

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3306-15T2

JENNIFER KOCANOWSKI,

Petitioner-Appellant,

v.

TOWNSHIP OF BRIDGEWATER,

Respondent-Respondent.

APPROVED FOR PUBLICATION

December 11, 2017

APPELLATE DIVISION

Argued June 6, 2017 – Decided December 11, 2017

Before Judges Messano, Suter and Grall.

On appeal from Division of Workers' Compensation, Department of Labor and Workforce Development, Docket No. 2015-29962.

Galen W. Booth argued the cause for appellant (Law Offices of Galen W. Booth, attorneys; Galen W. Booth and Peter Ventrice, of counsel and on the brief).

Jennifer A. Cottell argued the cause for respondent (Cooper, Cottell & Taylor, LLC, attorneys; Jennifer A. Cottell, on the brief).

The Blanco Law Firm, LLC, attorneys for amicus curiae New Jersey Advisory Council on Safety and Health (COSH) (Pablo N. Blanco, on the brief).

The opinion of the court was delivered by

SUTER, J.A.D.

Petitioner Jennifer Kocanowski appeals the March 30, 2016 order of the Division of Workers' Compensation (Division) denying her claim for temporary total disability benefits. We affirm.

I.

Kocanowski was a volunteer firefighter with the FINDERNE Fire Engine Company in Bridgewater Township for more than fourteen years. On March 6, 2015, when responding with her company to a "multi-alarm fire," she slipped and fell on ice, breaking her right fibula. Over the course of the next year, she had surgeries to repair her fibula, foot and left knee. She also attended physical therapy. She complained about pain in her lower back. Although she did not specifically recall it, she thought she "must have" landed on her "Scott pack" breathing apparatus, which she was carrying on her back.

Kocanowski was not employed at the time of the accident. In October 2013, she stopped working to help her ailing father, who has since passed away. She did not "look for any type of work" from then until the accident in March 2015. She was employed in the past as a nanny and certified home health aide, but her license lapsed when her father became ill. In July 2014, she resumed her activities as a volunteer firefighter. She was not paid in this capacity. She has not had any paid employment since October 2013. Kocanowski testified at trial that since the March 2015 accident,

she has not been able to return to work as a volunteer firefighter.¹ She did not believe she could "go back to nanny's work or home health care work."

Kocanowski filed an employee claim petition against respondent Township of Bridgewater (Bridgewater) in November 2015 seeking workers' compensation benefits for injuries to her "right ankle and right lower leg; left knee; [and] low back," arising from the slip and fall. In December 2015, she filed a motion for temporary disability and medical benefits. Because she was an injured volunteer firefighter, her application requested temporary disability payments at the maximum weekly benefit amount, then \$855 per week. Bridgewater filed opposition, claiming that because Kocanowski was not employed at the time of the accident, she was not entitled to temporary disability payments.²

Trial was conducted by the Division on Kocanowski's motion for medical and temporary benefits. Bridgewater stipulated only that Kocanowski slipped and fell on ice when she was a volunteer

¹ Because the issue on appeal concerns whether she is entitled to receive temporary total disability benefits, we do not recount her prior or subsequent injuries, surgeries, treatments or medical conditions.

² Bridgewater also opposed her application for medical benefits related to the back injury, claiming it was not related to the slip and fall. That issue is not on appeal here.

firefighter and received medical treatment. Kocanowski and her boyfriend testified; there was no expert testimony.

The workers' compensation judge denied Kocanowski's application for temporary benefits. Although finding that "petitioner's volunteer work is laudable and certainly entitles her to both medical treatment and permanent disability for her injuries," the judge denied the application for temporary benefits. The judge stated, "The case law in New Jersey is clear, petitioner must be receiving wages to merit receiving temporary disability replacement for those wages." Kocanowski's application for penalties under Amorosa v. Jersey City Welding & Machine Works, 214 N.J. Super. 130 (App. Div. 1986), also was denied. The March 30, 2016 order denied temporary benefits but provided that "[i]ssues of medical treatment remain pending."³

On appeal, Kocanowski contends that as a firefighter injured in the line of duty, she is entitled to temporary disability payments under N.J.S.A. 34:15-75 and N.J.S.A. 34:15-43 at the maximum rate of compensation, whether or not she was earning a wage at the time of the accident. She argues the Division erred in denying her application just because she was unemployed. She

³ Kocanowski acknowledges that Bridgewater has paid her medical bills.

argues the order was contrary to "prevailing caselaw, and public policy," as well as the "intent of the Legislature."⁴

II.

Where the question raised is legal, not factual, we owe no "special deference" to the compensation judge's "interpretation of the law and the legal consequences that flow from established facts." Hitesman v. Bridgeway, Inc., 218 N.J. 8, 26 (2014) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). Our review is de novo. Twp. of Holmdel v. N.J. Highway Auth., 190 N.J. 74, 86 (2007).

The Workers' Compensation Act (Act), N.J.S.A. 34:15-1 to -142, is remedial legislation which is liberally construed. Cuna v. Bd. of Fire Comm'rs, 42 N.J. 292, 298 (1964). Its primary purpose is "to provide an employee, when he [or she] suffers a work-connected injury, with a speedy and efficient remedy for loss of wages." Cureton v. Joma Plumbing & Heating Co., 38 N.J. 326,

⁴ Amicus curiae, New Jersey Advisory Council on Safety and Health agrees with Kocanowski that volunteer firefighters are entitled to temporary disability because N.J.S.A. 34:15-75 "decouples the right to workers compensation benefits from any connection to actual wages."

331 (1962). The compensation judge's decision on a claim is "final and conclusive between the parties." N.J.S.A. 34:15-58.⁵

Temporary disability benefits "provide an individual who suffers a work-related injury with a 'partial substitute for loss of current wages.'" Cunningham v. Atl. States Cast Iron Pipe Co., 386 N.J. Super. 423, 428 (App. Div.) (quoting Ort v. Taylor-Wharton Co., 47 N.J. 198, 208 (1966)), certif. denied, 188 N.J. 492 (2006). They are payable at "70% of the worker's weekly wages received at the time of the injury, subject to a maximum compensation of 75% of the average weekly wages earned by all employees covered by the 'unemployment compensation law' and a minimum of 20% of such average weekly wages a week." N.J.S.A. 34:15-12(a) (emphasis added) (citation omitted). "[T]emporary disability [payments] continue[] until the employee is able to resume work and continue permanently thereat or until he [or she] is as far restored as the permanent character of the injuries will permit, whichever happens

⁵ This appeal is from the denial of temporary disability payments. The court did not resolve the issue of medical payments. Although we might have concluded this appeal was interlocutory requiring leave, we rely upon our prior decisions in Della Rosa v. Van-Rad Contracting Co., 267 N.J. Super. 290, 293-94 (App. Div. 1993), and Hodgdon v. Project Packaging, Inc., 214 N.J. Super. 352, 360 (App. Div. 1986), that an award or denial of temporary disability benefits is a final judgment and appealable as of right. But see, Andersen v. Well-Built Homes of Cent. Jersey, Inc., 69 N.J. Super. 246, 254 (App. Div. 1961) (stating an award of temporary disability benefits is "not appealable as of right prior to a final judgment disposing of all issues").

first." Cunningham, supra, 386 N.J. Super. at 427-28 (alteration in original) (quoting Monaco v. Albert Maund, Inc., 17 N.J. Super. 425, 431 (App. Div. 1952)). This period is not to exceed 400 weeks. N.J.S.A. 34:15-12(a).

"To calculate the number of weeks and fraction thereof that compensation is payable for temporary disability," the statute provides as a starting point to "determine the number of calendar days of disability from . . . the day that the employee is first unable to continue at work by reason of the accident." N.J.S.A. 34:15-38 (emphasis added). Then, the date "the employee is able to resume work and continue permanently thereat" is determined. Ibid. (emphasis added). A seven-day waiting period is subtracted and the remainder is divided by seven. Ibid.

Given the statutory reference to "weekly wages," the ability to "continue at work" and to "resume work," cases have held that an "[a]ctual absence from work is a prerequisite to a temporary disability award." Cunningham, supra, 386 N.J. Super. at 428. The workers' compensation judge must find a claimant actually lost income "because of [a] disability." Id. at 433.

Kocanowski argues there are specific provisions within the workers' compensation statutes that not only address volunteer firefighters but that require different treatment for their temporary disability claims. Under N.J.S.A. 34:15-43, "each and

every member of a volunteer fire company doing public fire duty . . . who may be injured in line of duty shall be compensated under and by virtue of the provisions of this article⁶ and article 2 of this chapter (R.S. 34:15-7 et seq.)." "'[D]oing public fire duty' and 'who may be injured in line of duty' . . . shall be deemed to include . . . the rendering of assistance in case of fire" Ibid. Members of a volunteer fire company are "deemed" to be conducting these duties "under the control or supervision of any such . . . governing body." Ibid.

Another portion of the statute states, the "[c]ompensation for injury and death" of "any volunteer fireman" shall be "based upon a weekly salary or compensation" that is "conclusively presumed" to be the maximum allowed by "this chapter."⁷ N.J.S.A. 34:15-75. Also, the seven-day waiting period is expressly waived. N.J.S.A. 34:15-75(b). Because these statutes do not reference weekly wages or resuming work, Kocanowski contends that she is entitled to temporary disability benefits even though she was not employed at the time of her injury.

We agree with the compensation judge's application of these statutes that barred Kocanowski's receipt of temporary disability

⁶ This reference is to N.J.S.A. 34:15-36 to -48.

⁷ This reference is to the Act.

benefits. There is no question that volunteer firefighters are within the scope of the workers' compensation statute and that they are treated as under the control and supervision of their governing body. But, we find no support for the notion that the provisions regarding firefighters were to stand alone without reference to the other sections of the statute. See Brown v. Twp. of Old Bridge, 319 N.J. Super. 476, 498 (App. Div. 1999) (citations omitted) (quoting Mimkon v. Ford, 66 N.J. 426, 433 (1975)) (providing that "[s]tatutes which deal with the same matter or subject and which seek to achieve the same overall legislative purpose should be read 'in para materia.'").

Kocanowski's claim is at odds with the underlying reason for awarding temporary disability, which is to replace lost wages. It is at odds with the method for calculating temporary disability, which is to consider weekly wages. When the legislature enacted the provisions that addressed firefighters and others, it did not make any special provisions for calculating temporary disability in a different way. Indeed, the case law is clear that where there are no wages lost, the payment of temporary disability is considered a windfall.

In Calabria v. Liberty Mutual Insurance Co., 4 N.J. 64, 68 (1950), the Supreme Court found an employee, who continued to work even though he alleged exposure to chrome poisoning, could not

make a claim for temporary disability because "there had been no absence from work."

In Electronic Associates, Inc. v. Heisinger, 111 N.J. Super. 15, 20 (App. Div.), certif. denied, 75 N.J. 139 (1970), we held that an employee who voluntarily terminated her employment did not suffer a current wage loss and was not entitled to temporary disability payments. "Temporary disability benefits within the intendment of workmen's compensation legislation represent a 'partial substitute for loss of current wages.'" Ibid. (citations omitted) (citing Ort v. Taylor-Wharton Co., 47 N.J. 198, 208 (1966)). We referenced the language in N.J.S.A. 34:15-38 that used the terms "working day" and "able to resume work," stating "[t]his phraseology strongly suggests that temporary disability has relevance only in an employment situation wherein the injured workmen's enjoyment of current wages has been suspended by a work-connected injury." Id. at 21.

In Tamecki v. Johns-Manville Products Corp., 125 N.J. Super. 355 (App. Div. 1973), certif. denied, 64 N.J. 495 (1974), we held that a college student was not entitled to additional temporary disability benefits. There, the petitioner was not available to work because of his college program and not because of his injury, and as such, he did not suffer wage loss. Id. at 359-60.

In Outland v. Monmouth-Ocean Education Service Commission, 154 N.J. 531, 540 (1998), the Supreme Court remanded a teacher's claim for temporary benefits to determine whether the teacher's injury during the school year actually "caused her to lose income she could otherwise have earned from summer employment." Id. at 543. The Court held that the teacher, who was employed under a ten-month contract, could receive temporary disability benefits for the summer recess period if she could prove she "planned to work during the summer recess but her injury prevented her." Id. at 542. If she "planned to relax all summer the benefits would represent a windfall." Ibid.

More recently in Cunningham, we held that "[a]ctual absence from work is a prerequisite to a temporary disability award." 386 N.J. Super. at 428. We agreed with Heisinger that temporary disability was not due where the employee "remov[ed] herself from the workforce" because an award in those circumstances "would have been impermissibly based on a fictitious wage-earning status during the period of her disability." Id. at 432. All of these cases required proof of lost income as a prerequisite for an award of temporary disability benefits.

We are not persuaded by Kocanowski's argument that our decision in Capano v. Bound Brook Relief Fire Co., 356 N.J. Super. 87 (App. Div. 2002), certif. denied, 175 N.J. 550 (2003), leads

to a different result. In Capano, the petitioner was a ninety-three-year-old man who had served as a volunteer firefighter for the Borough of Bound Brook since he was eighteen. He "no longer attended drills nor responded to the scene of a fire," id. at 89, but spent time at the firehouse cleaning up and taking care of the wood-burning stove that heated the firehouse. He fell and fractured his hip when tending the fire. He was awarded temporary and permanent disability benefits.

The issue addressed in Capano centered on whether tending the fire constituted "in the line of duty," id. at 94, qualifying him for benefits under N.J.S.A. 34:15-43. There was no discussion about the issue before us here. There was no reference to the temporary disability statute or to N.J.S.A. 34:15-75. We do not view that case as controlling on the issue raised here in the absence of analysis.

We agree with the compensation judge that although a volunteer firefighter is entitled to temporary benefits at the maximum rate and that the seven-day waiting period does not need to be served, there first must be an entitlement by the volunteer to payment of temporary benefits. That payment depends on proof of lost wages. Neither the cases nor the statutes supports Kocanowski's argument that lost wages are not required for volunteer firefighters who

are injured. Because there was no proof of lost wages, there is no entitlement to payment of temporary disability benefits.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.



CLERK OF THE APPELLATE DIVISION