, at the twilight of which he experiences disabilities that were not present earlier. Under the revised definition, these problems may not be the result of an occupational disease. Instead, they may be the result of the normal wear and tear of everyday life, or deterioration due to the natural process of aging. If the condition is of the latter character, it is not compensable even though a real functional disability exists.

The deterioration referred to in section 31:15-31(b) must be assumed to mean something more than the employer credit granted for preexisting disabilities under section 34:15-12(d) of the New Jersey

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[23] N.J. STAT. ANN. § 34:15-31(a) (West Cum. Supp. 1981-1982).

[24] N.J. STAT. ANN. § 34:15-7.2 (West Cum. Supp. 1981-1982).

[25] *Id.* This criteria of compensability established is a substantial departure from the criteria for heart claims in the case of Dwyer v. Ford Motor Co., 36 N.J. 487, 178 A.2d 161 (1962).

[26] *See* Oldfield v. New Jersey Realty Co., 1 N.J. 63, 69, 61 A.2d 767, 770 (1948).

[27] Conversely, it should be noted that the insertion of the phrase "place of" in the definition of occupational disease technically expands the definition. Diseases characteristic of or peculiar to a place of employment are also now specifically compensable. N.J. STAT. ANN. § 34:15-31(a) (West Cum. Supp. 1981-1982).

[28] *Id.* § 34:15-31(b).

Statutes Annotated.[29] Under section 34:15-12(d) of the new Act, employers will receive a credit for an employee's prior loss of function involving the same body part subsequently affected by a compensable occupational disease.[30] In what represents a significant departure from prior law, this credit will be applied regardless of whether the earlier injury was compensated.[31] This amendment effectively modifies the long established principle that "an employer takes an employee as he finds him," with all his personal infirmities, and is responsible for the end result of an occupational disease or accident acting upon those infirmities.[32] The burden of proof is on the employer to establish the preexisting disability.[33] If successful, the employer is liable only for the later injury, despite the fact that the resultant cumulative disability may be greater than the compensation afforded the later injury alone.

In the past, a dollar credit was extended for prior compensation which was paid involving the same part of the body. Now, however, the credit is given "for the previous loss of function."[34] Although the precise nature of the credit is not made explicit in the statute, it would seem that to achieve the full intent of the changes, the overall disability must first be computed. The employer would then receive a credit measured by the number of weeks of disability that would be payable for the degree of preexisting loss under the new schedule. Compensation would be granted for the difference between the overall disability and the preexisting disability. For example, if a petitioner had an overall disability of sixty-percent of partial total at the maximum rate in 1980, he would be entitled to over $53,000. Assuming the employer is entitled to a credit for twenty-percent of partial total for preexisting disability, the credit would be computed, following the new schedule, at about $6,000, resulting in a net award to the petitioner of approximately $47,000. The disability attributable to the employment should not be stated as the difference between the overall disability and the

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[29] N.J. STAT. ANN. § 34:15-12(d) (West Cum. Supp. 1981-1982). The statute provides in part:

> If previous loss of function to the body . . . is established by competent evidence, and subsequently an injury or occupational disease arising out of and in the course of employment occurs to that part of the body, . . . where there was previous loss of function, . . . credit shall be given the employer . . . for the previous loss of function.

Id.

[30] *Id.* Section 34:15-12(d) was amended to include occupational diseases, but this does not represent a substantive change in the application of the Act.

[31] *Id.*

[32] Belth v. Anthony Ferrante & Son Inc., 47 N.J. 38, 219 A.2d 168 (1968).

[33] N.J. STAT. ANN. § 34:15-12(d).

[34] *Id.*

credit, or forty-percent of partial total, because this would result in the petitioner receiving only about $23,500, or less than half of what he is entitled to. Overall disability should be used insomuch as the work related injury moved the petitioner from a twenty-percent disability to a sixty-percent disability and the employer should pay compensation for the equivalent value of that disability.

Because the employer's credit is for the loss of function and not a dollar credit for prior compensation paid, a problem arises in its application to occupational disease claims. The problem is exemplified in the case where a worker who was adjudicated disabled under the old law files for additional exposure under the new law. This claimant will receive less total compensation than that paid to a worker with the same overall disability who simply files and receives compensation once under the new law. Notwithstanding the apparent inequity, this result is necessary. Were it otherwise, in the multiple employer situation the last employer would be subsidizing the prior employers by bringing the payments made before 1980 up to the compensation rate under the amendments.

As stated earlier, the amendment to section 34:15-12(d) modifies the doctrine that the employer takes the employee as he finds him, a fundamental concept which has been the underpinning of a legion of judicial decisions in New Jersey.[35] It also eliminates a conflict which had existed between that doctrine and the Second Injury Fund.[36] For if an employer takes an employee as he finds him and is responsible for the end result after an accident or occupational disease, it would seem

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[35] *See, e.g.*, Belth v. Anthony Ferrante & Son, Inc., 47 N.J. 38, 219 A.2d 168 (1966). When an employee is admitted to an employer's work force, he makes no warranty of physical or mental fitness, or freedom from latent or patent disability or disease. The employer takes him as he is, handicapped by any physical impairments, whether or not observable, as well as to any underlying condition or any unusual susceptibility or idiosyncrasy or quiescent disease, which when subjected to accidental work-connected injury acting on the already existing impairment or condition or disease produces greater disability than would follow if such impaired physical condition or weakness were not present. In such cases if a compensable injury acting in the already existing impairment or condition or disease produces greater disability than might ordinarily flow therefrom, it has been held uniformly that the award of workmen's compensation must equal the full extent of the impairment.

Id. at 45-46, 219 A.2d at 171.

[36] N.J. STAT. ANN. § 34:15-94 to -95.1 (West Cum. Supp. 1981-1982). The Second Injury Fund (formerly known as the One Percent Fund or the Two Percent Fund) is a reinsurance mechanism which attempts to mitigate the impact on employers of awards to workers for permanent and total disabilities resulting from the combined effects of a work-related injury and a prior disability. Its purpose is to "encourage the hiring by industry of people handicapped by pre-existing diabilities." Paul v. Baltimore Upholstery Co., 66 N.J. 111, 129, 328 A.2d 610, 620 (1974). For a discussion of the legislative history and intent of the Second Injury Fund, see Ratsch v. Holderman, 31 N.J. 458, 468-471, 158 A.2d 24, 30-32 (1960) (Burling, J., dissenting).

unnecessary for the Fund to be responsible for any of the preexisting injury. The elimination of this conflict should facilitate determinations of Fund eligibility. The amendments will also place a greater financial burden on the Fund because conditions which were previously the sole responsibility of the employer by virtue of their aggravation will now be divided between the Fund and the employer due to the credit in section 34:15-12(d) and due to the elimination of aggravation of a pre-existing condition as a basis for denial of Fund benefits.[37]

Partial Permanent Disability Defined

Prior to the reform Act, there was no statutory definition of partial permanent disability. Perhaps the most profound legislative change affecting occupational disease claims is the enactment of section 34:15-36 of the New Jersey Statutes Annotated,[38] which defines this phrase. The definition was judicially expressed in *Everhardt v. Newark Cleaning & Dyeing Co.*[39] as "the loss ensuing from personal injury which detracts from the 'former efficiency' of the workman's 'body or its member in the ordinary pursuits of life.'"[40] Once proven to be occupationally related, most diseases under the old law were treated as compensable provided there were permanent changes associated with the disease. Litigation often centered around the existence of the disease or lack thereof, and its relation to the employment.[41]

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[37] The deletion by the reform act of subsection (b) of N.J. Stat. Ann. § 34:15-95 represents a significant change in the applicability of the Second Injury Fund. Subsection (b) had previously protected the Fund from responsibility for permanent total disability resulting from the aggravation of a previous disability by the last compensable injury. Lewicki v. New Jersey Art Foundry, 88 N.J. 75, 85, 438 A.2d 544, 549 (1981).

[38] N.J. Stat. Ann. § 34:15-36 (West Cum. Supp. 1981-1982) provides in part:

> Disability permanent in quality and partial in character means 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. Injuries such as minor lacerations, minor contusions, minor sprains, and scars which do not constitute significant permanent disfigurement, and occupational disease of a minor nature such as mild dermatitis and mild bronchitis shall not constitute permanent disability within the meaning of this definition.

Id.

[39] 119 N.J.L. 108, 194 A. 294 (1937).

[40] *Id.* at 111, 194 A. at 296.

[41] *See, e.g.*, Bondar v. Simmons Co., 23 N.J. Super. 109, 92 A.2d 642 (App. Div.), *aff'd*, 12 N.J. 361, 96 A.2d 795 (1953).

Now, however, even after a disease is found to be present and occupationally related, there may be no partial permanent disability. The new definition of partial permanent disability will severely limit awards for compensable occupational diseases and, for that matter, accidents.[42]

Under the statutory definition, partial permanent disability is a "permanent impairment . . . which restricts the function of the body or of its members or organs."[43] Partial permanent disability is now not simply a loss which detracts from the body or its members.[44] Furthermore, the new definition considers "whether there has been a lessening to a material degree of an employee's working ability,"[45] rather than whether there has been a lessening of the employee's efficiency "in the ordinary pursuits of life."[46] While these proscriptions might be thought to strictly require a functional loss, to the exclusion of purely cosmetic disabilities, this cannot be the case because scarring will constitute partial permanent disability provided it constitutes a "significant permanent disfigurement."[47]

More significantly, the statute states that "occupational diseases of a minor nature such as mild dermatitis and mild bronchitis shall not constitute permanent disability."[48] Thus, a condition may meet the more restrictive definition of occupational disease, yet not give rise to a partial permanent disability. There is theoretically a threshold under which a disease, though disabling, is not compensable. This threshold applies to all occupational diseases. Merely changing terminology by calling chronic bronchitis "chronic obstructive lung disease" will not circumvent the requirements of section 34:15-36. The actual definition of "minor" will undoubtedly become a matter of controversy which will be decided in the courts.

The definition of partial permanent disability also requires that the impairment be "based upon demonstrable objective medical evidence."[49] As indicated in the statement accompanying the New Jersey Senate Committee Substitute Bill, which was eventually enacted, "objective medical evidence is understood to mean evidence exceeding the subjective statement of the petitioner."[50] Presumably, subjective

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[42] The statutory language expressly excludes from the definition "injuries such as minor lacerations, minor contusions, minor sprains, and scars." N.J. STAT. ANN. § 34:15-36.

[43] *Id.*

[44] *See Everhardt*, 119 N.J.L. at 111, 194 A. at 296.

[45] N.J. STAT. ANN. § 34:15-36.

[46] *Everhardt*, 119 N.J.L. at 111, 194 A. at 296.

[47] N.J. STAT. ANN. § 34:15-36.

[48] *Id.*

[49] *Id.*

[50] JOINT STATEMENT, *supra* note 2, at 2.

proofs, such as the complaints of a petitioner, no matter how believable, will not suffice to establish partial permanent disability. There must be "objective medical evidence" of restriction of the function of the body or its members or organs. This will demand that doctors change the emphasis and format of their reports so as to indicate in detail objective restrictions rather than subjective ones. If a doctor's report does not indicate positive objective restrictions, it cannot be a basis for a finding of partial permanent disability under this new definition.

JURISDICTIONAL LIMITATIONS REGARDING OCCUPATIONAL DISEASE CLAIMS

A third major revision concerning the compensability of occupational disease claims deals with the jurisdictional limitations imposed on the workers' compensation court through the amendment to section 34:15-34 of the New Jersey Statutes Annotated.[51] Under the law, occupational claims generally have to be filed within two years after discovery of the disability and its relationship to the employment.[52] Because in many instances the symptoms of occupational illnesses would not surface for many years, claims could be brought long after the petitioner was exposed to the cause of the disease. The amendment adds the following language to the statute to clarify the 1974 amendment:

> It is the express intention of the Legislature that, except in any case where claim is made for asbestosis, radiation poisoning, siderosis, anthracosis, silicosis, mercury poisoning, beryllium poisoning, chrome poisoning, lead poisoning or any occupational disease having the same characteristics of the above enumerated diseases as subsequently determined by the National Institute for Occupational Safety and Health, the provisions of this section shall not be applied retroactively but shall be applied only to those employees who shall cease to have been exposed in the course of employment to causes of compensable occupational diseases as defined in 34:15-31(a) subsequent to January 1, 1980.[53]

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[51] N.J. STAT. ANN. § 34:15-34 (West Cum. Supp. 1981-1982). Prior to July 3, 1974, this statutory provision limited the compensation courts' jurisdiction to claims filed within two years of last exposure or one year after the employee knew or should have known the nature of the disability and its relationship to the employment, but in no event later than five years after exposure. 1948 N.J. Pub. L. No. 468. This language was changed in 1974 to the present statutory language. 1974 N.J. Pub. L. No. 65. The recent amendment does not change the statutory language but merely expresses the intention of the legislature of the statutorily language enacted in 1974.

[52] *See* Panzino v. Continental Can Co., 71 N.J. 298, 364 A.2d 1043 (1976).

[53] N.J. STAT. ANN. § 34:15-34.

As a result of this amendment, the application of section 34:15-34 is limited to exposures ending subsequent to January 1, 1980 and will not be applied retroactively except for certain specifically listed diseases or those with similar characteristics.[54] This obviously attempts to curtail the open-ended jurisdiction for occupational claims recognized in *Panzino v. Continental Can Co.*[55] In fact, according to the statement accompanying the Senate Committee Substitute Bill, the 1979 amendment to section 34:15-34 amendment attempted to limit jurisdiction to only those diseases with a latency period between exposure and the onset of symptomatology.[56] Yet, not all the specified diseases involve such a latency period. Lead and chrome poisoning do not involve a symptomless period after exposure. On the contrary, when the exposure is significant enough, damage is caused without any real latent period. The meaning of the catch-all phrase in the amendment, "having the same characteristics" as the named diseases, is, therefore, ambiguous since all of the named diseases do not involve latent conditions. The liberal construction doctrine should allow the widest possible construction to this catch-all phrase so that jurisdiction will be found in as many cases as possible. With the narrowed definition of occupational disease and the further limitation on compensability imposed by the definition of permanent partial disability, it would seem unnecessary to further eliminate cases meeting these tests by limiting the jurisdiction of the court. An occupational disease claim meeting the two former tests should be compensated.

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[54] *Id.* This list of occupational diseases includes some of the conditions listed in section 34:15-31 before the 1938 amendment which created the general occupational disease definition. Prior to the 1938 amendment, the following conditions were classified as occupational diseases: anthrax, lead poisoning, mercury poisoning, arsenic poisoning, phosphorous poisoning, benzene poisoning, wood alcohol poisoning, chrome poisoning, caisson poisoning, and radium poisoning. *See id.* § 34:15-31 (West 1959).

[55] 71 N.J. 298, 364 A.2d 1043 (1976). In *Panzino*, the petitioner filed an occupational hearing loss claim six years after his retirement from respondent corporation, but within one month after discovery that the loss was work-related. Under the existing jurisdictional limitations, the claim would have been barred because the employee's last occupational exposure was more than five years prior to the filing of a claim. By applying the 1974 amendment to section 34:15-34, which became effective two months before the hearing, the court held that petitioner's claim was retroactively valid:

> Experience has revealed that by their very nature occupational diseases often do not become manifest until years after exposure. . . . Accordingly, we conclude that the [1974] enactment should be read to cover any claimant who files a petition within two years of the date on which he learns of the nature of his disability and its relation to his employment.

Id. at 302, 364 A.2d at 1045.

[56] JOINT STATEMENT, *supra* note 2, at 2.

As to diseases not of the same character as those listed, the amendment to section 34:15-34 provides that the section will apply only to exposures ending subsequent to January 1, 1980.[57] If an occupational exposure continues beyond January 1, 1980, the section 34:15-34 filing provisions will apply even though the disease is not listed within the special category.[58] The amending language, however, can mean no more than that there is a different filing requirement for exposures ceasing before January 1, 1980. It does not deal with the right to file a claim petition, but only when a claim must be filed for the court to have jurisdiction. The question which necessarily follows if section 34:15-34 does not apply concerns the filing requirement for occupational diseases which are not within the special category and in which the exposure ended prior to 1980. The beginning sentence of section 34:15-34 suggests that the time limit for filing would be provided by section 34:15-51 of the New Jersey Statutes Annotated,[59] which is two years from the date of the accident or last payment of compensation.[60] Nevertheless, it would seem difficult to apply language dealing with accidental injury to occupational diseases.

Another possibility is to apply the section 34:15-34 language in effect prior to its amendment in 1974. The filing limitation at that time was two years from the date of last exposure or one year after the employee knew or should have known the nature of his disability and its relation to the employment, but in no event later than five years after exposure.[61] Since this language was changed to its present form by the 1974 amendment, effective July 3, 1974, any claims in which exposure ended after that date would dictate the application of the present wording of section 34:15-34; but such an interpretation would violate the expressed intention of the 1979 amendment.[62] An intention to apply section 34:15-34 to exposures ceasing after July 3, 1974, rather than those ceasing after January 1, 1980, would be a more intellectually consistent approach because the language came into effect in 1974.

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[57] N.J. STAT. ANN. § 34:15-34.
[58] *Id.*
[59] *Id.* § 34:15-51.
[60] *Id.* § 34:15-34.
[61] 1948 N.J. Pub. L. No. 468.
[62] *See* N.J. STAT. ANN. § 34:15-34.

Further confusion regarding the application of the section 34:15-34 filing requirements ensues as a result of the incorporation of this section[63] into the new occupational hearing loss provisions.[64] According to the dictates of section 34:15-34, the section will not be applicable to those hearing loss cases in which exposure does not extend into 1980.[65] By its terms, however, the Hearing Loss Act also provides that it is to be applied retroactively "where practicable" to all cases pending in the division of workers' compensation.[66] Presumably, this would include cases where exposure ended or disability manifested prior to January 1, 1980. This statutory incongruity similarly awaits judicial interpretation or legislative reconstruction.[67]

In light of this quandary, one must wonder why section 34:15-34 was not amended in its entirety, instead of simply adding a declaration of intention as to the meaning of language which has been present since 1974. The expressed intent is obviously inconsistent with the

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[63] *See id.* § 34:15-35.19.

[64] *Id.* § 34:15-35.10 to -35.22 (West Cum. Supp. 1980-1981). This enactment marks New Jersey's first attempt at setting forth specific guidelines for compensating employees for occupational hearing loss. The Act standardizes the method of determining the percentage of hearing disability and increases the rate of compensation for occupational hearing loss, while eliminating compensation for lesser impairments. When deafness due to a loud noise suddenly occurs, it is usually the result of an accident or explosion. This type of acoustic trauma does not fall within the provisions of the hearing loss act, but rather is compensated under the general provisions of the compensation act for accidental injuries.

[65] *See id.* § 34:15-35.19.

[66] 1979 N.J. Pub. L. No. 285, § 15 (codified at N.J. STAT. ANN. § 34:15-35.10 (West Cum. Supp. 1980-1981)). The new law provides, in pertinent part, as follows:

> This act shall take effect on the sixtieth day after its enactment and, where practicable, shall apply to all actions instituted thereafter, and to all proceedings taken subsequent thereto in all actions pending on such effective date; except that judgments theretofore entered or awards theretofore made pursuant to law shall not be affected by this act.

Id.

[67] The clear intent of section 15 of the Hearing Loss Act, 1979 PUB. L. No. 285, § 15, is that the new standards for evaluation of hearing loss be applied to all cases pending in the division of workers' compensation. The legislature is watching and will review the application of all of the 1979 amendments. Under the terms of the 1980 reform act, the director of the division of workers' compensation must report to the legislature regarding the success in achieving the aims of this legislation. *See* JOINT STATEMENT, *supra* note 2. Further legislative revisions will undoubtedly occur if determinations do not comport with such clear pronouncements.

Use of the "where practicable" clause to ignore a retroactive application to the hearing loss provisions is not suggested here. This clause, instead, should be used to alleviate any hardships or impractical proof requirements of the new Act. For example, new examinations may not be required even though readings at three thousand hertz were not taken. *See* N.J. STAT. ANN. § 34:15-35.15. If no decibel readings for a place of employment are available, it may not be practicable to require them. *See id.* § 34:15-35.11(e). It could also mean that additional time may be needed to complete discovery. The "where practicable" clause should not, however, work to avoid the application of the act.

plain wording of the unchanged language which appears to make the filing requirement in section 34 applicable to all diseases, not just those enumerated by the amendment or those where exposure ended after January 1, 1980. Moreover, the expressed intent does not supply a filing requirement in and of itself. Because circumstances exist under which the statute may not reasonably operate, a court might well conclude that if the legislature wants section 34 to mean something else it will have to amend the wording to so state, rather than simply add an expressed intention. Therefore, the appended expressed intention may be insufficient to change the Supreme Court of New Jersey's interpretation of section 34.[68]

Expanded Employer Defenses

Another major revision adds as an employer defense the willful failure of an employee to use a required protective device. When an employee fails to use a protective device and an injury results, that injury will not be compensable if six factors are satisfied: the failure to use the device must be willful; the device must be furnished by the employer; the device must have clearly been a requirement of the employment; the requirement must have been uniformly enforced; repeated warnings by the employer can be documented; and the failure to use the device is the proximate cause of the injury.[69] The employer has the burden of proof to establish the requirements of this defense. By returning to a consideration of fault concepts, this defense can insulate employers from liability for occupational diseases when the requirements can be met through documentary proof.

Multiple Occupational Claims

A final legislative provision in the Act which affects primarily occupational claims is the new requirement that weeks of disability are not cumulative where more than one disability is alleged in a single claim petition.[70] It is a common practice by some attorneys to allege all occupational disabilities a petitioner may have in one claim petition. Under the new Act the compensation rate for each of the disabilities, for example, pulmonary and loss of hearing, is to be determined by beginning at the first week in the schedule for each disability separately.[71] The weeks should not be added together to

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[68] *See* Panzino v. Continental Can Co., 71 N.J. 298, 364 A.2d 1043 (1976); note 55 *supra.*
[69] N.J. Stat. Ann. § 34:15-7.
[70] *Id.* § 34:15-12(c).
[71] *Id.*

determine the average rate over the number of weeks of the award. This is appropriate so that the petitioner receives the same award as the petitioner who files separate compensation claims for each disability. Indeed, the latter filing practice is to be encouraged because it gives a more accurate picture of the disabilities being claimed and adjudicated in The Division of Workers' Compensation.

The term "disability" in this subsection, however, should not be confused with the separate elements of a disability flowing from a single traumatic event. A worker may as a result of an accident suffer disability which includes orthopedic injuries, neuropsychiatric injuries, and other injuries. It would be incorrect to interpret the language in section 34:15-12(c) to mean that in such an accident the rate of compensation is determined by beginning with the first week in the schedule for each of the elements of the disability. The severely injured worker should be compensated at a progessively higher rate depending on the severity of the injury. If the injury is comprised of several elements, as most severe injuries are, the benefits of the higher rate would be withheld from petitioner by determining the compensation rate from the beginning of the schedule for each element within the disability. On the contrary, the new section 34:15-12(c) is concerned only with negating any advantage resulting from the misjoinder of more than one disability in a single claim petition. A claim for compensation for one accidental injury, though the disability may take several forms, is a single claim for disability flowing from the single accident. The section 34:15-12(c) provision has no applicability to a claim alleging one compensable accident.

CONCLUSION

The workers' compensation amendments of 1979 will act to restrict the compensability of occupational disease claims. The narrowed definition of occupational disease, the further limitation imposed by the definition of partial permanent disability, new jurisdictional constraints, and expanded employer defenses will present serious hurdles to the compensation petitioner. The Act itself has raised questions regarding its ultimate impact. While this Article may not resolve these questions, it is hoped that the discussion of these issues will stimulate arguments in the hearing process so that the worthwhile development of compensation law in New Jersey will continue.