



## Currents In ADA/ FMLA/ Workers' Compensation

CAPEHART SCATCHARD ATTORNEYS AT LAW

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## The Accidental Disability Bonanza In New Jersey

by John H. Geaney, Esq.

Readers often ask about the rules on accidental disability pensions in New Jersey. These pensions are available to public employees in New Jersey who can no longer perform their job due to a work accident. As a result of tax policy, the beneficiary of an accidental disability pension will earn about 30% more than the employee was earning before the accident. In some cases, as discussed below, the beneficiary of the disability pension may earn much more than that if he or she returns to a different line of work.

The first rule to understand about an accidental disability pension is that the accident must arise out of work. Hence, accidental disability pensions always dovetail with a workers' compensation claim. The injured employee cannot keep both the workers' compensation award and the accidental disability pension. There is generally a dollar-for-dollar offset.

The second distinguishing feature in New Jersey is that the recipient of an accidental disability pension receives anywhere from a low of two thirds to a high of 72% of his or her pay for life TAX FREE. The percentage of the disability pension depends on whether the beneficiary is in the PFRS, PERS or TPAF pension fund. There are no federal taxes assessed on the pension and no state taxes until age 65. This tax benefit results in a situation where the beneficiary is receiving substantially more money than when he or she was working.

The third and most astonishing feature about accidental disability pensions is that in one pension system, namely Police and Firemen's Retirement System, (PFRS), the beneficiary can collect the pension and then work another job without any earnings offset. Consider, for example, a police officer who is earning \$100,000 per year who blows out his knee during the course of work and can no longer effect an arrest. If that officer receives an accidental disability pension, he will receive almost \$100,000 per year for life (two thirds of his pay with no taxes taken out). In addition, the officer can go to work in any other capacity almost immediately. If the new job nets income of over \$50,000, \$100,000, \$150,000 or any

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For more information on Capehart Scatchard, visit our website at [www.capehart.com](http://www.capehart.com).

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amount at all, the officer continues to receive the accidental disability pension tax free plus the new earnings without offset. In contrast, a private sector employee could not receive private plan disability benefits for life if he or she returned to work in another line of work. The disability pension would end at that point or be reduced dollar for dollar depending on the plan language.

The Division of Pensions currently does not offset against the outside income for PFRS. It does have an earnings offset for beneficiaries in PERS (Public Employees' Retirement System) and TPAF (Teachers' Pension Annuity Fund). In those pensions, one cannot earn more than what he or she earned before the accident. Hence, if a teacher earns \$100,000 per year he or she would be limited to the tax free pension plus the difference between the gross salary at the time of the pension minus the pension amount.

It is important to further understand that the applicant for an accidental disability pension does not have to prove that he or she can never work any job in the marketplace. There is no requirement to show total and permanent disability. Accidental disability pensions are often awarded to police officers who can no longer fire a gun due to a hand injury, for instance, but are otherwise completely healthy. All the applicant must prove is that he or she cannot work the job in which the injury occurred. The majority of disability pension claims do not involve claims for total and permanent disability in workers' compensation.

The irony regarding accidental disability pensions is this: while the state is experiencing unparalleled budget deficits, the courts recently lowered the standard to receive accidental disability pensions. It is now easier to get a disability pension in New Jersey for a public employee than it was before 2005. The leading case is *Richardson v. Board of Trustees, Police and Firemen's Retirement System*. The case involved a corrections officer for the South Woods State Prison in Cumberland County. On January 7, 2003, Richardson and another officer responded to an emergency signal and attempted to subdue an inmate whom they wrestled to the ground. Richardson straddled the inmate to keep him down. As Richardson was reaching for handcuffs, the inmate got his arm loose and forced it up from the ground, knocking Richardson backward and causing him to fall on his left hand, tearing a ligament. Surgery ensued but was unsuccessful. Richardson's doctors would only approve light duty but advised he could not return to his former job.

Richardson applied for an accidental disability retirement pension with the Police & Firemen's Retirement System. His application was denied for an accidental disability pension but was accepted for a lower amount on an ordinary disability pension. For the PFRS pension system, an accidental disability pays two thirds, while an ordinary disability pension pays 40%. The reason Richardson's accidental disability pension was denied was that the Administrative Law Judge considered that subduing a violent inmate is part of the normal course of a correction's officer's job. The Appellate Division affirmed the denial of the accidental disability pension on similar grounds.

The New Jersey Supreme Court reversed the denial of the accidental disability pension. It said that an applicant does not have to prove that the traumatic event is outside the normal course of job duties. The court did make clear that unlike workers' compensation, "the Legislature sought to prohibit the grant of accidental disability benefits to a member disabled by a pre-existing condition, alone or in combination with work effort." The court set forth the following standards:

1. The applicant must prove that he or she is permanently and totally disabled from the job in which the accident occurred;
2. As a direct result of a traumatic event that is
  - a. identifiable as to time and place,
  - b. undesigned and unexpected, and
  - c. caused by a circumstance external to the member (not the result of pre-existing disease that is aggravated or accelerated by the work);
3. That the traumatic event occurred during and as a result of the member's regular or assigned duties;
4. That the disability was not the result of the member's willful negligence; and
5. That the member is mentally or physically incapacitated from performing his usual duty.

The court made clear that the focus on "external" force is meant to rule out slip and fall injuries. While slip and fall injuries are considered "accidents" in workers' compensation,

they are not considered “traumatic events” for purposes of an accidental disability pension.

Presently, there is an Assembly Bill, No. 3796, which would radically reform the way ordinary and accidental disability

pensions work. With respect to accidental disability pensions, the new law would include an earnings offset for members of PFRS. ☐

## Massachusetts Court Applies ADA Amendments Act To Validate Disability Claims

by John H. Geaney, Esq.

The ADA Amendments Act is having an impact on disability claims that might otherwise have been dismissed in the past. In *Gil v. Vortex, LLC*, 697 F.Supp.2d 234 (D. Mass. 2010), the plaintiff, Luis Gil, filed a complaint alleging disability discrimination. He said the acts of discrimination dated back to March 2007 when he lacerated his hand while working a punch press. He claimed that the company questioned his ability to work on a punch press given his monocular vision. The company first told him to get a doctor’s note stating he could do his job. Later the company advised that he would have to submit to a fitness exam, but the exam never occurred. Gil had been working on the punch press for nearly 15 years at the time.

Gil suffered a work-related hernia in the summer of 2008. After he began treatment, he was terminated. Gil was told that the reason for termination is that he never got a doctor’s note as requested in 2007. Gil produced the note that he had gotten in 2007 and a second note, causing the company to rescind its termination. However, the company referred him to a less desirable work area.

Gil took leave in November 2008 for hernia surgery. When he returned to work, he was told there was no work available. Gil’s daughter spoke with management and was advised that the company was concerned that Gil might reinjure himself again. These events took place on January 2, 2009, the day after the effective date of the ADAAA.

Plaintiff Gil filed a complaint alleging disability discrimination. The company filed a motion to dismiss the complaint for failure to make a claim under the ADA. The District Court first observed that the case should be considered under “the more plaintiff friendly disability standard of the ADA Amendments Act of 2008” because the last act of alleged discrimination took place on January 2, 2009. The court said, “This bill lowers the standard for

determining whether an impairment constitutes a disability and reaffirms the intent of Congress that the definition of disability in the ADA is to be interpreted broadly and inclusively.”

The court acknowledged that Gil’s complaint was not drawn very carefully but it still met the revised ADA standards. A man with monocular vision (blindness in one eye) could show a substantial impairment of seeing and working.

As for plaintiff’s claim that he was regarded as having a disability, the court said that Gil plead enough in stating that Vortex took adverse action against him due to his fear that he might injure himself as a result of his monocular vision. Under the new standards, a plaintiff need not show that the employer regarded the employee as actually having an impairment. Under the facts viewed in the most favorable light to plaintiff, “Vortex believed him to be disabled, and terminated him as a result.” If an individual can show that he or she was subjected to discriminatory conduct as a result of even a mistaken belief that there is an impairment, that is enough to prove a regarded as claim.

The court also discussed the reasonable accommodation issues in this case. Vortex argued that Gil failed to ask for any reasonable accommodation. Gil claimed that he had worked 16 years on the punch press with monocular vision and he did not need or ask for any accommodation. “Whether an employee has requested an accommodation is irrelevant when he makes no allegation that he required an accommodation to perform his job.”

For these reasons, the court denied Vortex’s motion to dismiss the complaint and the case will move forward. It shows that under the ADAAA the focus is not going to be so much on whether there is a disability but on whether the employee can perform the essential functions of the job with or without reasonable accommodation. ☐

## Upcoming Seminars

### April 14, 2011

The undersigned will be moderating a full-day seminar for Millennium Seminars, Inc. at the Doubletree in Mount Laurel, New Jersey on the above date. The first fifteen registrants will receive a complimentary copy of Mr. Geaney’s 2011 Workers’ Compensation Manual sold by ICLE for \$169.00. CLE credits are being applied for in connection with this seminar. To view the full seminar brochure, please visit their website at [www.millenniumseminars.com](http://www.millenniumseminars.com). To register for this seminar, please contact Carol Wright at (609) 234-1776. Below are the seminar topics and speakers:

Recent Cases You Should Know About NJ Comp -- **Michael L. Bileci, Esq., Capehart Scatchard**

Trends in Workers' Compensation, ADA and FMLA -- **John H. Geaney, Capehart Scatchard**

Part One: Why Comp Is Often Misused As General Health Care Coverage

Part Two: How to Fight FMLA Fraud and Avoid ADA Litigation

The Complex Nature of Knee Injuries in Workers' Comp -- **Alexander A. Sapega, M.D., New Jersey Knee & Shoulder Center**

Physiatry and Pain Management in Workers' Comp -- **Daniel J. Ragone, Jr., M.D.**

"Jeopardy" Comp Style

FCEs and Fitness-For-Duty Exams in New Jersey -- **Matthew F. Gerdes, P.T., D.P.T., Kinematic Consultants, Inc.**

New Jersey Workers' Comp Fundamentals -- **John H. Geaney, Capehart Scatchard and Prudence M. Higbee, Esq., Capehart Scatchard**

Part One: How To Win In Comp Court

Part Two: All You Need To Know About Permanency Rates

### **May 5-6, 2011**

The New Jersey Self-Insurers Association Spring Meeting will be held at Harrah's Resort and Casino in Atlantic City, New Jersey. The topics are as follows:

Navigating the Difficulties of Neck and Back Injuries -- **Charles Gatto, M.D., Tri-County Spine Center**

Evidenced Based Functional Testing - **Beth Sarfaty, PT, Kessler Rehabilitation Center**

Managing Co-morbidities in Workplace Injuries - Getting Employees Back to Baseline -- **Peter LaRocca, HR, PSE&G, Steven Crawford, M.D., Meridian Health, Jeff Newby, Esq., Weber Gallagher and the Moderator is Dana Veronica, RN, Wegmans Food Market, Inc.**

Safety Leadership and Risk Management - **Ken Bogdan, VP Private Sector Director, J.A. Montgomery Risk Control**

"So You Think You've Got It Bad?!" – Attorney Panel Discussion - **Ken Goldman, Esq., Wolff, Goodrich & Goldman (New York, Robin Romano, Esq., Marshall, Dennehey, Warner, Coleman & Goggin (Pennsylvania), John Geaney, Esq., Capehart Scatchard (New Jersey), Albert Randall, Esq., Franklin & Prokopik (Maryland) and the Moderator is Judge Robert F. Butler, Sr., Retired**

Around The Horn - **Joyce Newman, EVP Business Development, First MCO and Lora Northen, Esq., Capehart Scatchard**

Case Law and Legislation Update -- **Nicole Downs, Esq., Hoagland, Longo, Moran, Dunst & Doukas**

Risk Management 101- **A. Wayne Klokis, Corporate Risk Manager, Johnson & Johnson**

Pain Management, Physical Medicine and Rehabilitation -- **Alan Sackstein, M.D., The Pain Management Center and Robert Pannullo, M.D., CIME, Seaview Orthopedic**

For more information, please contact Maura Bala at 732-219-0319, via email at [mbala@njselfinsurers.com](mailto:mbala@njselfinsurers.com) or visit the website at <http://www.njselfinsurers.com>.

## **Geaney's 2011 Workers' Compensation Manual Is Now Available**

The 2011 Manual is a compilation of prior editions with particular emphasis on cases decided in 2009-2010 as well as the addition of important chapters for practitioners of workers' compensation. The manual is being sold by New Jersey Institute for Continuing Legal Education for \$169.00. To order a copy of the manual, please contact Carol Wright at [cwright@capehart.com](mailto:cwright@capehart.com).

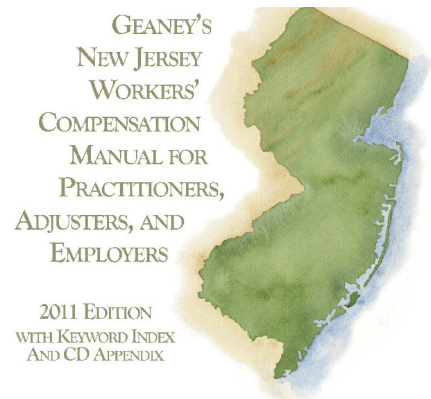
Some of the 2011 Edition highlights are as follows:

- New chapter on appellate practice in workers' compensation
- New chapter on applications for review or modification (reopeners)
- New chapter on medical reimbursement liens
- New chapter on Longshore Harbor Workers' Act

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- CD attached to Manual including Rules of the Division and other key items
- Expanded analysis of bad faith claims
- Expanded analysis of 2008 FMLA regulations
- Expanded analysis of intentional harm claims
- Expanded analysis of Medicare Secondary Payer Statute
- Analysis of over 50 Appellate Division decisions
  - *Sexton v. County of Cumberland* (perfume exposure)
  - *Quereshi v. Cintas Corporation* (counsel fees)
  - *Meuse v. Egg Harbor* (idiopathic claims)
  - *Cooper v. Barnickel* (coffee break and major/minor deviation)
  - *Davis v. OneBeacon* (federal court bad faith claim)
  - *Ottens v. Board of Review* (TDB benefits)
  - *Condi v. Compucom* (job termination and temp benefits)
  - *Gruzlovic v. Giovanni's Trattoria* (reconstructed wages)
  - *Zrno v. Wegman's* (reopener impleaders)
  - *Singleton v. Wawa* (reopener impleaders)
  - *Huntoon v. Borough of Clementon* (occupational statute of limitations)
  - *Van Dunk v. Reckson* (intentional harm and exclusive remedy) 



John H. Geaney, Esq.

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## Additional Client Services Offered By Capehart Scatchard

For clients of Capehart Scatchard here are some additional services that may interest you:

1) Access to a recommended list of treating and IME physicians maintained by John Geaney for each county in the state. This list is regularly updated and includes address, phone numbers and fax numbers for physicians.


2) Access to useful forms such as an employee accident history filled out entirely by the injured worker

3) Access to a post-offer medical history form

4) In-house training seminars on a number of issues involving workers' compensation, the ADA and FMLA

5) Guidance on new files not yet in petition status

6) Guidance on transitional duty policies

If interested in any of the foregoing, please contact John Geaney directly at 856-914-2063 

This update is published for our clients, friends and professional associates. It is designed to provide accurate and authoritative information with respect to the subject covered. The information contained in this update is intended to be general in nature. In addition, state law may have an impact on specific situations. Before any action is taken based upon this information, it is essential that competent, individual, professional advice be obtained.

For more information on Capehart Scatchard, P.A. visit our website at [www.capehart.com](http://www.capehart.com).

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