



## **NEW JERSEY LAW REVISION COMMISSION**

### **Final Report**

### **Regarding Temporary Disability Benefits to Certain Volunteers and Other Workers Pursuant to N.J.S. 34:15-75**

**January 21, 2021**

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.

Please consult the New Jersey statutes to determine the law of the State.

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## Executive Summary<sup>1</sup>

The efforts and risks borne by volunteer firefighters have long been legally recognized by certain protections and exemptions in New Jersey's employment law. The Workers' Compensation Act (the "Act") delineates workers' compensation benefits for such voluntary services. The New Jersey Supreme Court has, however, identified specific language contained in the Act that it considers to be unclear. Although extrinsic evidence suggests a history of legislative expansion for these protections, the statute does not reflect the intent of the Legislature.

The Commission proposes modifications to the current workers' compensation statute, N.J.S. 34:15-75, to clarify that regardless of their outside employment at the time of the injury, certain volunteer employees and other workers should be eligible to collect benefits for either injury or death that occurs during the course of performing their duties.

### Statute Considered

N.J.S. 34:15-75, pertains to compensation for injury and death to certain volunteers and other workers, and it provides:

Compensation for injury and death, either or both, of any volunteer fireman, county fire marshal, assistant county fire marshal, volunteer first aid or rescue squad worker, volunteer driver of any municipally-owned or operated ambulance, forest fire warden or forest fire fighter employed by the State of New Jersey, member of a board of education, special reserve or auxiliary policeman doing volunteer public police duty under the control or supervision of any commission, council or any other governing body of any municipality, emergency management volunteer doing emergency management service, health care workers, public health workers and support services personnel registered with the Emergency Health Care Provider Registry pursuant to section 6 of P.L.2005, c. 222 (C.26:13-6) and doing emergency management service for the State, or any volunteer worker for the Division of Parks and Forestry, the Division of Fish and Wildlife, the New Jersey Natural Lands Trust or the New Jersey Historic Trust, shall:

a. Be based upon a weekly salary or compensation conclusively presumed to be received by such person in an amount sufficient to entitle him, or, in the event of

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<sup>1</sup> Preliminary work on this topic was performed by Katherine DeMottie during her time as a legislative intern with the New Jersey Law Revision Commission. Memorandum from Katherine DeMottie on Temporary Disability Benefits for Volunteer Firefighters to the New Jersey Law Revision Commission 1 (Apr. 04, 2019) (on file with the Commission). See NEW JERSEY LAW REVISION COMMISSION (2019) 'Temporary Disability Benefits for Volunteer Firefighters'. *Minutes of NJLRC meeting 18 Apr. 2019*, Newark, New Jersey.

his death, his dependents, to receive the maximum compensation by this chapter authorized; and [...] shall:

b. Not be subject to the seven-day waiting period provided in R.S.34:15-14.

### **Background**

In response to a multi-alarm fire, Jennifer Kocanowski (“Kocanowski” or “Plaintiff”) and other volunteer firefighters responded to the call.<sup>2</sup> While performing her duties as a firefighter, Kocanowski broke the upper shaft of her right fibula, severely damaged her ankle, and tore several ligaments.<sup>3</sup> She required multiple surgeries and received numerous medical treatments for her injuries.<sup>4</sup> As a result, she was unable to return to volunteer firefighting or her previous employment as a nanny or home health care aide.<sup>5</sup>

At the time that Kocanowski sustained her injuries she had been working as a volunteer firefighter for approximately seventeen years.<sup>6</sup> In addition to her volunteer work, she usually maintained outside employment.<sup>7</sup> Prior to sustaining her injuries as a firefighter, she had taken leave from her outside employment in order to provide care for her dying father and her ill mother.<sup>8</sup> Thus, at the time of her accident, she had no outside employment and no other source of income.<sup>9</sup> She did, however, receive \$125 per week in benefits from the volunteer fire company during the year following her accident.<sup>10</sup>

A claim for temporary disability benefits, pursuant to N.J.S. 34:15-75, was filed with the Division of Workers’ Compensation.<sup>11</sup> The Division of Workers’ Compensation judge heard and denied the plaintiff’s application for benefits.<sup>12</sup> The Court based its denial on the grounds that temporary disability benefits were intended to be a wage-replacement.<sup>13</sup> The Court noted that Kocanowski had not been employed at the time of her accident, and she was therefore not entitled to temporary benefits.<sup>14</sup>

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<sup>2</sup> *Kocanowski v. Twp. of Bridgewater*, 237 N.J. 3, 6 (2019).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 6-7.

<sup>10</sup> *Id.* at 7.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

The Appellate Division affirmed the denial of benefits to the Plaintiff.<sup>15</sup> The Court opined that “pre-injury outside employment is a necessary predicate to awarding temporary disability benefits to volunteer firefighters.”<sup>16</sup> In order for a claimant to receive temporary disability benefits, a claimant must provide proof of lost income.<sup>17</sup> Thereafter, the Plaintiff appealed the judgment of the Appellate Division.<sup>18</sup>

The New Jersey Supreme Court granted the Plaintiff’s petition for certification.<sup>19</sup>

### Analysis

In *Kocanowski*, the Supreme Court considered the provisions of the Workers’ Compensation Act (the “Act”)<sup>20</sup> in the context of an unemployed, volunteer firefighter injured in the line of duty who thereafter sought temporary disability benefits.<sup>21</sup> Pursuant to N.J.S. 34:15-75, a volunteer firefighter may recover temporary disability benefits under the Act for injury and death, either or both.<sup>22</sup> The statute further provides that the compensation award is “...based on a weekly salary or compensation conclusively presumed to be received by such person in an amount sufficient to entitle him [or her]... to receive the maximum compensation by this chapter authorized....”<sup>23</sup> This statutory reference, however, is subject to more than one interpretation.<sup>24</sup>

Given the statute’s lack of clarity, the *Kocanowski* Court undertook an examination of extrinsic evidence, including the legislative history of the statute.<sup>25</sup>

Enacted in 1911, the Workers’ Compensation Act was subsequently amended in 1931.<sup>26</sup> The requirement that every municipality and fire district provide compensation insurance for volunteer firefighters was enacted in 1931, and was set forth in N.J.S. 34:15-75.<sup>27</sup> This newly created requirement set forth explicit protection for “volunteer firefighters who did not have

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<sup>15</sup> *Id.* See *Kocanowski v. Twp. of Bridgewater*, 452 N.J. Super. 476, 478, 483 (App. Div., 2017).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 8.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> N.J. STAT. ANN. § 34:15-1 to -146 (West 2020).

<sup>21</sup> *Kocanowski v. Twp. of Bridgewater*, 237 N.J. 3 (2019).

<sup>22</sup> N.J. STAT. ANN. § 34:15-75 (West 2020).

<sup>23</sup> *Kocanowski*, 237 N.J. at 10 quoting N.J.S. 34:15-75.

<sup>24</sup> *Kocanowski*, 237 N.J. at 9. The Plaintiff argues that based upon the statutory history of the Act, the requirement that temporary disability benefits be awarded only to replace lost wages does not apply to volunteer firefighters. Conversely, the Defendant argues that these benefits were intended to replace lost wages and are thus unavailable to unemployed, volunteer firefighters.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 10-11.

<sup>27</sup> *Id.* at 11.

ordinary wages or salaries or who were unemployed at the time of their injury....”<sup>28</sup> In its original form, N.J.S. 34:15-75 provided, in relevant part:

“[A]ny volunteer fireman whose income is derived from any source other than wages or salaries shall be entitled to receive the maximum compensation ... and where not employed at the time of ... injury, such compensation shall be ascertained and paid upon the basis of the weekly compensation last received by such person when so employed.”<sup>29</sup>

This statute was amended in 1952 to its current form.<sup>30</sup>

The New Jersey Supreme Court recognized both the important role of volunteer firefighters in New Jersey and the intent of the Legislature to encourage such work through protective legislation.<sup>31</sup> The New Jersey judiciary has liberally construed the Workers’ Compensation Act to provide coverage for volunteer firefighters in recognition of the protections and benefits created by the Legislature.<sup>32</sup> After years of expanding the protections and exemptions for volunteer firefighters, the Court determined that it would be “incongruous and inconsistent... for the Legislature to abruptly limit the class of volunteers... who qualified for temporary disability from any volunteer firefighter who had ever been employed to only volunteer[s...] employed at the time of injury.”<sup>33</sup> The Court therefore concluded that N.J.S. 34:15-75 should not be used as not a barrier to temporary disability coverage.<sup>34</sup>

The “method of calculating compensation for temporary disability” outlined in N.J.S. 34:15-38 contains language such as “unable to continue at work” and “able to resume work,” which the Defendant suggests limits coverage to firefighters with outside employment at the time of their accident.<sup>35</sup>

The *Kocanowski* Court determined that N.J.S. 34:15-38, was drafted as a general, all-purpose, statute that is not specific to firefighters.<sup>36</sup> This statute existed at the same time as the pre-1952 version of N.J.S. 34:15-75.<sup>37</sup> It did not serve as a bar to benefits prior to 1952, and the Court was unwilling to read the statute in such a way as to bar them in this case.<sup>38</sup> In addition, the Court

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 12.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 13, citing N.J.S. 34:15-38.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

posited that a volunteer firefighters injured while performing their duties “**were at work, [are] unable to continue at work and... are unable to return to work.**”<sup>39</sup> Finally, requiring outside employment, as suggested by N.J.S. 34:15-38, would lead to an absurd result because a firefighter, employed or unemployed, is required to take the same risk in their duties for the fire department.<sup>40</sup>

The New Jersey Supreme Court reversed the judgment of the Appellate Division decision and remanded the matter to the Division of Workers’ Compensation for the award of benefits consistent with the Court’s opinion.<sup>41</sup> In doing so, the Court concluded that “the Legislature’s amendment in 1952 creating the current version of N.J.S.[ ] 34:15-75 was intended to grant all volunteer firefighters the maximum compensation allowed, regardless of current or previous income.”<sup>42</sup>

While the Legislature may have intended to broaden the protections of volunteer workers under the Workers’ Compensation Act, the current wording of the statute may impede this objective.

## Outreach

In connection with this Report, Staff sought comments from several knowledgeable individuals and organizations. These stakeholders included: the Workers’ Compensation Section of the New Jersey State Bar Association; the Police and Firemen’s Retirement System of New Jersey; the New Jersey Council on Safety and Health; the New Jersey Compensation Association; the Department of Labor and Workforce Development; the Director of the Division of Workers’ Compensation; the New Jersey Self-Insurers Association; and, private practitioners.

### • *Opposition*

It has been suggested that the N.J.S. 34:15-75 is neither vague nor opaque and is not in need of clarification.<sup>43</sup> The doctrine set forth in *Cunningham v. Atlantic States Cast Iron Pipe Co.*<sup>44</sup> which provides that a claimant is only entitled to temporary disability benefits after termination for cause upon a showing of lost wages to injury has been applied inconsistently in workers’

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<sup>39</sup> *Id.* (Emphasis added).

<sup>40</sup> *Id.* at 14 (observing that such an interpretation would allow a volunteer firefighter working for a de minimis salary to automatically receive the maximum compensation while an unemployed volunteer would receive no benefit at all).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> E-mail from Richard Rubenstein, Esq., Rothenberg Rubenstein Berliner & Shinrod, LLC, to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission (Oct. 27, 2020, 15:28 EST) (on file with the NJLRC).

<sup>44</sup> *Cunningham v. Atl. States Cast Iron Pipe Co.*, 386 N.J. Super. 423, (App. Div. 2006) (holding that a claimant would be entitled to temporary disability benefits after termination for cause upon showing of lost wages due to injury).

compensation cases.<sup>45</sup> The application of the *Cunningham* doctrine has “...wreaked havoc in the Division of Workers['] Compensation since it was decided....”<sup>46</sup> The impact of this issue, is of “... great moment to the [W]orker’s [C]ompensation Bar.”<sup>47</sup>

- *Support*

The members of the Workers’ Compensation Section of the New Jersey State Bar Association (NJSBA) reviewed the Commission’s Report.<sup>48</sup> The members of this section “...agree that changes to the Workers’ Compensation Act are necessary to clarify the New Jersey Supreme Court’s conclusion in *Kocanowski v. Twp. of Bridgewater*....”<sup>49</sup> In addition, “... the Legislature intended to grant volunteer workers the maximum compensation allowed, regardless of current or previous income.”<sup>50</sup> The recommended changes, according to the NJSBA, “...provide that clarification, consistent with the Court’s decision.”<sup>51</sup>

Galen W. Booth, counsel for the appellant, Jennifer Kocanowski in the appeal before the New Jersey Supreme Court, furnished comments to the Commission regarding this Report.<sup>52</sup> Regarding the Commission’s proposed modifications, Mr. Booth opined, “...I fully support the amendment of the statute[ ] [*sic*] in question to comport with the Supreme Court’s landmark decision....”<sup>53</sup>

## Conclusion

A review of N.J.S. 34:15-75 suggests that it is capable of more than one plausible interpretation. The modification of this statute is intended to clarify the law contained in this statutory provision. The Appendix on the following page sets forth the proposed modifications to N.J.S. 34:15-75.

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<sup>45</sup> Rubenstein to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission (Oct. 27, 2020, 15:28 EST) (on file with the NJLRC).

<sup>46</sup> *Id.*

<sup>47</sup> E-mail from Richard Rubenstein, Esq., Rothenberg Rubenstein Berliner & Shinrod, LLC, to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission (Oct. 27, 2020, 15:41 EST) (on file with the NJLRC).

<sup>48</sup> Letter from Kimberly A. Yonta, President of the New Jersey State Bar Association to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission \*1 (Dec. 14, 2020) (on file with the NJLRC).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> E-Mail from Galen W. Booth, Esq., Attorney for Kimberly Kocanowski, to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission (Oct. 27, 2020, 16:34 EST) (on file with the NJLRC).

<sup>53</sup> *Id.*

## Appendix

The proposed modifications to **N.J.S. 34:15-75 Compensation for injury and death to certain volunteers and other workers** (shown with ~~strikethrough~~, or underlining), follows:

Compensation for either injury, ~~and~~ death, ~~either~~ or both, of any volunteer ~~fireman~~ fire fighter, county fire marshal, assistant county fire marshal, volunteer first aid or rescue squad worker, volunteer driver of any municipally-owned or operated ambulance, forest fire warden or forest fire fighter employed by the State of New Jersey, member of a board of education, special reserve or auxiliary ~~police~~ police officer doing volunteer public police duty under the control or supervision of any commission, council or any other governing body of any municipality, emergency management volunteer doing emergency management service, health care workers, public health workers and support services personnel registered with the Emergency Health Care Provider Registry pursuant to section 6 of P.L.2005, c. 222 (C.26:13-6) and doing emergency management service for the State, or any volunteer worker for the Division of Parks and Forestry, the Division of Fish and Wildlife, the New Jersey Natural Lands Trust or the New Jersey Historic Trust, that occurs during the course of performing his or her duties shall:

a. ~~Be based upon a weekly salary or compensation conclusively presumed to be received by such person in an amount sufficient to entitle him, or, in the event of his death, his dependents, to receive equal~~ the maximum compensation ~~by this chapter~~ authorized by this chapter regardless of his or her outside employment status at the time of the injury; and,

b. ~~Not~~ not be subject to the seven-day waiting period provided in R.S.34:15-14.

Credits: Amended by L.1945, c. 74, p. 398, § 18; L.1952, c. 316, p. 1037, § 2; L.1953, c. 340, p. 1898, § 2; L.1967, c. 297, § 2, eff. Feb. 15, 1968; L.1978, c. 145, § 3, eff. Nov. 22, 1978; L.1995, c. 383, § 3, eff. Feb. 9, 1996; L.1997, c. 199, § 3, eff. Sept. 13, 1997; L.2001, c. 328, § 2, eff. Jan. 5, 2002; L.2005, c. 222, § 34, eff. Sept. 14, 2005.

### Comment

The proposed modifications are based upon the New Jersey Supreme Court's decision in *Kocanowski v. Twp. of Bridgewater*, 237 N.J. 3 (2019).