NEW JERSEY DEFENSE

FALL 2012

NEW JERSEY DEFENSE ASSOCIATION

# PRESIDENT'S MESSAGE

## *Mark A. Saloman, Esq.*

Seizing the momentum from our Annual Convention in Boston, my primary objective for 2012-13 can be summed up in one sentence: The NJDA Wants YOU!

From our 600+ members, the NJDA draws from the deepest bench of talented defense lawyers in New Jersey. Yet we need more. More new ideas, more new faces, more new leaders. This is why I cordially invite each and every one of you to meet at Due Mari on October 18 in New Brunswick for a special New Leaders networking event.

Whether you are a brand new member looking for writing or speaking opportunities, a long-time member looking to re-energize, or a group looking to raise your profile, the NJDA's New Leaders event is for you. Come for a drink and a bite, meet the current NJDA Board of Directors, learn more about our upcoming "Women and the Law" and "Auto Insurance" CLE seminars in November, and explore exactly how you and your firm can benefit from becoming a leader in the NJDA.

As a former Young Lawyer (many moons ago), I remember and appreciate the opportunities the NJDA offers in every area of defense law—especially for junior lawyers. So, borrowing a page from last century, we look forward to our future and to meeting you in person on October 18 at Due Mari.

*Mark Saloman*

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# Van Dunk v. Reckson Associates: The Supreme Court Revisits Employer Liability for "Intentional Wrong"

### By: Richard C. Bryan, Esq. *

In the NJDA Spring 2012 newsletter, George Kenney wrote an excellent article discussing the history and analysis of intentional wrong "Laidlow" claims asserted against employers by employees in New Jersey. At the time the article was published, we were awaiting a decision by the New Jersey Supreme Court on the appeal of the Appellate Division's decision in Van Dunk v. Reckson Associates, 415 N.J. Super. 490 (App. Div. 2010). Subsequently, on June 26, 2012, the Supreme Court issued this long awaited opinion, Van Dunk v. Reckson Associates, 210 N.J. 449 (2012).

As will be discussed below, the Van Dunk decision, while not abrogating the "conduct/context" analytical framework, nonetheless takes strides in limiting the types of evidence probative of each prong and further defining the cause of action.

**BACKGROUND**

Without recapitulating the history of employer intentional wrong claims or the prior published opinions dealing with the issue, (see Kenney, George J., *Employer Liability for "Intentional Wrong"),* New Jersey Defense, at 7-10 Spring 2012, we must keep in mind that the "purpose" of permitting such claims is to allow suit against employers who act with a level of egregiousness that justifies punishment equivalent to that of an employer who subjectively intends to injure an employee. Only this very high level of impropriety can allow an employee to circumvent the exclusivity "bar" of N.J.S.A. 34:15-8, which prohibits common law suits "except for intentional wrong."

However, the lack of specific guidance by the Court on what facts support, and more importantly, do not support, a finding of knowledge by an employer of virtual certainty of injury, combined with the "totality of the facts" analysis stated in Laidlow v. Hariton Machinery Co., 170 N.J. 602 (2002), have opened the door to many questionable claims by employees against New Jersey employers. The "totality of the facts" analysis was enunciated in Laidlow so that trial courts would evaluate each claim on a case by case basis, with no specific fact being a prerequisite to recovery. However, in practical application, when applying the "totality of the facts" language, trial courts often permit plaintiffs to proceed to trial on mere multiple allegations of negligence, or upon facts that appear facially similar to, but are nonetheless clearly different than the facts of the published case law. This has lead to substantial erosion of the general rule of immunity provided to employers for workplace accidents.

The Van Dunk opinion should help to constrain some of the mischaracterizations of this cause of action, and hopefully reflects a trend going forward of the Court's strict analysis of Laidlow claims.

**VAN DUNK**

Van Dunk involved an accident where an employee of a construction company was injured after an excavated trench collapsed on him. Van Dunk,

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# VAN DUNK V. RECKSON ASSOCIATES

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210 N.J. at 453-454. Plaintiff and his employer were attempting to place fabric at the bottom of an excavation at the time of the accident. The excavation exceeded the depth for which OSHA required the use of trench protection prior to allowing employees to enter it. It had been raining and the rain caused unplanned and costly delays of the project to the employer. The rain also made the excavation more prone to collapse. Id. Plaintiff and his coworkers were having difficulty installing the fabric from outside the trench and plaintiff volunteered to his supervisor to enter the trench and place the fabric. At first, his supervisor would not let him enter the excavation because it was too dangerous due to moisture in the soil, cracking in the dirt and vibrations from a nearby excavator. Id. Later, after further unsuccessful attempts to install the fabric from above, the supervisor, out of frustration, told the plaintiff to go into the unprotected excavation to adjust the fabric. While doing so, the trench wall caved in, burying Van Dunk to his chest and causing injury. Id.

Post-accident, after interviewing the supervisor, OSHA discovered that he was aware, prior to the collapse, that the trench required protection, and he purposely decided not to use "trench boxes" - a form of acceptable protection which was available on site. Id. at 455. The supervisor also admitted to OSHA that the sloping of the walls of the excavation did not meet OSHA requirements and that the depth of the excavation was "at the cusp" of the limit that would, pursuant to OSHA regulations, require professional engineering to design the sloping. Id. As a result of the supervisor's admissions, OSHA issued a "willful" violation to plaintiff's employer. Id.

Plaintiff filed suit against his employer. Summary judgment was granted to the defendant employer. The trial court held that the "willful" finding by OSHA in its post-accident investigation was not determinative of the conduct prong because OSHA's definition of "willful" could mean "intentional disregard or plain indifference". Id. at 456. Because the definition of "willful" was not restricted solely to intentional disregard, the OSHA violation alone could not establish liability of the employer under the conduct prong of the analysis. The trial court otherwise held that the totality of the facts did not support liability. Id.

On appeal, the Appellate Division reversed, finding that the totality of the facts presented met both the conduct and context prong of the Laidlow analysis. The Appellate Division noted that the employer had knowledge that allowing employees to enter the trench with no safety devices present "could" lead to injury or death. Id. (citing Van Dunk, 415 N.J. Super. at 505.) The Appellate Division also credited the supervisor's admission that he knew that there was water in the trench, moisture was seeping from the walls, there was cracking on the bank of the trench and the fact that they were working on "type "C" soil - all of which showed that "he knew the trench was unstable and could fail." Id. at 457. Despite finding that the post-accident OSHA "willful" violation was not determinative of the conduct prong, it held that the totality of the facts presented met both prongs of the analysis.

The Appellate Division's reversal was clearly predicated on a finding that the employer knew that an accident "could" happen, as opposed to the requisite knowledge that an accident was "virtually certain" to occur. The practical implication of this decision was that trial courts could find questions of fact on whether an employer knew that an accident "could" occur - a significantly less stringent standard

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## VAN DUNK V. RECKSON ASSOCIATES

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than presenting an issue of an accident being "virtually certain" to occur.

In Van Dunk, the Supreme Court granted certification and reversed the Appellate Division, barring plaintiff's action against his employer. The Supreme Court first agreed that the post-accident "willful" OSHA violation did not establish *de facto* liability against an employer, but was instead "one factor among the totality of circumstances to be considered in respect of immunity, notwithstanding the categorization of the OSHA violation as willful." Van Dunk, 210 N.J. at 469.

In evaluating the facts of plaintiff's accident under the totality of the facts test, the Supreme Court concluded that the employer did not have knowledge of substantial certainty of injury. Id. at 471. Thus, despite the employer's admissions that it purposely decided not to use trench protection even though it knew the same was required by OSHA, along with the employer's admitted knowledge that the soil was wet, that the excavation had improper sloping which was more prone to collapse, and despite the employer's admission that there were cracks and water seeping from the excavation, the sum of these facts did "not equate to the more egregious circumstances involving intentional and persistent OSHA safety violations that, in the past we found defeated an employer's motion for summary judgment on the conduct prong analysis." Id.

In reaching its decision, the Supreme Court distinguished the totality of facts presented with the earlier case law. It noted that the earlier cases of Millison, Laidlow, Crippen, and Mull were all distinguishable because "those cases all involved the employer's affirmative action to remove a safety device from a machine, prior OSHA citations, deliberate deceit regarding the condition of the workplace or machine, or in the case of Millison, the employee's medical condition, knowledge of prior injury or accidents, and previous complaints from employees." Id. Thus, by distinguishing the facts of the prior cases from the facts of Van Dunk, the Supreme Court seemingly indicated that removal of safety devices, prior OSHA citations, prior accidents, prior complaints and deceit by the employer are necessary hallmarks of an intentional wrong claim.

Next, the Supreme Court rejected the notion that OSHA violations or an employer's decision to forego safety devices or practices may be considered in the analysis unless a "durational aspect" is met. Id. The Court noted that its earlier decisions, in Crippen and Laidlow, held OSHA violations and an employer's removal of a machine's guard relevant to the conduct analysis under the totality of the facts test only because the OSHA violation in Crippen existed for eighteen months after the employer was cited and because the employer in Laidlow had disabled a machine's guard for thirteen years. In applying this durational test to the facts before it, the Court noted that there was "no objectively reasonable basis for concluding that the violation of safety protocol was substantially certain to lead to injury or death during the few minutes plaintiff was going to be in the trench...." Id. at 471-472. Thus, the length of time that a known hazard exists or OSHA violation is permitted to go unabated is probative on the employer's knowledge of virtual certainty of injury in the workplace.

The final "conduct prong" factor, addressed by the Court in Van Dunk, was the Appellate Division's reliance upon plaintiff's argument that the employer's disregard for plaintiff's safety was motivated by a desire to increase "profit and productivity." Id. at 473. The Court noted that the record lacked sub-

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# VAN DUNK V. RECKSON ASSOCIATES

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stantial factual support for that allegation, but went on to limit its future application in Laidlow claims. The Court acknowledged that companies ordinarily act with economic business motivation. However, evidence of such has "limited relevance" unless there is a "long term choice specifically to sacrifice employee safety for product production efficiency" akin to that which occurred in Laidlow, where the employer removed a machine guard for many years specifically for that purpose. Id. Thus, to simply argue that an employer had economic motivations without proving that it specifically made a "long term choice" to sacrifice safety is not to be considered in the conduct analysis.

Lastly, the Court briefly considered the "context" prong. This prong requires the court to consider whether, irrespective of the "conduct" prong analysis, the happening of plaintiff's accident was a fact of industrial life or instead something that is plainly beyond anything the legislature could have contemplated as entitling the employee to recover only under the Compensation Act. Id. at 474. The court held that the context prong was not met irrespective of the post-accident "willful" OSHA violation.

In sum, the Van Dunk opinion rejects the notion that a post-accident "willful" OSHA violation establishes *de facto* employer intentional wrong liability. However, beyond that principal determination, it arguably limits the relevance of both prior unabated OSHA violations and the existence of known workplace hazards to only those that meet a "durational aspect" test. Further, the decision rejects profit motive arguments unless the plaintiff can show the employer specifically made a "long term choice" to sacrifice safety at the expense of productivity. Each of these findings is a step in the right direction for employers in New Jersey.

*** Richard C. Bryan is a partner with the law firm of Martin, Gunn & Martin, P.A. in Westmont, New Jersey where he represents clients in complex construction/ industrial accident matters, employee intentional wrong claims, product liability claims, and general defense litigation matters throughout the state. Rich can be reached at Rbryan@martingunn.com**

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## NJDA Congratulates:

- Joe Garvey, who was honored by the Trial Attorneys of New Jersey at their 45th Annual Trial Bar Awards Banquet on October 4, 2012.
- Mike Leegan, who was recently elected as the new Atlantic Regional Director of the Defense Research Institute.

# THE TIMES THEY ARE A-CHANGIN'[1]: "MASS TORTS" ARE NOW "MULTICOUNTY LITIGATION" UNDER NEW JERSEY'S *RULE* 4:38A

BY: NATALIE H. MANTELL, ESQ.[2]

On July 19, 2012, the Supreme Court of New Jersey issued an Omnibus Rule Amendment Order, which, among other significant changes, rids our state of "Mass Tort" nomenclature under *Rule* 4:38A. Omnibus Rule Amendment Order, Supreme Court of New Jersey, July 19, 2012, http://www.judiciary.state.nj.us/notices/2012/n120725e.pdf. Instead, the Court adopted the term "Multicounty Litigation," similar to the federal system's "Multidistrict Litigation." *Id.*; *see generally* 28 U.S.C. § 1407.

Though the new rule did not become effective until September 4, 2012, changes began in August. On August 7, 2012, the Administrative Office of the Courts ("AOC") issued Directive #08-12, which amends the caption of *Rule* 4:38A to "Centralized Management of Multicounty Litigation" in lieu of "Management of Mass Torts" and promulgates the "Multicounty Litigation Guidelines for Centralized Management," which supersede the prior "Revised Mass Tort Guidelines." *See* Directive #08-12, New Jersey Administrative Office of the Courts, August 7, 2012, http://www.judiciary.state.nj.us/notices/2012/n120809b.pdf. In a reserved manner, the AOC wrote, "[t]he revisions to the court rule and to the guidelines were solely to replace the superseded 'Mass Tort' terminology with new 'Multicounty Litigation' terminology." *Id.* But if this amendment is merely a terminology replacement, why bother?

The "Mass Tort" designation and the ensuing negative publicity about a product and, by association, its manufacturer, immediately results in undue prejudice to defendants -- long before any finding of liability or lack thereof. Additionally, the term "Mass Torts" can mislead patients and discourage them from using a product despite its benefits, even if those patients would not be at risk for developing the condition at issue in the litigation. For these reasons, in December 2004, the New Jersey Defense Association first wrote to the AOC and to the New Jersey Supreme Court Civil Practice Committee requesting that the Court use "Multicounty Litigation" instead of "Mass Tort."

In December 2009, The NJDA renewed its request, this time joined by the New Jersey Lawsuit Reform Alliance. NJDA requested that "Centralized Management" be utilized instead of "Mass Torts," particularly because the Court had begun using such terminology to refer to centrally managed litigations. The NJDA and NJLRA emphasized that using neutral nomenclature would remedy a long-standing bias against defendants in the current system.

It is uncertain what prompted the Supreme Court to amend *Rule* 4:38A several years later. Regardless of the reason, the Court made an important change to *Rule* 4:38A in favor of neutral terminology that helps level the playing field among plaintiffs and defendants in New Jersey product liability litigation. This change also is consistent with the Supreme Court's prior statements that the Legislature incorporated provisions in the New Jersey Products Liability Act, N.J.S.A. § 2A:58C-1 *et seq.*, "to limit the liabil-

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## MULTICOUNTY LITIGATION

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ity of manufacturers so as to 'balance[] the interests of the public and the individual with a view towards economic reality.'" Sinclair v. Merck & Co., 195 N.J. 51, 62 (2008) (quoting Zaza v. Marquess & Nell, Inc., 144 N.J. 34, 47-48 (1996)); accord Rowe v. Hoffman[n]-La Roche Inc., 189 N.J. 615, 623-24 (2007); Roberts v. Rich Foods, Inc., 139 N.J. 365, 374 (1995); Shackil v. Lederle Labs., 116 N.J. 155, 188 (1989).

Does the amendment to *Rule* 4:38A signify future positive changes for defendants in New Jersey product liability litigation? Only time will tell. For now, one thing is certain – change is good.

**[1] Bob Dylan, *The Times They Are A-Changin'*, on THE TIMES THEY ARE A-CHANGIN' (Columbia Records 1964)**

**[2] Natalie H. Mantell is an Associate in Gibbons P.C.'s Newark office, where she devotes much of her practice to multicounty litigation and complex product liability litigation involving pharmaceuticals and medical devices. Natalie also counsels clients regarding litigation avoidance strategies in marketing and other product-related materials. She can be reached at nmantell@gibbonslaw.com.**

**THE NJDA WANTS YOU**

at the

# New Leaders Networking Event

Thursday, October 18, 2012

6:30 p.m. at Due Mari in New Brunswick

Join current NJDA Board of Directors and explore
how you and your firm can benefit from becoming a leader
in the civil defense voice of the New Jersey Bar.
Light food will be served.

# TO GEORGE, WITH LOVE
# IN MEMORIAM GEORGE SESSO
## BY: BRIAN O'TOOLE, ESQ.

When you watched Fred Astaire dance in Top Hat or Jack Nicholson act in A Few Good Men you said to yourself, "Who could ever replace them?" Just such a phenomenon occurred within our defense world with the recent passing of George Sesso. I had the privilege of knowing and dealing with George for over 35 years. George was a consummate professional who was an expert in all areas of litigation and especially coverage issues. No matter how complex the fact pattern and no matter how many policies were involved (the so called bar exam question), the answer to my problem was only a phone call away. George's claim handling philosophy was based on the premise that you thoroughly investigate all of the facts, leaving no stone unturned, then make your evaluation and stick to it. His adversaries respected George's integrity and fair mindedness and as a result he did not have to try that many of his cases. We did try one case together when we had co-defendant insureds. When the jury was out, my adjuster was very worried and considered increasing our offer. George simply said "Don't worry, the jury didn't buy the plaintiff's testimony." Of course, George was right and we got a defense verdict.

George was born in Mount Vernon, New York on June 28, 1943, the youngest of three children. He grew up in the Bronx, but moved to Fair Lawn, New Jersey when he was eight. He graduated from Fair Lawn High School and obtained his undergraduate degree in Business at Seton Hall University. While at Seton Hall, George was a member of the ROTC Company. During the Vietnam War, George was ready but unable to serve due to a hip deformity he developed at age 13, which required extensive surgery. You may have noticed that George always walked with a slight limp. He earned his MBA at Fairleigh Dickson University and law degree from Seton Hall Law School over a course of five grueling years at night. George was such a dedicated law student that while in the delivery room awaiting the arrival of his daughter, Pamela, he was studying for the bar exam.

George began his professional career with Employers Insurance of Wausau and quickly rose through the ranks of adjuster and liability claims manager to branch manager. His next (and last) job was with Great American Insurance Company where he served for thirty two years and retired in 2006 as Vice President of General Casualty. During his tenure he did stints in Employers Northeast District Office in Connecticut and ran the Parsippany Claims Office until he retired. As his responsibilities increased, George handled litigation nationwide, including mass tort claims. One of the characteristics that endeared George to his employees was his willingness to give of his time to teach them and answer their questions. A testimony to this is the large number of George's people who went on to top management positions in the industry. George was an invaluable member of the New Jersey Defense Association, serving as President and Chairman of the Board, in addition to being a Board of Trustee member for over twenty years. George was also a longtime member of the Defense Research Institute.

On the personal side, George had a passion for history, especially the Civil War and World War II. He read voraciously on these subjects. (This also influenced his decision to enroll in the ROTC Program while at Seton Hall). One of his first dates with his wife, Barbara, was to see the movie The Longest Day, (or as Barbara liked to call it, "the longest night"). He and I shared a love of the movie Patton and we enjoyed quoting the movie's most famous line as Patton surveyed the battlefield with his field glasses-"Rommel, you magnificent bastard, I read your book!" George was also moved by his trip to Normandy and was profoundly affected as he

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# GEORGE SESSO

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walked through the countless white crosses that honor our fallen heroes. George was also proud to know Bud Lomell who, as a Ranger scaled the cliffs of Pointe-du-Hoc overlooking Utah Beach on D-Day. His travels also brought him and his family to the Soviet Union, Greece, Italy and the Caribbean. He especially loved Italy due to his 100 per cent Italian heritage, Naples and Sicily. Come to think of it, I guess we should have all called him "The Godfather!"

George was a loyal Yankee and Giants Football fan and was never known to shy away from a good tailgate. He bowled for many years with Barbara in the Company league at West Orange Lanes. George always claimed that bowling kept him young and where else could you throw a sixteen pound projectile as hard as you wanted and not get arrested. George was also a sun worshiper, vacationing every summer at Long Beach Island.

But the best part of the story has to be saved for last, and the best part of George Sesso was his love of family. He was extremely proud of his children, Howard and Pamela. Howard is an epidemiologist associated with Harvard Medical School and Brigham Women's Hospital and Pamela is an attorney. George especially glowed when talking about his four grandchildren, Jason, Steven, Mia and Claudia. Nothing, and I mean absolutely nothing, stood in the way of any activity involving his "four aces."

And then we have the crown jewel of George's existence, his beloved Barbara. Barbara and George met at Fair Lawn High School when she was "sweet sixteen." They've been together ever since, being married for forty six years. Barbara participated in all of George's activities and was his valued travel companion. My wife, Sunny, and I, like so many of you, were honored to enjoy their company at numerous NJDA conventions and DRI meetings. I truly believe that after being around George for so long, Barbara could have stepped into his job as Vice President of General Casualty when he retired in 2006. As George would say "Barbara is an elegant lady who puts up with me.". While I certainly agree that Barbara is an elegant lady, I know she also cherished every moment with George.

We shall all miss George's easy going personality, ready smile and honest opinions. Our NJDA Board meetings will not be the same, but hopefully we will remember the lessons George taught us of never holding a grudge and always giving it your all.

Rest in peace my friend with the knowledge that you will always be remembered.

**George Sesso**
**June 28, 1943 to May 27, 2012**

# NOVEMBER NJDA EVENTS

## WOMEN AND THE LAW

**Monday, November 12, 2012**
8:30 a.m. to 1:00 p.m.
Hilton Woodbridge
4.7 CLE Credits

## AUTO LIABILITY SEMINAR

**Tuesday, November 20, 2012**
8:30 a.m. to 1:00 p.m.
Hilton Woodbridge
4.7 CLE Credits

# CONVENTION MEMORIES

Outgoing President Edward Fanning, Jr., receiving the Outstanding Service Award from outgoing Chairman of the Board Joseph Garvey

President Mark Saloman receiving the gavel from Chairman of the Board Edward Fanning, Jr.

Fenway Park
Friday, June 28, 2012

The Green Monster at Fenway

At the EMC Club at Fenway
Jennifer Passannante, Stephen Banks, Michele Haas

Michael McCaffrey, Elizabeth Flanagan, Marie Carey, Mark Saloman

# CONVENTION MEMORIES

Officers: Chairman of the Board Edward Fanning Jr., President Mark Saloman, President-Elect Michele Haas, Secretary Mario Delano

Edward Fanning Jr. receiving the DRI Exceptional Performance Citation from Michael Leegan

Past Presidents; Joseph Garvey, Philip Lezenby Jr., Marie Carey, Stephen Foley Jr., Edward Fanning, Michael Leegan, Linda Reig

Michael Leegan, Thomas Madden, Edward Fanning Jr., Mary Fanning

Roger Steedle, Mary Aronds, Joseph Aronds, Michael Leegan

Dean Saba of Robson Forensic, a long time supporter of NJDA Conventions, with his wife Ruth and daughter Isabella, at our Convention held in Boston in June. Dean and his family attended the Convention and provided many of the photographs used in this issue. Dean passed away September 2, 2012, and he will be missed by all of us at the NJDA.

# PROOF? YOU CAN'T HANDLE THE PROOF! - EFFECTIVELY DEFENDING A MOTION FOR MED AND TEMP

## BY ANGELA Y. DEMARY, ESQ.*

If you are a practitioner of workers' compensation in New Jersey, I am sure that you have encountered a motion for medical and/or temporary 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 a compensable condition, or it may be that the petitioner never even asked for the treatment but jumped the gun and filed the motion. Either way, the respondent must figure out how to effectively defend the motion.

This issue was recently addressed in Mauricio Moscoso v. Chief Fire Equipment & Service Co., 09-1472 decided October 28, 2011 by the Honorable Nilda C. Hernandez, J.W.C., which involved a 2007 back injury. At the time of the underlying incident, the petitioner was a sprinkler system installer. The petitioner's injuries included a one level bulge and one level herniation followed by laminectomy and discectomy at the L5-S1 level and L4-5 decompression with left sided radiculopathy. The claim resolved on 2009 for 27 ½ percent of permanent partial total.

In 2010, the petitioner filed an application for review and/or modification of the formal award, commonly referred to as a "reopener" petition. After filing the reopener petition, the petitioner requested additional treatment, which was denied by the respondent. The petitioner thereafter filed a motion for medical and/or temporary total disability benefits. There was a full hearing on the motion, including medical testimony. The court indicated that, although a petitioner's testimony is relevant, the issue of need for treatment underlying the motion is determined by medical testimony. The court went on to say that "[t]he medical treatment sought must be reasonable and necessary. It must also improve his medical condition. In other words, it doesn't really matter how much the petitioner subjectively complains if it is not corroborated by objective proofs."

The court compared the petitioner's testimony at the hearing of the resolution of the claim in 2009 and his testimony at the motion for medical and/or temporary disability benefits proceedings in 2011. The judge found that the petitioner's complaints did not change from 2009 when the claim initially resolved and when he reopened the claim in 2010. The court also considered the objective medical evidence. Notably, there was evidence that the petitioner relayed contradictory information regarding his complaints to the examiners.

The court recommended that the petitioner be returned to the prior authorized treating doctors to address whether there was a need for additional compensable treatment on a reopener. Specifically, the court stated, "The court observes that the best course of action that a respondent can take when a treatment request is presented is to refer the petitioner back to the original provider. This is so because a treating physician's opinion is entitled to be accorded more weight than a physician conducting a one-time evaluation."

The respondent first had the petitioner evaluated by its prior permanency examiner. The petitioner was initially evaluated by his family doctor and then the prior permanency examiner on his own behalf. The respondent had the petitioner evaluated by the prior authorized treating doctor. Only the two prior permanency examiners testified at the hearing. The report of the prior authorized treating doctor was accepted as *prima facie* evidence, but the doctor did

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## PROOF

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not testify. The court thus weighed the value of all three evaluators' opinions, finding that the treating doctor's opinion carried more weight.

The court ultimately found that there was no need for additional treatment on the reopener motion for medical and/or temporary disability benefits on three bases. First, the court held that the petitioner failed to prove a substantial worsening of subjective complaints of functionality since the entry of the prior formal award and reopener claim. Second, the petitioner's physical complaints were the same as at the time of the entry of prior formal award. Finally, there was no objective proof of worsening since the entry of prior formal award. The court dismissed not only the motion for medical and/or temporary total disability, but also the entire reopener claim, with prejudice, finding that the petitioner failed to prove that his condition had substantially worsened.

### Conclusion

While findings of cases are within the discretion of each individual judge, the important takeaway is that a motion for med and temp can be effectively defended. It is also notable that the opinion of the treating doctor generally carries more weight than that of a one-time evaluator. Lastly, a petitioner's subjective complaints alone are not enough to sustain one's burden of proving a significant worsening of one's condition. Simply put, petitioners have a burden of proof that must be met. Failure to do so may be the downfall of an entire claim.

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**Announcements:**

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# ONE FOR THE GOOD GUYS

The NJDA is introducing a new column for the association's Newsletter titled ONE FOR THE GOOD GUYS which will include recent defense trial victories in New Jersey Courts—or anywhere else. If you would like to submit a case for this article, please contact Michele Haas, Esq. at mhaas@hoaglandlongo.com or 732-545-4717.

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# COLLEGE DAYS

## By brian O'toole, Esq.

Back in our senior year in high school, most of us decided we'd better give some thought to whether we wanted to go to college and if so, where. Back in the 60's, the overwhelming majority of boys wanted to go to college, probably because we had been in school our whole lives and the thought of having to go to work seemed rather daunting. The cost of college was only a small fraction of what it is today, so for many of us, college was affordable, especially if you chose a local school where you could live at home. I had never been away from home so while the idea of living at school seemed exciting, I never really considered going too far away. While today's seniors probably consider ten to twelve schools, I only looked at three: Mount St. Mary's in Maryland; Fairfield in Connecticut; and Villanova in Pennsylvania. My choice was made considerably easier for me when my cousin and lifelong friend, Lee, decided to go to Villanova. We wound up rooming together for the entire four years. That's right folks, we both graduated in four years! As I previously mentioned, the cost was miniscule compared to today's Villanova tuition for an on-campus student of $47,000.00 per year. My entire four years of college, including tuition, room and board was, wait for it . . . $12,000.00. I was able to earn some of this and all of my everyday living expenses with my summer jobs and working for the Post Office during Christmas breaks.

Although I would be living only two hours away, I still remember that last night home being extremely nervous and questioning whether I was making the right decision. I readily identified myself with Kurt (Richard Dreyfus) in the movie American Graffiti when he was tortured as to whether he should fly east to go to school. Of course, my last night was boring by comparison to Kurt's in that Suzanne Sommers was not in the picture and I never had a chance to become a Pharaoh.

The first day of school, freshmen were greeted by the Orientation Committee and became acquainted with our bow tie, our beanie and our brick, which were to be our constant companions for the next two weeks. Luckily for me, I was a member of the freshman football team and the room next door housed a teammate, Mike Chappel, from coal mining country. Mike stood about 5'10 tall and dressed out at 260 pounds with not an ounce of fat on him, no kidding. Mike had no tolerance for any of the hazing and less for the Orientation Committee members. Consequently, when I was with him I was exempt from doing the freshman stuff because everybody, including me, was afraid of him.

The Villanova campus was huge and back in the 60's there were about one-third of the buildings that presently occupy the campus. My dormitory was quite a distance from Bartley Hall, which housed the College of Commerce and Finance. Consequently, I could usually be

## COLLEGE DAYS

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seen running (in those days I still could) across campus at 8:25 am for my 8:30 class. All students were required to be well-groomed, clean shaven and wear a jacket and tie to classes and meals. While I groused about it back then, looking back I think it was a good rule. I believe, again from hindsight, that it taught us some discipline and gave us a degree of self-respect. (We didn't do it to look good for the ladies because Villanova was not co-ed, except for a small nursing school class.) My first class was Economics 101 and my professor was Dr. Peter Elek, who spoke with an eastern European accent and who looked like Henry Kissinger. After a few classes when we could actually understand what he was saying, I developed quite a liking for him. He taught economics as though it was a religion to him; and his passion for his subject matter made a very boring subject come alive. I registered for two more of his classes, which were always open because the majority of the student body didn't share my enthusiasm for Dr. Elek. Dr. Elek also thought a "C" was a respectable grade. The last course I had him for was "The History of Economic Thought," imagine that.

Because freshman were not allowed to have cars and almost no one had a television, we spent a lot of time at the tiny student union building, known as Dougherty Hall. Dougherty Hall was the home of the "pie shop" which was a cafeteria which had two mounted televisions and served excellent cheeseburgers and malted milkshakes, which combined cost one dollar. It was Villanova's equivalent of Ozzie and Harriet's malt shop. Although it probably seated almost a hundred people, you'd have to get there by 8:30 p.m. on Thursday night to see Hullabaloo, which started at 9:00 p.m.

Without a car, hitchhiking became a way of life. Every night of the week there would be at least a dozen Nova men out on Lancaster Pike with their thumbs up. One of our favorite activities was to try and get some beer and sit in Ardmore Park drinking it. Of course, none of us were 21 and no one had any fake proof, so that left us with what we called a "cold call." We would take turns walking into a liquor store and ordering two six packs of Schmidt's (Philadelphia's own) and if we were asked for proof we would just say that it was out in the car and that would be the end of proofing. Thankfully, there were four liquor stores in Ardmore and we would usually get lucky. If all else failed, there was usually a local guy who was down on his luck and available to conduct the transaction.

While there were five girls' schools within hitchhiking distance, Freshmen really didn't fare too well. It seems that all freshman girls wanted little or nothing to do with freshman guys. The tip off was that you didn't have a car. Of course, it may have also been because my friends and I were not the coolest guys on campus. (But my mother assured me that wasn't the case.) In any event, a big Friday night was usually playing basketball at Alumni Gym and walking to Ho-Jos for a cheeseburger.

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## COLLEGE DAYS

*(Continued from page 17)*

Because there were limited things to do, athletic events on campus and in Philadelphia were always sell outs. Philadelphia was easily accessible via our P&W railroad station on campus. Villanova's basketball team was a member of the Big Five. This consisted of Philadelphia's five Division One Teams – Villanova, St. Joseph's, LaSalle, Penn and Temple. They played all the games at The Palestra, a basketball mecca, on Penn's campus. Our biggest rival was St. Joseph's, which was on City Line Avenue in Philly, only a 20 minute ride down the Lancaster Pike. In the St. Joe's game my freshman year, Villanova had a great team led by Bill Melchionni. With six seconds remaining Melchionni hit a shot to pull us ahead by one. With two seconds remaining Steve Donchez of St. Joe's hit a mid-court set shot to beat us. Ten minutes after the game ended, no one in the Villanova seats had moved. We were stunned. With that one shot, Donchez became a legend at St. Joe's whose name every Big Five fan will remember.

When I go back to campus now, as I frequently do, I can't help but think that while the campus is magnificent, it doesn't match the simple charms it had almost 50 years ago when instead of buildings we had rolling fields and instead of the beautiful Kennedy Hall Campus Center, we had the "pie shop." However, the campus is completely co-ed! Go Wildcats!

**VILLANOVA UNIVERSITY CHAPEL**

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