Superior Court of New Jersey
Appellate Division

Ricardo Munoz,	:	APPELLATE DIVISION
	:	DOCKET NO. A-003829-24
Petitioner-Respondent,	:	
	:	CIVIL ACTION
vs.	:	
	:	ON APPEAL FROM STATE OF NEW
Costco,	:	JERSEY DEPARTMENT OF LABOR
	:	AND WORKFORCE DEVELOPMENT,
Respondent-Appellant.	:	DIVISION OF WORKERS'
	:	COMPENSATION, MONMOUTH
	:	COUNTY
	:	
	:	
	:	SAT BELOW: Hon. Judge Joann Downey, Division of Workers' Compensation, Freehold, NJ
		Claim Petition No. 2023-11462

BRIEF AND APPENDIX ON BEHALF OF RESPONDENT-APPELLANT, COSTCO

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Submitted on September 29, 2025

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PRELIMINARY STATEMENT

The issues in this case are a matter of law. Respondent asserts that the Judge discounted our New Jersey workers' compensation statute and established case law in ordering retroactive, and continuing, temporary disability benefits ("TTD") benefits, as of the date of petitioner's voluntary resignation of his position with Costco of September 29, 2022 in her Order for Medical and/or Temporary Disability Benefits of July 3, 2025. (Ra 1, 31).

Respondent further asserts that the Judge discounted the findings of the authorized doctor that the work injury did not aggravate/ accelerate/ exacerbate petitioner's underlying right knee condition. Further, petitioner did have prior right knee issues/ treatment as evidenced by his prior/ unauthorized medical records from the VA. (Ra 281).

PROCEDURAL HISTORY

Petitioner -Respondent ("petitioner") filed Claim Petition No. 2023-11462 on May 4, 2023 alleging a right knee injury of January 2, 2022. (Ra 38). Compensability for the meniscal tear of the knee was accepted by Respondent- Appellant, Costco, ("Respondent") with Respondent's Answer being filed on May 10, 2023. (Ra 40).

Respondent provided authorized treatment for petitioner's meniscus injury with Dr. Scalfani, Dr. Schob, and ultimately Dr. Richmond. (Ra 197, Ra 200, Ra 206, Ra 209, Ra 212, Ra 219, Ra 225).

A Motion for Medical and/or Temporary Disability was filed on August 4, 2023 seeking TTD at a rate of $1,065.00 (the 2022 statutory maximum TTD rate) from September, 2022 onward and also sought medical treatment as recommended by Dr. Gerardo Goldberger in his report of June 29, 2023. (Ra 42). Contained in the Motion papers was the May 19, 2022 operative report, Dr. Richmond's reports of June 16, 2023 and June 27, 2023, and Dr. Goldberger's report of June 29, 2023. (Id.)

Respondent's Answer to the Motion for Med/ Temp was filed on August 25, 2023. (Ra 68). Respondent filed a supplement to the Answer to the Motion for Med/ Temp on September 15, 2023 enclosing Dr.

Richmond's addendum opinions of August 14, 2023 and September 7, 2023, and operative photos. (Ra 90).

In January, 2024, the court requested that Respondent arrange an exam with Dr. Frederick Song. The Dr. Song exam occurred on April 26, 2024 and Dr. Song issued a report dated April 29, 2024. (Ra 289, Ra 294).

Trial, and testimony, commenced on the Motion for Med/ Temp. During trial, petitioner's testimony was taken twice: on October 11, 2023 (1T) and on October 22, 2024 (6T). Testimony was also taken of Gabrielle Plate, Costco's payroll and human resources representative (October 30, 2023) (3T), and medical experts of Dr. Goldberger (October 30, 2023) (2T), Dr. Richmond (December 11, 2023) (4T), and Dr. Song (September 18, 2024) (5T).[1]

On December 4, 2024, the parties appeared on the record to review and admit the parties' exhibits and evidence. (7T).

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[1] [1] The transcripts are labelled in chronological order of testimony. The labels are as follows:
1T = Petitioner's October 11, 2023 testimony
2T = Dr. Gerard Goldberger's October 30, 2023 testimony
3T = Gabrielle Plate's October 30, 2023 testimony
4T = Dr. Daniel Richmond's December 11, 2023 testimony
5T = Dr. Frederick Song's September 18, 2024 testimony
6T = Petitioner's October 2, 2024 testimony
7T = Transcript of court proceedings of December 4, 2024
8T = Transcript of court proceedings of July 28, 2025
9T = Transcript of court proceedings of July 29, 2025

Both parties submitted trial briefs in January, 2025 and a Decision on the Motion for Medical and/or Temporary Disability Benefits was issued by the court on June 30, 2025, with a final Order for Medical and/or Temporary Disability Benefits being signed on July 3, 2025 and issued and circulated on July 9, 2025. (Ra 1 and Ra 31).

The Order states that Respondent is to authorize Dr. Song as petitioner's authorized provider. The Order also states that Respondent is to pay temporary disability benefits ("TTD") retroactive to September 29, 2022, the date of petitioner's voluntary resignation from Costco, and to continue to pay TTD until MMI or per statute.

Respondent filed a Motion to Stay the Judgement in the trial court on July 11, 2025. (Ra 100). Respondent also filed a Motion for Reconsideration in the trial court on July 18, 2025. (Ra 109). Petitioner opposed both and also, on July 18, 2025, filed a Motion to Enforce the July 3, 2025 Order, seeking statutory penalties for the retro-actively ordered TTD benefits, pursuant to N.J.S.A. 34:15-28.1 and N.J.A.C. 12:235-3.16. (Ra 168, Ra 179). Respondent filed an Answer/ opposition to this Motion to Enforce on July 22, 2025 noting that the Motion to Enforce was not timely filed, based on the date of the July 3, 2025 Order and circulating of Order on July 9, 2025. (Ra 176).

Oral argument on the July, 2025 Motions occurred on July 28, 2025 (8T). During oral argument on the Motion for Stay on July 28, 2025, the court denied Respondent's request that the TTD be held in petitioner's counsel's trust account, or petitioner be told to not spend the money pending the Appellate Division's decision as to the stay (8T, 20:20- 21:4; 8T: 21:8-20). The court did deny petitioner's Motion to Enforce at the hearing on July 28, 2025 as well; the denial was without prejudice. (8T, 28:6-11). (Ra 33, Ra 35, Ra 37).

During oral argument on July 28, 2025, the Court also discussed the visco supplementation medical records and alleged that Respondent had not provided the visco supplementation medical records to the doctors. (8T, 33: 4-11 and 8T, 39:8-40:4 and 8T, 49: 8-50-8).

Oral argument continued on the July, 2025 Motions on July 29, 2025. (9T). At that time, it was clarified that Respondent did indeed send Dr. Song copies of the visco supplementation medical records. (9T, 3: 7-4:16). During this proceeding, the Judge also noted her right to award petitioner's attorney fees on the Motion for Med/ Temp, and in connection with the July, 2025 Motions; potential fees would be reserved until the ultimate resolution of the matter. (9T, 5:24-6:15).

Respondent filed an Emergent Application in the Appellate Division, and notice of Appeal, in the Appellate Division, on August 1, 2025. (Ra 297). The Emergent Application was denied. Respondent filed a Motion to Stay Judgement on August 11, 2025 in the Appellate Division; this was denied on August 14, 2025.

STATEMENT OF FACTS

Petitioner filed Claim Petition No. 2023-11462 on May 4, 2023 alleging a right knee injury of January 2, 2022. (Ra 38). Compensability for the meniscal tear of the knee was accepted by Respondent with Respondent's Answer being filed on May 10, 2023. (Ra 40).

Respondent provided authorized treatment for petitioner's right knee meniscus injury with Dr. Scalfani, Dr. Schob, and ultimately Dr. Richmond. (Ra 197, Ra 200, Ra 206, Ra 209, Ra 212, Ra 219, Ra 225). On April 1, 2022, right knee X-rays were performed (Ra 218) and ultimately, on May 19, 2022, Dr. Richmond performed a right knee arthroscopic medial meniscectomy; the pre-operative diagnosis was right knee medial meniscal tear and the post-operative diagnoses were right knee medial meniscal tear and extensive chondromalacia of the patellofemoral trochlear groove. (Ra 229, Ra 231). Petitioner followed up with Dr. Richmond post-operatively. On May 31, 2022, Dr. Richmond returned petitioner to work on light duty status as of June 2, 2022. (Ra 238). On July 15, 2022, Dr. Richmond opined that petitioner could work full duty. (Ra 250). On August 2, 2022, Dr. Richmond placed petitioner at maximum medical improvement with full duty work status to continue at this time. (Ra 253). Dr. Richmond then saw petitioner again on June 16, 2023. (Ra 257). At this visit, Dr. Richmond

opined that petitioner's symptoms were related to his pre-existing patellofemoral degenerative joint disease. For completeness' sake, the doctor recommended a repeat X-ray to the right knee to compare to prior films. He opined that petitioner may continue to work full duty, but had retired from Costco at the time of this visit. Petitioner returned to Dr. Richmond on June 27, 2023, at which time, right knee X-rays were performed. (Ra 267, Ra 271). The doctor opined that there was no progression of the medial compartment degenerative joint disease. He again opined that petitioner's symptoms were related to his pre-existing patellofemoral degenerative joint disease and not due to the work related meniscal tear. (Ra 267). At this visit, Dr. Richmond placed petitioner at maximum medical improvement and again opined that petitioner may continue to work full duty. (Id.).

Following the filing of the Motion for Medical and/or Temporary Disability Benefits, trial, and testimony, commenced.

Petitioner testified on October 11, 2023. (1T). At this time, the parties stipulated to petitioner's weekly wages at $621.38 with a rate of compensation of $434.97. (1T, 5:16-20). Temporary disability benefits were paid from January 10, 2022 to April 5, 2022, and again paid from May 19, 2022 to June 1, 2022. (1T, 5:16-20).

During petitioner's testimony on October 11, 2023, he testified that he began working at Costco in October 2021 as a seasonal employee. (1T, 6: 14-22 and 1T, 31:22-33:22). Petitioner testified that he worked about 25 hours per week during his course of employment with Costco. (1T, 36:11-13 and 1T, 9:25-10:2). Petitioner did not have any other jobs while working at Costco. (1T, 7:3-5).

During petitioner's course of authorized treatment with Dr. Richmond, petitioner was paid TTD benefits for the time frames of January 10, 2022 through April 5, 2022 and from May 19, 2022 through June 1, 2022. (1T, 5:17-20). On May 31, 2022, Dr. Richmond released petitioner to work light duty. Costco accommodated petitioner's light duty work restriction as of July 12, 2022. (1T, 12:1-15).

Throughout treatment, petitioner was made aware that he had pre-existing arthritis in his right leg. (1T, 23:22 - 24:2). By July 15, 2022, Dr. Richmond released petitioner to work full duty. (Ra 250). On August 2, 2022, Dr. Richmond placed petitioner at maximum medical improvement ("MMI"); at this time, petitioner's full duty work status was to continue. (Ra 253). Petitioner testified that he returned to work full duty on July 22, 2022. (1T, 44:7-9). He testified that following his August 2, 2022 discharge from Dr. Richmond, he did not seek any treatment to his right knee. (1T, 50: 25-51:7).

He testified that he did not seek any treatment to his right knee with the VA, and did not inquire with the VA regarding any right knee treatment. (1T, 51: 18-21).

Petitioner's resignation form stated he was resigning for "personal reasons." (1T 21:10-13, J1, Ra 280). On direct examination, petitioner testified that he came to the conclusion in his own mind that he could not work any longer. (1T, 16: 16-19). He testified that he felt that he had to resign; he was retired from his fire department job and while it would be nice to continue to get paid more, he felt that he could not work any longer, stating, "I have money". (1T, 16:21-17:2). Petitioner testified that following his resignation with Costco of September 29, 2022, he did not look for any other work. (1T, 48:1-3). He did not look for any administrative positions. (1T, 48:4-10). He did not look, nor consider looking for, for any type of positions relating to dispatch or an EMT. (1T, 48:11-14). Petitioner testified that he has not worked in any capacity since resigning from Costco. (1T, 48:15-21).

Gabrielle Plate, Costco's payroll and human resources representative, testified on October 30, 2023. (3T). She testified that when petitioner resigned, he made no mention of his right knee, or right knee injury. (3T, 10: 22-11: 10; 3T, 13:4-12). Petitioner made no mention of any physical problems when he resigned. (3T, 29: 8-13). Petitioner's resignation form of

September 29, 2022 indicated that he was resigning for personal reasons. (3T, 12:8-13-3, 3 T: 39: 18-24, Ra 280).

Petitioner testified again on October 2, 2024 for the limited purpose of further discussion regarding his resignation with Costco. (6T, 3: 10-21). He testified that after his September, 2022 resignation, he went to Puerto Rico to visit his father in late 2022. (6T, 8: 19-24). He also went to Puerto Rico a few more times since 2022. (6T, 9:1-3). He testified that in the last two years, he traveled back and forth to Puerto Rico three or four times, staying for about a week each time. (6T, 9:11-13, 6T, 9: 16-19). Petitioner did testify that the only reason he resigned from Costco was his right leg injury and right knee pain. (6T, 14: 18-22).

Dr. Goldberger testified on October 30, 2023. (2T). Dr. Goldberger was admitted as an expert in orthopedic surgery. (2T, 18:8-10).

In his report of June 29, 2023, Dr. Goldberger recommended that petitioner be re-evaluated by a board-certified orthopedic surgeon who specializes in knee disorders, as well as undergo X-rays. (Ra 275). He further recommended that petitioner be considered for corticosteroid injections to the right, knee and physical therapy. (Id.). Ultimately, consideration towards total knee arthroplasty should be made. (Id.). Regarding work status, he placed petitioner on modified sedentary duty.

(Id.). Dr. Goldberger noted in his report that, "It is to be understood that no treatment was given or suggested, and no doctor to patient relationship exists". (Id.).

Dr. Goldberger testified that he saw petitioner on one occasion, and upon his one examination of petitioner, and review of treatment records supplied from petitioner's counsel, he issued a report of June 29, 2023. (2T, 19:19-20:10). Dr. Goldberger diagnosed petitioner with degenerative joint disease. (2T, 21: 16-22). He also diagnosed petitioner with aggravation of degenerative joint disease, stating that aggravation means that there is a mechanical change and there is a physical change to the joint line that is non-reversible. (2T, 29-23: 30:6). He testified that aggravation is a permanent condition. (2T, 40: 10-13). He testified that petitioner needs treatment, likely in the form of a total knee replacement. (2T, 40:1-42:5, 43:10-20). Dr. Goldberger stated petitioner's work status was "modified sedentary duty." (2T, 39:8-18).

Dr. Goldberger testified that the cartilage/ flap which was removed during the authorized surgery was a non-functional piece of anatomy and due to the non-contact nature of the flap, an injury cannot be developed in the area. (2T, 56: 2-47: 9). The cartilage flap which was shaved down during the authorized surgery performed by Dr. Richmond was pre-existing, non-

functioning, and was not caused by the work injury. (2T, 58: 9-23). Dr. Goldberger testified that petitioner's patellofemoral compartment degeneration was pre-existing. (2T, 69:5-9).

Dr. Richmond testified on December 11, 2023. (4T). He was admitted as an expert in orthopedic surgery. (4T, 11: 19-21). He was the authorized surgeon. (4T, 17:9-11). Dr. Richmond performed surgery on May 19, 2022 in the form of a right knee diagnostic arthroscopy. (4T, 47: 21-22, 4T, 49: 6-13). Dr. Richmond testified that after having reviewed the prior medical records, having performed the surgery, and having reviewed petitioner's transcript, with respect to the January 2, 2022 work injury, petitioner sustained a medial meniscal tear. (4T, 78: 2-12). There was no indication that there was any injury to the patellofemoral compartment, the trochlear groove, or any other compartment other than the medial meniscus. (4T, 78: 13-17). The degenerative changes in the patellofemoral compartment seen in petitioner's January 22, 2022 right knee MRI were not related to his January 2, 2022 work injury. (4T, 33: 8-14). Post-operatively, Dr. Richmond's diagnosis remained the same. (4T, 78: 18-20). Post-operatively, Dr. Richmond did not find an injury to the patellofemoral compartment. (4T, 78: 21-79:1). Dr. Richmond testified that the surgical procedure would not aggravate or accelerate petitioner's pre-existing patellofemoral arthritis. (4T,

79: 2-6). The May 21, 2022 lateral X-rays of petitioner's right knee revealed no fractures and no dislocations. (4T, 45: 3-16). The May 11, 2022 lateral X-rays of petitioner's right knee revealed unrelated spurring. (4T, 45:22-46: 4).

Dr. Richmond testified regarding the mechanism of the January 2, 2022 work injury; petitioner sustained a pivoting injury. (4T, 27: 23-28: 7). He testified that this type of pivoting injury, and petitioner's exam, was consistent with a meniscal injury. (4T, 28: 8-23). During the work injury, petitioner sustained a medial meniscus tear and he did not sustain an injury to any other compartment. (4T, 78:2-20).

Dr. Richmond testified that the post-operative X-rays of June 27, 2023 did not reveal progression of degenerative changes in the medial compartment and also did not reveal progression of degenerative changes in the patellofemoral compartment. (4T, 75:16-77: 15; 4T, 114: 19-115:13).

Dr. Richmond, in his report of June 27, 2023, opined that petitioner's patellofemoral degenerative joint disease was not related to the work related meniscal tear; petitioner was at MMI from the work injury and he may work full duty. (Ra 267). Dr. Richmond testified that the pre-operative January 22, 2022 MRI findings regarding the degenerative changes in the patella and bone spur were not related to the work injury. (4T, 33:8-14). He testified that post-operative May 22, 2022 MRI findings regarding the patella fracture

were not related to the work injury. (4T, 45:3-46:6). The cartilage which was trimmed during the surgery was not providing any benefit to the knee, and trimming the unstable cartilage would not accelerate, aggravate, or exacerbate the existing degeneration in the patellofemoral compartment. (4T, 63:13-64:7 and 4T, 78: 21-79:18). The cartilage was non-functional, frayed, and ready to break apart and contribute to effusions. (4T, 84: 20-24).

Regarding work status, Dr. Richmond testified that with respect to the causally related medial meniscus injury, petitioner has no work restrictions, and could work full duty. (4T, 81: 9-24).

Dr. Song testified on September 18, 2024. (5T). He was admitted as an expert in the field of orthopedic surgery. (5T, 11:4-7). Dr. Song testified that Dr. Richmond, as the surgeon, would be in the best position to talk about the actual condition of the knee. (5T, 43: 6-10).

Dr. Song testified that he acknowledged that Dr. Richmond testified that there was no progression of petitioner's arthritis between the pre-surgery films in 2022 to the post-surgery films of June, 2023. (5T, 27:23-39:14). Dr. Song did not dispute Dr. Richmond's findings as outlined during Dr. Richmond's testimony. (5T, 40:18-41:3). Dr. Song, in addition to giving deference to Dr. Richmond as the treating surgeon, also opined that removal of the cartilage would not progress arthritis. (5T, 19: 19-20:15). Dr. Song

testified that Dr. Richmond removed a non-functional cartilage during the surgery. (5T, 46: 4-9 and 5T, 47: 5-8). According to Dr. Song's testimony, removal of the non-functional flap can actually improve symptoms as the flap can be irritating. (5T, 47:5-15). Removing the flap would decrease irritation and would be helpful, not detrimental. (5T, 52: 16-22).

Dr. Song was unable to say with a reasonable degree of medical probability that the surgery aggravated, accelerated, or exacerbated petitioner's pre-existing arthritis in the patellofemoral compartment. (5T, 62: 10-22). Dr. Song testified that there was no objective worsening in the patellofemoral compartment from the removal of the flap. (5T, 48:19-22). In his report, Dr. Song also stated, "I do not believe that work-related injury caused this arthritis in the patellofemoral compartment and that it was more preexisting." Ibid. Dr. Song testified that the work injury and surgical treatment did not exacerbate the progression of petitioner's arthritis. (5T, 59:10-16). Regarding treatment recommendations, Dr. Song ultimately recommended petitioner undergo cortisone and visco supplementation injection therapy. (5T, 23:6-11).

LEGAL ARGUMENT

I. THE APPELLATE DIVISION DOES NOT DEFER TO THE TRIAL COURT ON ISSUES OF LAW. THE TRIAL JUDGE ERRED AS A MATTER OF LAW IN ORDERING TEMPORARY DISABILITY BENEFITS AFTER PETITIONER'S VOLUNTARY RETIREMENT DURING HIS PERIOD OF NON-TREATMENT AND ON ITS APPLICATION OF HARBATUK V. S & S FURNITURE SYSTEMS INSULATION, 211 N.J. SUPER. 614 (APP. DIV. 1986).

On appeal from the Division of Workers' Compensation, the compensation court is not entitled to deference as to legal findings: "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

When assessing facts, the scope of appellate review is limited to "whether the findings made could reasonably have been reached on sufficient credible evidence present in the record,' considering 'the proofs as a whole,' with due regard to the opportunity of the one who heard the witnesses to judge of their credibility." Close v. Kordulak Bros., 44 N.J. 589, 599 (1965); Goulding v. NJ Friendship House, Inc., 245 N.J. 157, 167 (2021) (relying on Close, 44 N.J. at 599).

While the judge of compensation has "expertise with respect to weighing the testimony of competing medical experts and appraising the

validity of [the petitioner's] compensation claim[,]" Ramos v. M & F Fashions, Inc., 154 N.J. 583, 598 (1998), the judge must "carefully explain[] why he [or she] considered certain medical conclusions more persuasive than others." Smith v. John L. Montgomery Nursing Home, 327 N.J. Super. 575, 579 (App. Div. 2000). The compensation judge's findings "must be supported by articulated reasons grounded in the evidence." Lewicki v. New Jersey Art Foundry, 88 N.J. 75, 89-90 (1981).

The appellate court defers to the judge of compensation's factual findings and legal determinations "unless they are 'manifestly unsupported by or inconsistent with competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Lindquist v. City of Jersey City Fire Dep't., 175 N.J. 244, 262 (2003) (quoting Perez v. Monmouth Cable Vision, 278 N.J. Super. 275, 282 (App. Div. 1994)). In such case, de novo review is appropriate if the compensation judge's evaluation of the underlying facts and inferences drawn therefrom "leave [the appellate court] with the definite conviction that the [compensation] judge went so wide of the mark that a mistake must have been made[.]" Manzo v. Amalgamated Industries Union Local 76B, 241 N.J. Super. 604, 609 (App. Div. 1990) (quoting C.B. Snyder Realty, Inc. v. BMW of N. Am., 233 N.J. Super. 65, 69 (App. Div. 1989)).

II. THE TRIAL COURT ERRED IN AWARDING TTD TO PETITIONER AFTER HIS VOLUNTARY RESIGNATION OF SEPTEMBER 29, 2022 ONWARD. (TRIAL DECISION, RA 1, PAGE 30).

The trial judge improperly awarded temporary total disability benefits (TTD) to petitioner following his voluntary resignation from employment. A claimant has the burden of proving not only that he was available and willing to work, but that he would have been working if not for the disability. Cunningham v. Atlantic States Cast Iron Pipe Co., 386 N.J. Super. 423, 432 (2006). It is Respondent's position that petitioner did not meet this burden of proof for any time period after his voluntary resignation of September 29, 2022.

Respondent maintains that petitioner has no legal entitlement to TTD for any time period after September 29, 2022. The court erred in considering petitioner's personal reasoning behind his voluntary resignation and by essentially allowing petitioner to be his own authorized doctor and select his work status and entitlement to TTD. After petitioner's voluntary resignation with Costco of September 29, 2022, he is entitled to no TTD as he removed himself from the workforce. His self-reported reasons for the resignation are irrelevant. There was no medical record, medical finding, medical physician, or medical conclusion stating that petitioner was unable to work at the time of his resignation, or was unable to work at any time after his resignation of

September 29, 2022. Dr. Richmond, the authorized treating provider and surgeon, did not take petitioner out of work at any time on or after September 29, 2022. Dr. Goldberger, petitioner's one-time IME doctor utilized in the Motion for Medical and/or Temporary Benefits, did not take petitioner out of work at any time on or after September 29, 2022. Dr. Song, the court's chosen physician, did not take petitioner out of work at any time on or after September 29, 2022.

Petitioner chose to remove himself from the workforce on September 29, 2022, and he is therefore not entitled to any TTD benefits after this date.

Almost three years has passed since September 29, 2022. Subsequent to September 29, 2022, there are three time frames to be considered on appeal:

a. From September 29, 2022 (the date of petitioner's resignation) through June 29, 2023 (the date of Dr. Goldberger's report utilized in the August 4, 2023 Motion for Medical and/or Temporary Disability Benefits).

b. June 29, 2023 (the date of Dr. Goldberger's report) through July 30, 2024 (Dr. Richmond re-exam).

c. July 30, 2024 (Dr. Richmond re-exam) through the court Order of June 3, 2025.

A. Time Frame Of September 29, 2022 (Date Of Petitioner's Voluntary Resignation) Through June 29, 2023 (The Date Of Dr. Goldberger's Report Utilized In The August 4, 2023 Motion For Medical And/Or Temporary Disability Benefits).

Petitioner is not entitled to TTD during the time frame of September 29, 2022 through June 29, 2023. Petitioner was not under any active medical treatment, authorized or unauthorized during this time frame. He was not seeing any doctors at all in relation to his work injury, authorized or unauthorized. There is no dispute that the petitioner had unfettered access to the VA Hospital (VA) for his personal medical care. Yet, he did not see the VA for any issues relating to his right knee prior to or subsequent to his resignation. The VA medical records do reveal some visits post September 29, 2022, but no visits whatsoever related to petitioner's right knee. Clearly if he was in need of treatment, he had access to same.

Petitioner did not request a treatment exam until May 25, 2023, resulting in the Dr. Richmond June 16, 2023 and June 27, 2023 visits and June, 2023 X-rays. However, no request for TTD was made in conjunction with any treatment request until the filing of the Motion for Medical and/or Temporary Disability Benefits on August 4, 2023. At both the June 16, 2023 and June 27, 2023 visits, Dr. Richmond opined that petitioner may work full duty.

Petitioner was not under active medical treatment at the time of his resignation, did not have a medical note taking him out of work, and he resigned for personal reasons. Petitioner chose to resign from his position at Costco on September 29, 2022, despite there being no medical support whatsoever suggesting anything less than a full duty work status. Petitioner is not entitled to TTD benefits from the date of his resignation going forward, as he voluntarily removed himself from the job market, and therefore cannot establish a wage loss associated with the work injury on January 2, 2022.

The court, in its decision ordering TTD benefits to be paid retroactively to September 29, 2022, the date of petitioner's voluntary resignation with Costco, stated that "petitioner [is] entitled to temporary disability benefits if he could not work due to his injuries". Respondent asserts this conclusion is legally incorrect.

New Jersey is an employer directed care state; we are also an MMI state. Established case law makes it clear that TTD benefits can stop upon ***either*** of the following scenarios (***both*** scenarios together are not required): a. Until petitioner is able to return to work, or b. Until he is placed at MMI. "Temporary disability continues 'until the employee is able to resume work and continue permanently thereat' or until he 'is as far restored as the

permanent character of the injuries will permit,' whichever happens first. Monaco v. Albert Maund, Inc., 17 N.J. Super. 425, 431 (1952) citing Cf. Mt. Olive Coal Co. v. Industrial Commission, 129 N.E. 103 (Ill. 1920).

Under Monaco, TTD can stop at either return to work **or** MMI. In the instant matter, in fact, **both** things had occurred at the time of petitioner's resignation of September 29, 2022.

Dr. Richmond placed petitioner at MMI on August 2, 2022 and continued petitioner's full duty work status at this time as well. At the time of petitioner's voluntary resignation of September 29, 2022, petitioner had been placed at MMI and he had been returned to work full duty. "[Entitlement to temporary] disability [benefits] should be 'deemed to be temporary until after a course of treatment and observation it is discovered to be permanent, and that fact is duly established.' Monaco at 431. TTD benefits are for individuals who are treating with an authorized provider who has placed the individual out of work due to the work related injury.

Respondent's asserts that as to this initial time frame, by not filing the Motion until August 4, 2023, petitioner sat on his rights for the entire time frame of September 29, 2022 through August 4, 2023. N.J.A.C. 12:235-3.2 allows a claimant to file a Motion for Medical and/or Temporary Benefits with the court to seek TTD benefits; petitioner did not file a Motion after being

initially discharged on August 2, 2022; he did not file a Motion after his resignation of September 29, 2022; he did not file a Motion after seeing Dr. Richmond twice during June, 2023; he did not file a Motion immediately after seeing Dr. Goldberger on June 29, 2023. He filed the Motion on August 4, 2023, just over one year from his initial MMI determination of August 2, 2022, and over ten months after his voluntary resignation from Costco.

It is undisputed that petitioner was under no active authorized medical treatment during the time frame of September 29, 2022 through June 16, 2023. Petitioner was initially deemed to be at MMI by Dr. Richmond on August 2, 2022, and again on June 27, 2023. (Ra 253, Ra 267). The only medical treatment/ visits petitioner had between August 2, 2022 and June 28, 2023 were the Dr. Richmond visits on June 16, 2023 and June 27, 2023; at both of these visits, petitioner's full duty work status was continued. There was no medical expert at all during the time frame of August 2, 2022 through June 28, 2023 stating that petitioner could not work full duty.

The court acknowledged that at the time of petitioner's resignation, he was already released from Dr. Richmond. (8T, 44:23-24). Petitioner was working full duty at the time of his resignation. (5T, 49: 23-25). Dr. Goldberger testified that petitioner was not under any active medical treatment between August, 2022 and June 2023. (2T, 66: 7-13). Dr.

Goldberger testified that there was no indication of any medical treatment between August, 2022 and June, 2023. (2T, 66: 22-25). Dr. Song testified that there was no treatment between petitioner's resignation in September, 2022 through June, 2023. (5T, 49: 12-18). Dr. Song also testified that a doctor, including himself, can comment on petitioner's work ability during the time frame of September, 2022 to June, 2023. (5T, 49: 19-25).

It is critical for the court to appreciate that Mr. Munoz was asked if he planned on working after his retirement from Costco. "Q: Have you looked for any work since resigning from Costco? A: Not at all, ma'am" (1T, 48:1-3). Petitioner testified that he did not look for any administrative positions; he did not look for any dispatcher/ EMT positions; he did not volunteer anywhere; he had not worked in any capacity since resigning. (1T, 48:4-21).

After resigning from Costco on September 29, 2022, petitioner did not look for work and he did not see any physician until June, 2023. Petitioner was not working, not sustaining wage loss, not looking for work, and not treating for his workers' compensation injury, during the time frame of September 29, 2022 through June 29, 2023. He is therefore not entitled to TTD for this time frame, as he had been placed at MMI, returned to work full duty, and was out of the work force, by personal choice, as of September 29, 2022.

B. Time Frame Of June 29, 2023 (The Date Of Dr. Goldberger's Report) Through July 30, 2024 (Dr. Richmond Re-Exam).

Next, for the second time frame of June 29, 2023 through July 30, 2024, in Dr. Goldberger's report of June 29, 2023, he placed petitioner on modified sedentary duty. This is the first time after petitioner's September 29, 2022 resignation that any doctor placed petitioner on anything other than full duty work status.

Petitioner's own unauthorized IME doctor, obtained for the purpose of filing the Motion for Medical and/or Temporary Disability Benefits seeking medical treatment and seeking TTD benefits, did not opine that petitioner could not work.

Dr. Goldberger, in his report of June 29, 2023, opined that petitioner could work modified sedentary duty. Respondent had previously accommodated petitioner's light duty designation. (1T, 12: 13-15). Petitioner's voluntary resignation of September 29, 2022 prejudiced the Respondent as by resigning, petitioner denied Respondent the opportunity to potentially offer modified sedentary duty following the June 29, 2023 exam, as they had in the past. By the time petitioner saw a physician who placed him on less than full duty work status, petitioner had already resigned, and

per his testimony had not worked, or looked for work in any type of position whatsoever, since September 29, 2022.

The next medical appointment/ visit was on April 29, 2024, when petitioner was examined by Dr. Frederick Song, the physician selected by the Judge of Compensation as a third opinion between Dr. Goldberger and Dr. Richmond. Regarding work status, Dr. Song stated, "he [petitioner] can **currently work** as tolerated with regard to the right knee". (emphasis added). Even the Judge appointed doctor did not place petitioner out of work. By ordering Respondent to issue TTD benefits, the Judge disregarded the opinion of the doctor whom she selected. The court stated on page 29 of its decision, "All of the experts including [p]etitioner's authorized treating surgeon were of the opinion that [p]etitioenr was unable to work full duty". This finding is not supported by the findings and opinions of the medical experts.

Dr. Richmond then saw petitioner on July 6 and 30, 2024 and provided injections to the right knee. Regarding work status, Dr. Richmond stated that petitioner may work full duty as it related to the work injury. No physician (authorized or unauthorized) placed petitioner out of work during the time frame of June 29, 2023 through July 30, 2024. Petitioner was not sustaining wage loss during this time period as he had already resigned and

was not placed out of work by any doctor. Had he not resigned on September 29, 2022, Respondent could have likely accommodated the modified sedentary duty designation of Dr. Richmond, as Respondent had accommodated light duty work in the past. However, petitioner denied Respondent the opportunity to do so after his voluntary resignation of September 29, 2022.

C. Time Frame Of July 30, 2024 (Dr. Richmond Re-Exam) Through The Court Order Of July 3, 2025.

During July and August, 2024, Respondent provided petitioner authorized treatment with Dr. Richmond without prejudice. Dr. Richmond saw petitioner on July 30, 2024, August 6, 2024, and on August 13, 2024. At each and every visit, Dr. Richmond opined that petitioner could work full duty.

During this time frame, petitioner was not working, was not looking for work, and was not placed out of work by any physician.

The court ordering Respondent to issue TTD during this time frame is contrary to the workers' compensation statute and case law. Temporary disability continues 'until the employee is able to resume work and continue permanently thereat' or until he 'is as far restored as the permanent character of the injuries will permit,' whichever happens first. Monaco at 431 citing

Cf. Mt. Olive Coal Co. v. Industrial Commission, 129 N.E. 103 (Ill. 1920). However, the court ordered TTD during this time frame as if petitioner were working/ had wage loss, and also as if he were placed out of work by a doctor; neither of these things were in fact occurring.

In New Jersey, an injured worker is not permitted to determine their own work status in connection with their workers' compensation claim; this determination must come from the authorized medical provider. A petitioner cannot voluntary remove himself from the work force and seek TTD benefits for wage loss from Respondent.

Looking first to the NJ Workers Compensation statute for guidance, there are a variety of statutes dealing with a petitioner's entitlement to TTD under N.J.S.A. 34:15. Sections 12, 14, 16, 19, and 38 all address entitlement to TTD.

Relevant to the instant matter, N.J.S.A. 34:15-12 states that TTD compensation "shall be paid during the period of such disability" for "injury producing temporary disability".

N.J.S.A. 34:15-16 states that permanency benefits run consecutively following TTD benefits.

N.J.S.A. 34:15-19 links entitlement to TTD to medical treatment, stating that a petitioner's refusal to submit to examinations on behalf of

Respondent shall deprive him of the right to [TTD] compensation during the continuance of such refusal.

Obviously, if a petitioner retires from work, is not under authorized medical treatment with a doctor placing him out of work due to the work injury, he cannot claim a right to TTD.

N.J.S.A. 34:15-38 states that a petitioner is entitled to TTD benefits during the time frame he is "first unable to continue at work by reason of the accident . . . up to the first working day that the employee is able to resume work and continue permanently thereat".

Notably, Section 38 implies that a claimant is working and treating. This section of the statute would not apply in an instance such as this where a claimant voluntarily resigns with no treating physician taking him out of work. In order for a petitioner to be entitled to TTD, there must be an authorized doctor placing petitioner out of work, or a request for treatment, or some effort from the petitioner to comply with authorized treatment.

Case law is also well established with respect to a petitioner's entitlement to TTD. First, our State Supreme Court has addressed this issue: "an injured employee may collect workers' compensation temporary disability benefits only if that employee has lost wages" Outland v. Monmouth-Ocean Educ. Serv. Comm'n, 154 N.J. 531, 540 (1998). The

Court in Outland went on to distinguish a petitioner who did not work from a petitioner who did work, and the entitlement of TTD:

> "We would agree with the Board that Outland would not be entitled to temporary disability benefits if Outland planned to relax all summer, perhaps vacationing at the Jersey shore. In that case the benefits would represent a windfall. But the payment of temporary disability benefits would not create a windfall if Outland planned to work during the summer recess and had her injury prevented her from following through with that plan". Id. at 542.

The instant matter involves a situation where petitioner resigned from his job and, per his own testimony, made no effort whatsoever to obtain new employment after his resignation of September 29, 2022. Therefore, the issuance of TTD to petitioner represents a windfall to which he is not entitled. Id.

The purpose of temporary disability benefits is to provide an individual who suffers a work-related injury with a "partial substitute for loss of current wages." Cunningham at 428, citing Ort v. Taylor-Wharton Co., 47 N.J. 198, 208 (1966). **Actual absence from work is a prerequisite to a temporary disability award**. Id. citing Calabria v. Liberty Mut. Ins. Co., 4 N.J. 64, 68 (1950) (emphasis added). The Court in Cunningham went on to state, "There is nothing in the record to suggest that he had any **promise or prospect of employment** to begin in the days following February 11, 2005 that he had to forgo because of the disability. Thus the

supposed wage loss replacement for those days was not for actual lost wages." (emphasis added). Id. at 432-433.

In this case, petitioner testified that he did not plan on working after his retirement from Costco; he therefore did not have an absence from work due to an injury. Petitioner also testified that he was working full duty when he resigned. He was not treating when he resigned. There was no medical provider stating that he could not work due to his work injury at the time of his resignation on September 29, 2022; in fact, there was no medical provider stating anything at all until June 16, 2023, as there was no medical treatment, or medical visits, between August 2, 2022 and June 16, 2023.

Pursuant to Cunningham, a claimant must "prove that he actually lost income…because of his disability". Temporary disability is intended to serve as a "**partial substitute for loss of current wages**." (emphasis added) Cunningham at 428. This is in contrast to payments for permanent partial disability, which are for functional loss as defined by N.J.S.A. 34:15-36.

The Court, on page 28 of in its June 30, 2025 decision references the case of Harbatuk v. S & S Furniture Systems Insulation, 211 N.J. Super. 614 (App. Div. 1986), purporting, "Pursuant to Harbatuk v. S & S Furniture Systems Insulation, 211 N.J Super. 614 (App. Div. 1986), the employer

must offer light duty work in order to terminate temporary disability benefits".

Respondent asserts that the Judge of Compensation misunderstood, misapplied, and distorted the meaning of Harbatuk.

There are a variety of situations where an employer does not have to first offer light duty work in order to terminate temporary disability benefits. If a claimant abandons treatment/ their claim, an employer does not have to first offer light duty work in order to terminate temporary disability benefits. N.J.S.A. 34:15-19. If a claimant is terminated for cause, an employer does not have to first offer light duty work in order to terminate temporary disability benefits. See Cunningham, supra. If a claimant is discharged at MMI with permanent work restrictions that are unable to be accommodated by the Respondent, an employer does not have to first offer light duty work in order to terminate temporary disability benefits. Monaco at 431, citing Cf. Mt. Olive Coal Co. v. Industrial Commission, 129 N.E. 103 (Ill. 1920).

The facts in Harbatuk involved an *actively treating employee*, whose authorized medical provider stated that petitioner could work light duty. Id. at 620. The court in Harbatuk stated that in an instance where petitioner is working for the Respondent and the authorized treating doctor places petitioner on light duty/ modified duty, any light duty/ modified duty offer

from the Respondent must require an actual offer for an available position. Id. at. 628-629. For the facts of Harbatuk to apply, there must be an injury which initially takes petitioner out of work, per an authorized doctor, followed by a light duty/ modified duty designation per the authorized doctor for an existing employee. An employer cannot be required to offer light duty to someone who has retired from employment. Harbatuk does not apply to a petitioner who was released to work full duty, nor does the case law and progeny apply to former employees.

By obligating the employer to pay TTD benefits on the mistaken notion of an employer's obligation to provide light duty for a former retired employee, the court reversed the long-standing law in N.J.S.A. 34:15-16 which clarifies the consecutive nature of benefits to be paid in workers' compensation. When a petitioner is not taken out of work by a physician, is not actively treating, is not looking for work, and has voluntarily resigned employment, that period of time, if anything, would be considered a period eligible for retroactive payments of permanent partial disability benefits.

Respondent again emphasizes that at no time after September 29, 2022 did any doctor place petitioner out of work due to the work injury. Therefore, even looking retroactively, petitioner still would not be entitled to TTD; to date, coming up on three years after petitioner's voluntary

resignation of September 29, 2022, there has been no physician, authorized or unauthorized, placing petitioner out of work due to the work injury.

Harbatuk states, "The ability for light or intermittent or sedentary work is not inconsistent per se with total incapacity. Clark v. American Can Co., 4 N.J. 527, 534 (1950); Rodriguez v. Michael A. Scatuorchio, Inc., 42 N.J. Super. 341, 352 (App. Div. 1956), certif. denied, 23 N.J. 140 (1957); Cleland v. Verona Radio, Inc., 130 N.J.L. 588, 595 (Sup. Ct. 1943). Harbatuk at 624. In this case, Respondent did previously offer, and provide, petitioner with light duty work during his course of authorized treatment. There is therefore no reason for petitioner to have believed that light duty might not be offered in the future. However, by choosing to voluntarily quit his employment with Costco, and waiting until August 4, 2023 to request TTD, petitioner made himself unavailable for work and deprived Respondent of the ability to offer petitioner light duty (as they previously had done).

Harbatuk also states is TTD benefits must be paid from "the day that the employee is first unable to continue at work by reason of the accident ... up to the first working day that the employee is able to resume work and continue permanently thereat," N.J.S.A. 34:15-38, or until he "is as far restored as the permanent character of the injury will permit — the

determinant date being whichever of these events happens first." Tamecki v. Johns-Manville, 125 N.J. Super. 355, 358-359 (App. Div. 1973), certif. denied, 64 N.J. 495 (1974); accord, Monaco v. Albert Maund, Inc., 17 N.J. Super. 425, 431 (App. Div. 1952). Harbatuk at 621.

Again, the case law of Monaco v. Albert Maund, Inc. is clear that TTD stops at either MMI **or** return to work. The benefits available to a petitioner post-dating MMI or return to work are permanency benefits, not TTD benefits. N.J.S.A. 34:15-16. TTD benefits do not continue in perpetuity; our statute and our case law provides designated circumstances where TTD ceases. In our instant matter, petitioner had been placed at MMI, and returned to work full duty, prior to his resignation of September 29, 2022. He has not been placed out of work by any doctor post-dating September 29, 2022.

In order to demonstrate entitlement to TTD benefits after being placed out of work by an authorized treating physician, a petitioner must prove that he was available and willing to work, he must prove that he would have been working if not for the disability, and he must demonstrate a promise or prospect of employment. Cunningham at 433.

As the Court stated in Gioia v. Herr Foods, Inc., No. A-0667-10T4, 2011 N.J. Super. Unpub. LEXIS 2565, *8-9, 2011 WL 4772848 (App. Div.

Oct. 11, 2011), "[Petitioner] has the burden of proving not only that he was available and willing to work, but that he would have been working if not for the disability. (Ra 305). Here, the claimed temporary disability benefit was replacement for nothing more than the wages of a theoretical job, and there is nothing in the record to suggest that he had any promise or prospect of employment. As in Cunningham, Gioia "**left his job** (whether characterized as voluntarily or as a termination for cause in violation of a company policy he knew would result in termination), and, **without new employment secured, he did so at his peril**. (emphasis added). Gioia at *8-9.

Petitioner voluntarily resigned his employment on September 29, 2022; he did not then make any effort to seek other employment. This does not entitle him to TTD benefits from the Respondent, particularly when he was not under active medical treatment for the January 2, 2022 work injury and he was not placed out of work by an authorized doctor at the time he chose to leave his employment with Respondent. To allow such a result as this is completely contrary to the NJ statute.

This decision by the Judge of Compensation ordering retroactive TTD dating back to petitioner's voluntary resignation of September 29, 2022 when petitioner was not under active medical treatment at the time of his resignation should be reversed. There is nothing in the law to support such a

finding. There is no statute, or case law, allowing a result where a petitioner voluntarily resigns from his position and is paid TTD benefits during a time when no treatment was rendered, or requested, had no doctor placing him out of work, and was not working.

III. THE TRIAL COURT ERRED IN DISCOUNTING THE FINDINGS OF THE AUTHORIZED DOCTOR, DR. RICHMOND, THAT THE WORK INJURY DID NOT AGGRAVATE/ ACCELERATE/ EXACERBATE PETITIONER'S UNDERLYING RIGHT KNEE CONDITION. (TRIAL DECISION, RA 1, 21)

The Trial Court erred in dismissing the credible findings of Dr. Richmond, the authorized doctor, who determined that the work injury neither aggravated nor accelerated petitioner's pre-existing right knee condition. This error undermines the validity of the trial judge's findings and warrants reconsideration. During trial, testimony was taken from three medical experts: Dr. Goldberger (October 30, 2023) (2T), Dr. Richmond (December 11, 2023) (4T), and Dr. Song (September 18, 2024) (5T).

The court, on page 26 of its June 30, 2025 decision found "the inconsistencies in Dr. Goldberger's report to not be determinative". However, the inconsistencies in Dr. Goldberger's report, and his testimony, are glaring; Respondent asserts that the Trial Court erred in not finding them to be determinative.

First, Dr. Goldberger testified that he did not read petitioner's transcript prior to testifying. Respondent therefore objected to testimony regarding the contents of petitioner's testimony; this objection was overruled. (2T, 43:21-44:23). Later, Dr. Goldberger admitted that while his report contained "multiple errors", upon reading petitioner's deposition [sic-transcript] during his testimony, "based on what he [petitioner] said in the deposition [transcript]", he was changing his opinion with respect to some things. (2T, 76: 11-18).

Dr. Goldberger testified that it is his office's procedure to take intake from a patient. (2T, 45:13-46:2). In the instant matter, the doctor did not have petitioner's intake form. (2T, 46:3-5). He testified that his office did not have a copy of petitioner's intake form. (2T, 46: 6-8). He testified that he does not know what happens to the form after it is completed by a patient. (2T, 46: 10-21). Despite the inexplicable loss of petitioner's intake sheet, the doctor testified that patient history may have come from the intake form. (2T, 51: 6-11). Despite the inexplicable loss of petitioner's intake sheet, the doctor testified that patient present symptomatology may have also come from the intake form. (2T, 51: 12-19).

Regarding the mechanism of injury and how the January 2, 2022 work injury occurred, Dr. Goldberger testified that his report incorrectly stated

that petitioner was lifting a heavy refrigerator when the work injury occurred; this was inaccurate as petitioner was lifting a generator. (2T, 48:21- 49: 3; 2T 52:10-13). While the doctor did attribute this error to his dictation software, he did not issue a corrected report. (2T, 50: 2-5).

Dr. Goldberger's report discusses a prior motor vehicle accident petitioner had been involved in, resulting in prior injuries to the right knee. (2T, 45: 4-8). This was inaccurate and the doctor did not issue a corrected report regarding this inaccurate prior history. (2T, 50: 6-10). The doctor did not know how this information was included in his report. (2T, 45: 4-12). He testified that the reference to a prior motor vehicle accident was a mistake. (2T, 52: 18-21).

Dr. Goldberger's June 29, 2023 report indicated that petitioner had problems walking his dog. (2T, 51: 23-52:1). In fact, petitioner does not have a dog. (2T, 52: 2-4; 2T: 52-14-17).

Ultimately, Dr. Goldberger, in his June 29, 2023 report, diagnosed petitioner with degenerative joint disease. (2T, 21: 16-22). He also diagnosed petitioner with aggravation of degenerative joint disease, stating that aggravation means that there is a mechanical change and there is a physical change to the joint line that is non-reversible. (2T, 29-23: 30:6). He testified that aggravation is a permanent condition. (2T, 40: 10-13). He

testified that petitioner needs treatment, likely in the form of a total knee replacement. (2T, 40:1-42:5). Petitioner likely needs a total knee replacement. (2T, 41:15-42:5; 2T, 43:10-20). Dr. Goldberger testified that at the time of his June 29, 2023 exam, he did not review the surgical photos. (2T, 73: 4-11). He did not have medical documentation to support worsening of patellar arthritis. (2T, 70: 6-17). He did not have Dr. Richmond's reports of June 16, 2023, nor June 27, 2023. (2T, 67:7- 68: 11).

During Dr. Song's testimony on September 18, 2024, he acknowledged that Dr. Richmond was in the best position to discuss the actual condition of petitioner's knee. (5T, 36:3-15; 5T, 43:6-10). Case law also supports that the opinion and findings of Dr. Richmond, as the authorized treater and surgeon, should be given the greater weight, as compared to that of an independent evaluator. This is because "…in a workers' compensation case, a treating physician is often in a better position to express opinions as to cause and effect than an expert who merely is examining the patient in order to give expert testimony." Bird v. Somerset Hills Country Club, 309 N.J. Super. 517, 523 (App. Div. 1998) In situations "where the medical testimony is in conflict, greater weight should be accorded to the testimony of the treating physician." Bialko v. H. Baker Milk Co., 38 N.J. Super. 169, 171-172 (App. Div. 1955) citing Fusco v. Cambridge Piece Dyeing Corp., 135 N.J.L. 160 (E. & A.

1947); Trusky v. Ford Motor Co., 19 N.J. Super. 100 (App. Div. 1952); Conquy v. New Jersey Power & Light Co., 23 N.J. Super. 325 (App. Div. 1952).

The Trial Court also erred in discounting the findings of the authorized treater, and surgeon, Dr. Richmond and in opining that Dr. Richmond's history regarding the mechanism of injury. On page 16 of the Court's written decision, the Trial Court states that "Dr. Richmond clearly did not consider the actual mechanism of injury which occurred in the petitioner's accident when writing his addendum". However, Dr. Richmond's testimony is clear that he understood the mechanism of injury.

Respondent asserts that petitioner has not proven objective medical evidence of a worsening of his pre-existing degenerative joint disease. The post-operative X-rays of June 27, 2023 (Ra 271) did not show any progression of petitioner's pre-existing degenerative joint disease as compared to his pre-operative X-rays of April 1, 2022 (Ra 218) and May 11, 2022 (Ra 227, Ra 228).

In the absence of objective medical evidence of worsening, the court erred in finding that there was any aggravation/ acceleration/ exacerbation of petitioner's pre-existing degenerative joint disease, especially as all of the doctors also relied upon petitioner's subjective denial of prior symptoms,

which the VA records showed to not be accurate. (Ra 281). Specifically, petitioner was diagnosed with bilateral knee joint pain at the VA on December 15, 2021, roughly two weeks prior to this accident. (Ra 284).

In order to succeed under an aggravation/ acceleration/ exacerbation theory, a petitioner must establish that his pre-existing condition was "aggravated, accelerated, or combined with a pre-existing disease or infirmity to produce the disability for which compensation is sought." Sexton v. County of Cumberland/Cumberland Manor, 404 N.J. Super. 542, 555 (App. Div. 2009). In Peterson v. Hermann Forwarding Co., 267 N.J. Super. 493 (App. Div. 1993), the Appellate Division applied the test of objective worsening to prove aggravation.

Petitioner has failed to meet his burden, as outlined in Sexton v. County of Cumberland/Cumberland Manor, 404 N.J. Super. 542, 555 (App. Div. 2009) and Beausejour v. Chamberlin Plumbing & Heating, Inc., No. A-1459-12T4, 2014 N.J. Super. Unpub. LEXIS 176 (App. Div. Jan. 29, 2014). (Ra 308).

A petitioner must prove both legal and medical causation, when contested, in order to receive workers' compensation benefits. Lindquist v. City of Jersey City Fire Dep't, 175 N.J. 244, 259 (2003). "Medical causation means the injury is a physical or emotional consequence of work exposure.

Stated another way, proof of medical causation means proof that the disability was actually caused by the work-related event." Ibid. "Proof of legal causation means proof that the injury is work connected." Ibid. (citing Kasper v. Bd. of Trs. of Tchrs' Pension and Annuity Fund, 164 N.J. 564, 591 (2000) (Coleman, J., concurring)). Here, petitioner's work-related event was the twisting motion that caused his right knee to "pop," resulting in a meniscal tear. "To find the requisite causal connection between the employment and the injury, '[i]t must be established that the work was at least a contributing cause of the injury and that the risk of the occurrence was reasonably incident to the employment.'" Sexton v. County of Cumberland/Cumberland Manor, 404 N.J. Super. 542, 549 (App. Div. 2009) (quoting Coleman v. Cycle Transformer Corp., 105 N.J. 285, 290 (1986). In New Jersey, judges of compensation use the "but for" or "potential-risk" test. Ibid. "[T]he question is whether it is more probably true than not that the injury would have occurred during the time and place of employment rather than elsewhere." Howard v. Harwood's Rest. Co., 25 N.J. 72, 83 (1957).

All doctors agree that the patella was not injured by the pivot mechanism. The issue is whether there was an aggravation, acceleration, or exacerbation of the underlying degenerative joint disease. According to the testimony of Dr. Richmond, who relied on the objective findings of the pre-

surgery and post-surgery X-rays, petitioner's pre-existing arthritis was not aggravated, accelerated, or exacerbated by petitioner's work injury or the surgery performed by Dr. Richmond. Petitioner has not demonstrated a need for treatment and/or causation for his pre-existing degenerative joint disease.

The court's opinion in Wake v. Township of Toms River is illustrative of an instance where performing surgery did not aggravate arthritis. No. A-5876-13, 2015 N.J. Super. Unpub. LEXIS 2193 (App. Div. September 16, 2015). (Ra 312). There, petitioner filed a Re-opener application alleging that his work-related injury caused an exacerbation of his degenerative joint disease. Id. at 1. The surgeon who performed surgery on the petitioner's knee in Wake "removed both the posterior horn and the entire middle portion of the lateral meniscus," which petitioner alleged "removed almost all of the shock absorber between the two arthritic bones, thereby augmenting and materially exacerbating [petitioner]'s pre-existing arthritis." Id. at 2-3. Petitioner's expert testified to the same effect. Ibid. However, the Court of Compensation gave "greater weight to the testimony of [the employer's expert] whose findings are basically in union with the authorized treating physician," and found petitioner's need for treatment was "causally related to his preexisting degenerative arthritic condition rather than his work-related injury." Id. at 2.

The judge also noted petitioner "would be suffering from the same symptomology had the work-related injury not occurred." Id. at 2-3.

In Wake, just as here, all of the doctors opined that the petitioner had "serious preexisting arthritis." Id. at 3. As such, the court "reject[ed] . . . the view that the removal of the cushion of meniscal material aggravated [the petitioner]'s arthritic condition." Ibid. The court held petitioner

> was not benefitting from any cushion effect on his knee based upon [the employer's expert]'s findings and therefore the removal of same made no difference. [The petitioner]'s condition is degenerative in nature and the court believes [the employer's expert]'s view that [the petitioner]'s symptomology is associated with the continued degeneration of this very serious arthritic condition which is not the responsibility of respondent.
>
> [Ibid.]

The Appellate Division affirmed the Court of Compensation's decision, noting that a petitioner seeking benefits based on increased incapacity "bears the 'burden of proving by a preponderance of the evidence not only the fact of increase but also that it is causally related to the original accident and resulting injury.'" Id. at 3 (quoting Schiffres v. Kittatinny Lodge, Inc., 39 N.J. 139, 148-49 (1963)).

Petitioner has not met his burden to show that the arthritic condition in his patellofemoral compartment was causally related to the original work accident. As in Wake, all of the doctors in the present case testified regarding

the preexistence of significant arthritis in petitioner's patellofemoral compartment. The court in Wake also properly afforded deference to the opinion of the authorized treating doctor, whom the employer's expert had agreed with, that there was no aggravation of arthritis caused by the removal of any tissue. Id. at 2-3.

Petitioner's prior/ unauthorized medical records from the VA of December 15, 2021 and April, 2016 show that petitioner's arthritis was preexisting. When all of the doctors examined petitioner after the January 2, 2022 work injury, they relied on petitioner's personal representation that he had no prior injury or pain in his right knee prior to this accident when they addressed causation regarding petitioner's arthritis. Petitioner's history and baseline with regard to arthritis was never accurately portrayed to any of the physicians who examined him, unfairly skewing their analysis for causation of petitioner's arthritis. Dr. Song and Dr. Richmond testified that the removal of the cartilage flap would have improved the patella and not aggravated the arthritis. (4T, 63: 13-64:7, 5T, 19:19-20:15, 5T, 52:16-22). Respondent asserts that petitioner failed to submit any medical evidence showing objective evidence that the removal of the non-functioning flap of cartilage accelerated, exacerbated, or aggravated petitioner's patellofemoral arthritis. In fact, Dr. Song testified that the petitioner benefitted from the removal of the flap. (5T,

20:8-13). The court in Wake noted that a petitioner seeking benefits based on increased incapacity "bears the 'burden of proving by a preponderance of the evidence not only the fact of increase but also that it is causally related to the original accident and resulting injury.'" Id. at *1 (quoting Schiffres v. Kittatinny Lodge, Inc., 39 N.J. 139, 148-49 (1963)). As in Wake, all of the doctors in the present case testified regarding the preexistence of significant arthritis in petitioner's patellofemoral compartment.

CONCLUSION

Respondent maintains that as a matter of law, the Trial Court's ordering TTD benefits to be paid from petitioner's resignation of September 29, 2022 onward and finding that the patella injury was related to the January 2, 2022 work injury was incorrect.

Regarding the TTD issue, petitioner did not sustain any wage loss after his voluntary resignation and he had no promise or prospect of employment/ wages following his resignation. He was not under any medical treatment when he voluntary resigned on September 29, 2022 and he testified that he did not look for any work whatsoever for any type of position after September 29, 2022. To date, no physician has taken petitioner out of work due to the January 2, 2022 work injury.

Regarding medical, the record is entirely devoid of any medical evidence supporting an injury, or acceleration, exacerbation, or aggravation of petitioner's pre-existing patellofemoral arthritis, either from the January 2, 2022 work injury itself or the May 19, 2022 authorized meniscal surgery.

For the reasons stated herein, the Trial Court committed reversible errors in her June 30, 2025 decision and July 3, 2025 Order. In light of the foregoing, the Trial Court's ruling must be reversed.

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RICARDO MUNOZ, Respondent v. COSTCO Appellant	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NUMBER: A-003829-24 ON APPEAL FROM STATE AGENCY WORKERS' COMPENSATION, FREEHOLD DISTRICT OFFICE DOCKET NO.: 2023-11462 Sat Below: Hon. Joann Downey, J.W.C. (Civil Action) **RESPONDENT'S BRIEF**

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PRELIMINARY STATEMENT

The issues in this case solely revolve around the appellant's unhappiness with the trial judge's factual findings. More specifically, the appellant is unhappy with the trial judge's factual finding that Ricardo Munoz did not voluntarily resign from working at Costco and instead stopped working due to the ongoing, debilitating, residuals of his work injury and was entitled to total temporary disability benefits (TTD). The appellant is likewise unhappy with the trial judge's factual finding that Mr. Munoz's work-related right knee medial meniscus tear and resulting surgery activated and aggravated his previously asymptomatic right knee osteoarthritis. The trial judge's factual findings are well supported by the record below.

PROCEDURAL HISTORY

The procedural history outlined in the appellant's brief is accurate. The Court should also note that the appellant paid the outstanding total temporary disability (TTD) benefits ordered by Judge Downey to Mr. Munoz.

STATEMENT OF FACTS

The appellant's statement of facts, while self-serving, is generally accurate with the following exceptions:

Mr. Munoz testified that he started working for Costco because he wanted to supplement his retirement income and stopped working at Costco only because of the disabling, unrelenting right knee pain he sustained while working for Costco and not due to any alleged financial security (1T, 10:3-11 and 16:16 to 18:10). Indeed, Mr. Munoz planned on working for several years if he had not been injured (1T, 19:1-18). Additionally, several Costco employees were aware that he quit Costco due to the pain and limitations sustained from his work injury and resulting surgery (1T, 21:14 to 22:8).

The testimony attributed to Dr. Goldberger on pages twelve and thirteen (12-13) of the appellant's brief (discussing a 'non-functional piece of anatomy') is not supported in the record nor the appellant's transcript citation.

Dr. Richmond, the treating doctor selected by the appellant, testified that Mr. Munoz did not have any prior right knee complaints or medical treatment (4T, 87:4-14) before his Costco work accident. Further, Dr. Richmond confirmed that Mr. Munoz only complained about "patella" pain after Dr. Richmond's right knee surgery and was only diagnosed with "chondromalacia" (arthritis) after surgery (4T. 96:2 to 97:1). Likewise, Mr. Munoz was only diagnosed with "anterior" knee pain and effusion after surgery (4T, 98:18 to 99:11). Indeed, Dr. Richmond admitted that Munoz only became symptomatic for his right knee "degenerative joint disease" (arthritis) after he returned to work full duty after surgery (4T. 105:19-23).

Dr. Richmond disputes that Mr. Munoz's work accident aggravated Mr. Munoz's pre-existing right knee osteoarthritis because the work injury resulted from "normal lifting activities" (4T, 103:10-20 and Aa 269). However, it is undisputed that the generator that Mr. Munoz was lifting when he twisted his right knee weighed approximately three hundred (300) pounds (1T, 9:21-24).

Dr. Richmond's review of Mr. Munoz's x-ray images also confirm that Mr. Munoz's patellar-femoral degenerative joint disease progressed from "mild" on May 11, 2022 (Ra 2) to "mild, moderate" on June 27, 2023 (Aa 268) (4T, 102:18-22).

Dr. Frederick Song is the court appointed expert orthopedic surgeon who examined Mr. Munoz, issued a narrative report and testified at trial (5T, 3:1-18). Dr. Song's April 29, 2024 narrative report was admitted as evidence (Aa 294) and confirmed that Mr. Munoz's medial compartment osteoarthritis was worsened due to his work-related injury and resulting surgery.

In June of 2024, while the motion hearing below was still pending, the appellant agreed to authorize Dr. Richmond to treat Mr. Munoz for his right knee arthritis, without prejudice. The respondent, however, refused to acknowledge its obligation to pay Mr. Munoz TTD and the motion hearing continued.

Dr. Song then testified on September 18, 2024 that while he cannot definitively state that Mr. Munoz's medial compartment injury and resulting surgery worsened his pre-existing patellofemoral arthritis, his injury likely "exacerbated the pain" and "activated his symptoms" in the patellofemoral compartment (5T, 53:5-21, 57:17-23 and 59:10 to 60:14).

LEGAL ARGUMENT

The Court is well aware of the scope of review governing workers' compensation cases. Such review is "limited to whether the findings made could have been reached on sufficient credible evidence present in the record…with due regard also to the agency's expertise." Hersh v. County of Morris, 217 N.J. 236, 242 (2014, internal cite omitted). "Deference must be accorded the factual findings and legal determinations made the judge of compensation unless they are manifestly unsupported by or inconsistent with competent relevant and reasonable credible evidence as to the offend the interests of justice." Linquist v. City of Jersey City Fire Department, 175 N.J. 244, 262 (2003, internal cite omitted). This deference is due to the "compensation court's expertise and the valuable opportunity it has had in hearing live testimony." Ribb v. County of Hudson, 472 N.J. Super. 600, 606 (App. Div. 2022, internal cite omitted).

Stated differently, "the factual findings of the compensation court are entitled to substantial deference." Ramos v. M & F Fashions, Inc., 154 N.J. 583, 594 (1998). The appellate inquiry is limited "to whether the findings made . . . could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole, with due regard to the opportunity of [the] one who heard the witnesses to judge their credibility and with due regard to [their] expertise." Ibid. internal cite omitted.

An appellate court "may not substitute (its) own factfinding for that of the [j]udge of [c]ompensation…" Lombardo v. Revlon, Inc., 328 N.J. Super. 484, 488 (App. Div. 2000). Indeed, our courts have consistently found that "[I]n reviewing the exercise of discretion it is not the appellate function to decide whether the trial court took the wisest

course, or even the better course, since to do so would merely be to substitute our judgment for that of the lower court. The question is only whether the trial judge pursues a manifestly unjust course." Gittleman v. Central Jersey Bank & Trust Co., 103 N.J. Super. 175, 179 (App. Div. 1967), reversed on other grounds, 52 N.J. 503 (1968).

Finally, the Workers' Compensation Act (Act) is "humane social legislation designed to place the cost of work-connected injury on the employer who may readily provide for it as an operating expense." Valdez v. Tri-State Furniture, 374 N.J. Super. 223, 232 (App.Div. 2005, internal cite omitted). The provisions of the Act therefore are to be applied consistent with this objective and "liberally construed in favor of employees to further its beneficial purpose." Ibid.

Given this framework, the appellant has not shown (and cannot show) that Judge Downey's factual findings were not adequately supported in the record, yet alone offensive to the interests of justice.

I. THE TRIAL COURT'S FACTUAL FINDING THAT MR. MUNOZ DID NOT VOLUNTARILY RESIGN IS WELL SUPPORTED IN THE RECORD.

At trial, the appellant strenuously argued that Mr. Munoz had voluntarily removed himself from the workforce on September 29, 2022, thus making him ineligible for TTD pursuant to Cunningham v Atlantic States Cast Iron Pipe, Co., 386 N.J. Super 423 (App. Div. 2006). More particularly, the appellant asserts that when Mr. Munoz signed a resignation form on September 29, 2022, stating he was resigning from Costco due to "personal reasons" (AA 280), he forfeited his right to TTD.

The respondent does not dispute the holding in Cunningham and admits that Cunningham and its progeny stand for the proposition that since TTD "constitute replacement for actual wage loss, the employee must prove that but for the (work) disability he would have been employed." Id at 425. As such, those who voluntarily remove themselves from the workforce, for reasons unrelated to their work injury, are ineligible to receive TTD. Indeed, the court in Cunningham specifically found that Mr. Cunningham leaving his job "was not related in any way to his disability" and that "(w)e do not suggest expert testimony is a necessary element of proof." Id at 434.

The facts in this case are markedly different and Judge Downey's factual finding that Mr. Munoz did not 'voluntarily' resign from Costco and instead only stopped working due to his unrelenting work-related right knee pain and resulting limitations, is well supported in the record.

It is undisputed that on August 2, 2022, approximately ten weeks after performing right knee surgery on Mr. Munoz, Dr. Richmond discharged Mr. Munoz from medical care with full duty work status. Upon returning to full duty work, Mr. Munoz testified

that his right knee would regularly "blow up" during his work shift making it difficult for him to walk or even get into his vehicle. After completing each work shift, he was unable to do even simple activities like climbing the steps to his home or go food shopping due to his right knee. Prior to being discharged from treatment, Mr. Munoz testified that he would regularly tell Dr. Richmond of the difficulties he was having at work due to his right knee pain and was only told to "continue working full duty" (1T, 14:2 to 19:18).

Mr. Munoz testified that his "co-workers" and "managers" were aware that he needed to quit Costco due to his right knee pain and resulting difficulties. More specifically, Mr. Munoz testified that he complained to his co-workers and managers about his pain and that these same people observed firsthand the difficulties he was having due to his right knee (1T 21:14 to 23:21).

Additionally, Mr. Munoz testified that upon signing his resignation form, he told the manager who completed the form that he "couldn't continue working because my knee was just painful and I can't keep working in sales" (1T, 46:15-17).

Judge Downey, in evaluating the evidence, found that Mr. Munoz was "extremely credible" (Aa 28) and noted that Mr. Munoz was still walking with a limp when he testified on October 11, 2023 (Aa 11). Substantial, convincing medical evidence was also presented below. Ibid.

More particularly, both Dr. Goldberger and Dr. Song testified that Mr. Munoz could only work with restrictions. Dr. Goldberger testified that Mr. Munoz could only perform "modified sedentary duty" work and explained this means a "sit-down job" (3T. 39:8-21). Similarly, Dr. Song testified that as of his April 29, 2024 evaluation, Mr.

Munoz could only work "as tolerated". Dr. Song explained that if certain job activities caused subjective complaints of pain along with objective findings such as "swelling and stiffness", Mr. Munoz should stop doing those activities. Dr. Song also testified that if Mr. Munoz was as symptomatic in September of 2022 as he was during his April 2024 evaluation, his work restrictions would have been the same in September of 2022. (5T, 28:13 to 29:9 and 57:25 to 58:22).

The appellant offered no evidence disputing these objective or subjective findings of injury and, most strikingly, Dr. Richmond confirmed that Mr. Munoz "had symptoms of knee pain complaints" as of his final June 27, 2023 office visit and that he would have recommended certain job restrictions "regardless of cause so as to not aggravate the pain he was suffering from and/or create any other problems with the knee" (4T, 82:8-16).

II. THE TRIAL COURT'S FACTUAL FINDING THAT MR. MUNOZ'S PRE-EXISTING, ASYMPTOMATIC, OSTEOARTHRITIS WAS WORSENED BY (AND BECAME SYMPTOMATIC FROM) HIS COSTCO WORK ACCIDENT IS WELL SUPPORTED IN THE RECORD.

At the hearing below, all three testifying doctors agreed that Mr. Munoz sustained a work-related right knee medial meniscus tear that required surgery. Each doctor also agreed that Mr. Munoz had preexisting right knee osteoarthritis. The doctors also agreed that Mr. Munoz did not have any right knee symptoms or limitations in the months and years preceding his January 2, 2022 work accident and that Mr. Munoz was not having any difficulties performing his normal work activities at Costco before his January 2, 2022 work accident.

Dr. Goldberger and Dr. Song, however, found that Mr. Munoz's work accident and resulting surgery aggravated and activated his previously asymptomatic right knee osteoarthritis while Dr. Richmond consistently testified that Mr. Munoz's right knee injury and resulting surgery did not aggravate, accelerate or activate Mr. Munoz's pre-existing, asymptomatic. right knee osteoarthritis.

In cases dealing with the aggravation, exacerbation or acceleration of a preexisting condition (such as arthritis), the law is well settled:

> New Jersey adheres to the proposition that the employer takes the employee as the employer finds the employee, with all of the pre-existing disease and infirmity that may exist. Therefore, the employee is not disqualified under the requirement that the injury arise out of the employment where the pre-existing condition is aggravated. accelerated or combined with the pre-existing disease or infirmity to produce the disability for which compensation is sought...The rule has long been established that, in cases of injury from accident arising out of and in the course of the employment. the employer takes the employee as he finds him with his existing disabilities and weaknesses. and that the workman is entitled to compensation for all of the consequences flowing freely and naturally from his accidental injury. irrespective of the fact that such consequences may be

> much more severe by reason of his pre-existing condition or defect. Verge v. County of Morris, 272 N.J. Super. 118, 125-126 (App. Div.1994, internal cites omitted).

Further, an employer must provide medical treatment benefits for the aggravation, acceleration and exacerbation of a pre-existing condition. "Employees are not disqualified under the requirement that the injury arise out of the employment where the pre-existing condition is aggravated, accelerated or combined with the pre-existing disease or infirmity to produce the disability for which compensation is sought." Sexton v. County of Cumberland/Cumberland Manor, 404 N.J. Super 542, 555 (App. Div. 2009, internal cite omitted).

Stated differently, a respondent can only succeed in rejecting an aggravation of a pre-existing injury claim if "the preexisting condition is the **sole** cause of the injury for which compensation is sought." Id at 556, emphasis supplied.

At the conclusion of the hearing below, Judge Downey weighed the evidence and considered the credibility of each doctor, ultimately finding that the evidence presented by Mr. Munoz was convincing and believable, thus satisfying his burden of proof. Judge Downey's factual findings are well supported in the record.

While a workers' compensation judge must "carefully explain why [they] considered certain medical conclusions more persuasive than others." Smith v. John L. Montgomery Nursing Home, 327 N.J. Super. 575, 579 (App. Div. 2000). once that is done an appellate court "may not engage in an independent assessment of the evidence as if [we] were the court of first instance." Sager v. O.A. Peterson Constr., Co., 182 N.J. 156, 164 (2004, internal cite omitted). "Accordingly, if in reviewing an agency decision, an appellate court finds sufficient credible evidence in the record to support the agency's

conclusions, that court must uphold those findings, even if the court believes that it would have reached a different result." Ibid.

More particularly, appellate courts

> especially defer to a judge of compensation's credibility findings as these determinations are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record. Moreover, it is well settled that a judge of compensation is not bound by the conclusional opinions of any one or more, or all of the medical experts. The judge is considered to have expertise with respect to weighing the testimony of competing medical experts and appraising the validity of [the petitioner's] compensation claim. That [the judge] gave more weight to the opinion of one physician as opposed to the other provides no reason to reverse th[e] judgment. Bellino v. Verizon Wireless, 435 N.J. Super. 85, 95 (App. Div. 2014, internal cites omitted).

Judge Downey recognized that in cases of conflicting medical evidence "greater weight is generally accorded to the treating physician's testimony" (Aa 24), Bialko v. H. Baker Milk Co., 38 N.J. Super 169, 171 (App. Div. 1955), *certif. denied*, 20 N.J. 535 (1956). Judge Downey also recognized, however, that she was not bound by Dr. Richmond's testimony and instead needed to weigh the conflicting proofs in arriving at her decision.

After weighing the evidence, Judge Downey found that while all three testifying doctors were credible. Dr. Richmond's opinion regarding causation was "less credible" (Aa 26). This was due to several factors.

One such factor was Dr. Richmond's August 14, 2023 addendum (Aa 269) which erroneously indicated that Mr. Munoz's injury occurred "while performing normal lifting activities". That medical note also failed to indicate the twisting nature of Mr. Munoz's injury, later acknowledged by Dr. Richmond (Aa 18, 4T, 34:15 to 35:24).

Additionally, Judge Downey found it "incredulous" that Mr. Munoz's right knee degenerative joint disease only became symptomatic (and in need of medical treatment) after Mr. Munoz returned to full duty work status after surgery (Aa 20, 4T 105:19-23). Indeed, if the "normal" physical nature of Mr. Munoz's job duties at Costco were not "well tolerated in someone who (has) such extensive patellofemoral" arthritis (Aa 269-270), why did Mr. Munoz only become unable to perform such duties after his work accident and resulting surgery?

Instead, Judge Downey found "more credible the opinion and testimony of Dr. Frederick Song, the neutral orthopedic surgeon chosen by the Court to gain additional information regarding the Petitioner's knee and causal relationship to the work accident." (Aa 21). The Court found "Dr. Song was the most clear and impressive in his testimony" and made it easy to understand that "any surgery by definition would exacerbate any arthritis because the muscles are weakened by the surgery." (Aa 26). Once again, this finding was adequately supported in the record.

Initially, Dr. Song confirmed that Dr. Richmond removed meniscus tissue in Mr. Munoz's medial knee compartment during surgery (5T, 14:21 to 15:22). Dr. Song likewise explained that meniscus tissue absorbs shock in the knee and "help cushion the knee and keep the joint moving smoothly." (5T, 16:7-12). Dr. Song then explained that the removal of meniscus tissue ("protective cushioning") in the knee increases the forces in the joint in that area as "the cartilage can contact and wear out quicker." Thus, the removal of this protective cushioning "typically will and does cause a little higher rate of arthritis compared to when someone does not have meniscus taken out the same area." (5T, 19:12 to 20:5). As such, Mr. Munoz's work injury and resulting surgery resulted in

the progression of his preexisting medial compartment arthritis (5T, 60:10-14). Dr. Song also testified that Mr. Munoz's knee injury and resulting surgery likely "exacerbated the pain" and "activated his symptoms" from his pre-existing patellofemoral arthritis (5T, 53:5-21, 57:17-23 and 59:10 to 60:14). This was because the work injury and resulting surgery inflamed and weakened the muscles surrounding the knee, resulting in the misalignment of Mr. Munoz's kneecap, which in turn caused Mr. Munoz to become symptomatic (5T, 47:16 to 48:22).

III. THE TRIAL COURT'S FACTUAL FINDING THAT ANY ATTEMPT BY MR. MUNOZ TO SECURE ADDITIONAL MEDICAL TREATMENT FROM COSTCO WOULD HAVE BEEN FUTILE IS WELL SUPPORTED IN THE RECORD.

Lastly, the appellant disputes Judge Downey's factual finding that it would have been futile for Mr. Munoz to continue to request additional medical treatment for his significant right knee symptoms. It is undisputed that the respondent consistently refused to provide medical treatment to Mr. Munoz for his right knee arthritis prior to the filing of his motion for medical benefits.

Judge Downey found that, pursuant to N.J.S.A. 34:15-15 and Benson v. Coca Cola, 115 N.J. Super. 585 (Law Div. 1971), remanded with instructions, 120 N.J. Super. 60 (App. Div. 1972), it would have been futile for Mr. Munoz to continually seek additional medical treatment from Costco. Specifically, Judge Downey found that "following his discharge from treatment by Dr. Richmond, there was no reason for Petitioner to ask for more treatment until he sought additional care on his own as Respondent would not provide the appropriate treatment to get him to function better on a daily basis." Judge Downey also found that Mr. Munoz unsuccessfully attempted to find a less strenuous position at Costco (Aa 28).

The record provides extensive support for these factual findings. More particularly, Mr. Munoz testified that upon returning to work full duty, he returned to his original sales position and continued working full duty until he resigned. Realizing that he needed additional medical treatment, Mr. Munoz contacted the workers' compensation adjuster in charge of his case, Morgan Murphy. Unfortunately, Ms. Murphy and her

subsequent replacement would not return his "numerous" phone calls. Mr. Munoz likewise told Costco employees of his need to return to see a doctor (1T, 43:1 to 44:19).

Mr. Munoz also testified that he told his Costco supervisors of the difficulties he was having with full duty work due to his right knee. Specifically, he asked Costco's administrative manager ("Natalie") if another position was available. Instead of providing Mr. Munoz with an alternate position, Natelie attempted to convince Mr. Munoz that his sales position did not involve physical tasks such as squatting, heavy lifting or kneeling. Mr. Munoz then asked his sales supervisor ("Alexis") if an administrative position answering phones was available due to his right knee symptoms. No such position was offered to Mr. Munoz (1T, 44:20 to 45:23).

Thereafter, Mr. Munoz sought legal assistance. With the assistance of counsel, Dr. Richmond reevaluated Mr. Munoz in June of 2023. While Dr. Richmond did find that Mr. Munoz required medical treatment for his "severely arthritic" right knee (Aa 260), Dr. Richmond opined that the need for such treatment was not work related and instead was due to pre-existing arthritis. Dr. Richmond also found that Mr. Munoz's job responsibilities at Costco "may not be well tolerated in someone who (has) such extensive patellofemoral DJD." (Aa 269-270).

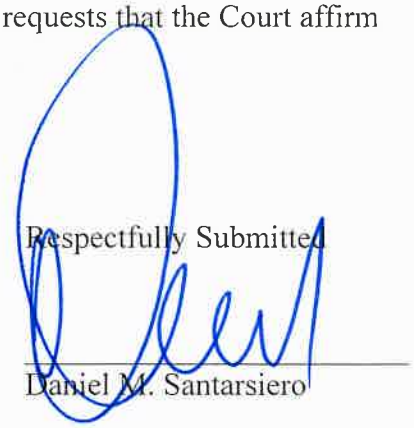
Dr. Gerardo Goldberger then examined Mr. Munoz on June 29, 2023 (Aa 275). Contrary to Dr. Richmond's opinions, Dr. Goldberger found that Mr. Munoz's need for additional medical treatment was due to his work-related right knee injury and that Mr. Munoz could only perform sedentary duty work.

Light duty work was never offered to Mr. Munoz by Costco after August 2, 2022. Furthermore, Mr. Munoz "was not obligated to establish that he was unable to find light

duty work with a new employer. That would require him to establish a negative, something the law rarely, if ever, imposes." Williams v. Topps Appliance City, 239 N.J. Super 528, 532-533 (App.Div. 1989), citing Barbato v. Alsan Masonry, 64 N.J. 514, 531, n. 2 (1974).

CONCLUSION

For all the above reasons, Mr. Munoz respectfully requests that the Court affirm the trial court's July 3, 2025 order.



Respectfully Submitted

Daniel M. Santarsiero

Superior Court of New Jersey
Appellate Division

Ricardo Munoz,	:	APPELLATE DIVISION
	:	DOCKET NO. A-003829-24
Petitioner-Respondent,	:	
	:	CIVIL ACTION
vs.	:	
	:	ON APPEAL FROM STATE OF NEW
Costco,	:	JERSEY DEPARTMENT OF LABOR
	:	AND WORKFORCE DEVELOPMENT,
Respondent-Appellant.	:	DIVISION OF WORKERS'
	:	COMPENSATION, MONMOUTH
	:	COUNTY
	:	
	:	
	:	SAT BELOW: Hon. Judge Joann Downey, Division of Workers' Compensation, Freehold, NJ
		Claim Petition No. 2023-11462

REPLY BRIEF ON BEHALF OF RESPONDENT-APPELLANT, COSTCO

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Submitted on November 10, 2025

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CASES

LEGAL ARGUMENT

I. THE CASE OF WILLIAMS V. TOPPS APPLICANCE CITY (239 N.J. SUPER. 528) DOES NOT APPLY IN THIS INSTANCE

Petitioner- Respondent ("petitioner") relies upon the case of Williams v. Topps Appliance City, 239 N.J. Super. 528, 532-33 (App. Div. 1989). Specifically, Williams states that a petitioner is "not obliged to establish that he was unable to find light duty work with a new employer" as this "would require him to establish a negative, something the law rarely, if ever, imposes". Id.

However, the facts of Williams are distinguishable from our instant matter. In Williams, petitioner sustained a work injury of June 8, 1985. Id. at 529. At the time petitioner's authorized treating doctor opined that petitioner could work light duty, his employer had no light duty work to offer petitioner. Id. at 530. The court in Williams therefore found that temporary disability benefits ("TTD") was owed to petitioner due to "evidence of his disability, his inability to perform his regular work, or light duty work as defined by [the authorized treater], and his employer's failure to provide any light duty work". Id. at 533. Williams goes on to also state, "Not until July 18, 1986 could it be said that petitioner's disability was permanent and that further treatment would not alter the disability. Id. at 533, citing Harbatuk v. S & S Furniture Sys. Insulation, 211 N.J. Super. 614, 621 (App. Div. 1986). In Williams, the court noted, "In March 1987, petitioner returned to work for a new

employer as an assistant warehouse manager basically doing office work; the new employer did not offer petitioner light duty work". Id. at 532 (emphasis added).

In the instant matter, there was no new employer; petitioner testified that following his resignation from Costco of September 29, 2022, he did not look for any other work. (1T, 48:1-3). He testified that he had not worked in any capacity since resigning from Costco. (1T, 48: 15-21).

Petitioner was not, and is not, being asked to "establish a negative" and prove that he was "unable to find light duty work with a new employer" as discussed in Williams. In this matter, there was no new employer. Petitioner did not have any other jobs while working at Costco (1T, 7:3-5), and after resigning from Costco, he did not look for any other type of work, nor did he work for any new employer. (1T, 48: 1-3, 1T 48: 4-10, 1T, 48: 11-14, 1T 48: 15-21).

It is true that the law does not require the petitioner to prove a negative; nor does it require the respondent to prove a negative. Petitioner is arguing that the employer was required to offer a light duty position to a former employee in order to stop paying TTD benefits. That is an impossibility. This would require the employer to make an offer to a non-employee who voluntarily quit the employer (in this instance, also without any physician taking him out of work, and also in this instance, per his testimony, voluntarily quit the workforce entirely).

Petitioner argues that "light duty work was never offered to Mr. Munoz by Costco after August 2, 2022". This is accurate. Dr. Richmond, on August 2, 2022, placed petitioner at MMI and opined that petitioner could work full duty. As of August 2, 2022, no physician was placing petitioner on any light duty status. Petitioner then resigned on September 29, 2022. After petitioner's resignation of September 29, 2022, Respondent obviously could not offer light duty. Nor could another employer offer light duty, as petitioner had no subsequent employment, according to his testimony. While Dr. Goldberger, in his examination of petitioner on June 29, 2023, opined that petitioner could work sedentary duty, this was nine months after petitioner had resigned from Costco, and resigned from the workforce.

Petitioner also refers to instances where petitioner purportedly complained to his co-workers about his knee and his work status. Our workers' compensation statute contains no provision allowing an injured worker to claim TTD benefits based on subjective complaints to non-medical personnel.

Respondent again emphasizes that as of June 2, 2022, petitioner was returned to work on light duty status. (Ra 238). Costco was able to accommodate petitioner's light duty work restriction as of July 12, 2022. (1T, 12:1-15). As of July 15, 2022, Dr. Richmond opined that petitioner could work full duty. (Ra 250). At no time after June 2, 2022 did any physician place petitioner out of work.

Petitioner argues that Respondent "refused to acknowledge its obligation to pay Mr. Munoz TTD" during the time when Respondent authorized Dr. Richmond to treat petitioner on a without prejudice basis. However, there was no obligation to pay petitioner TTD during this time, as at each and every visit petitioner had with Dr. Richmond during this time frame, on July 30, 2024, August 6, 2024, and August 13, 2024, Dr. Richmond opined that petitioner could work full duty.

CONCLUSION

Under our workers' compensation statute and pursuant to established case law precedent, Respondent had no obligation to pay petitioner TTD at any time where he was not under active, authorized medical treatment; being placed out of work by the authorized treating doctor; and also sustaining wage loss.

To date, no physician has taken petitioner out of work due to the January 2, 2022 work injury. Despite this, Respondent was ordered to pay TTD benefits as of September 29, 2022 onward.

As such, Respondent again respectfully asserts that the Trial Court's ruling must be reversed.

Respectfully Submitted,

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