



STATE OF NEW JERSEY

NEW JERSEY LAW REVISION COMMISSION

**Final Report
Relating to**

Workers' Compensation—Mandatory Attorney Fees

May 17, 2012

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.
Please consult the New Jersey statutes in order to determine the law of the State.

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Introduction

This project is a reflection of a New Jersey Appellate Court's decision in *Quereshi v. Cintas Corp.*, 413 *N.J. Super.* 492 (App. Div. 2010), addressing attorney fees in the Worker's Compensation statute. *Quereshi*, examined whether a judge of compensation must award reasonable attorney fees when a self-insured or uninsured employer or employer's insurance carrier unreasonably delays payment of temporary disability compensation upon having actual knowledge of the occurrence of the injury or notice that compensation is due. *Id.* at 495. The court held that attorney fees are mandatory and not limited by *N.J.S.* 34:15–64(a), which governs “fee awards following an award of benefits.” *Id.* at 496. Staff's research to this time has not revealed a trend of a mandatory attorney fees, but the *Quereshi* decision may be the first in that direction.¹

In *Quereshi*, the plaintiff suffered a work-related injury, and on October 22, 2003, the court ordered the respondent employer to pay plaintiff's temporary disability benefits. *Ibid.* Subsequently, “[t]he employer failed to timely pay the temporary benefits as required by [the order,]” and the plaintiff sought a penalty under *N.J.S.* 34:15–28.1. *Ibid.* The judge found that the employer “had paid the benefits more than thirty days after entry of his order . . . and assessed a penalty of 25% of the temporary benefits owed.” However, the judge refused to award attorney fees because he awarded attorney fees on his original 2003 order, and deemed the current 25% penalty sufficient. *Id.* at 497.

The statutory framework is as follows. *N.J.S.* 34:15–28.1 states that benefits must be promptly paid and if a respondent negligently or unreasonably delays payment, a penalty is assessed, “and reasonable attorneys' fees *shall* be paid.” *Ibid.* (emphasis added). Additionally, “[a] delay of thirty days or more gives rise to a rebuttable presumption of unreasonable and negligent conduct by the respondent.” *Ibid.* The referenced section addresses delay or refusal in payment of temporary disability compensations and penalties in the following circumstances:

If a self-insured or uninsured employer or employer's insurance carrier, having actual knowledge of the occurrence of the injury, or having received notice thereof such that temporary disability compensation is due pursuant to R.S. 34:15-17, unreasonably or negligently delays or refuses to pay temporary disability compensation, or unreasonably or negligently delays denial of a claim, it shall be liable to the petitioner for an additional amount of 25% of the amounts then due

¹ *Quereshi* was applied in *Chase Bank USA, N.A. v. Staffenberg*, 419 *N.J. Super.* 386, 396 (App. Div. 2011), where the Appellate Division held that inclusion of “[attorney] fees as taxed costs of suit is mandatory under *N.J.S.* 22A:2–42.” The court applied the statutory framework of *Quereshi* that “[t]he use of the word ‘shall’ ordinarily denotes action that is mandatory, unless the context suggests otherwise.” *Ibid.* (quoting *Quereshi v. Cintas Corp.*, 413 *N.J. Super.* 492, 498 (App. Div. 2010)). Therefore, because *N.J.S.* 22A:2–42 provides that “[t]here *shall* be taxed by the clerk of the Superior Court, Law Division, Special Civil Part in the costs against the judgment debtor, a fee to the attorney of the prevailing party,” there are mandatory attorney fees in Special Civil Part actions. *See ibid.* (emphasis added).

plus any reasonable legal fees incurred by the petitioner as a result of and in relation to such delays or refusals. A delay of 30 days or more shall give rise to a rebuttable presumption of unreasonable and negligent conduct on the part of a self-insured or uninsured employer or an employer's insurance carrier.
[*N.J.S.* 34:15–28.1.]

To determine whether attorney fees are mandatory under *N.J.S.* 34:15–28.1, the *Quereshi* court looked at the plain language of the statute and its legislative history. *Quereshi, supra*, 412 *N.J. Super.* at 497-99. The court noted that the purpose of the statute was to ensure prompt payment to “ameliorate the economic disruption occasioned by a workplace injury and the loss of a regular paycheck.” *Id.* at 499 (citing *Amorosa v. Jersey City Welding & Machine Works*, 214 *N.J. Super.* 130, 137-39 (App. Div. 1986)). The specific language in question was the use of “shall” and “plus” in the phrase, “it *shall* be liable to the petitioner for an additional amount of 25% of the amounts then due *plus* any reasonable legal fees.” *N.J.S.* 34:15–28.1. (emphasis added). The court found that the word “shall” ordinarily denotes mandatory action and the preposition “plus” commonly means “increased by.” *Quereshi, supra*, 412 *N.J. Super.* at 498. Thus, the court found that “the judge must award both the statutory penalty and a reasonable legal fee.” *Ibid.*

Having found attorneys fees mandatory, the court examined whether attorney fees granted under *N.J.S.* 34:15–28.1 are limited by *N.J.S.* 34:15–64(a). *Id.* at 499. Subsection 64(a) provides that “[t]he official conducting any hearing under this chapter may allow to the party in whose favor judgment is entered, costs of witness fees and a reasonable attorney fee, not exceeding 20% of the judgment.” The employer argued that because Subsection 64(a) and Subsection 28.1 require “reasonable” attorney fees, a judge of compensation awarding attorney fees under Subsection 28.1 is bound by the 20% limit in Subsection 64(a). *Quereshi, supra*, 412 *N.J. Super.* at 501. The Appellate Division disagreed. *Ibid.* The court found the lack of a cap referenced in Subsection 28.1 dispositive. *Id.* at 501-02. The court reasoned that the reasonableness standard in Subsection 28.1 “should reflect the actual cost to obtain the previously ordered benefits.” *Id.* at 502. Furthermore, the court analogized Subsection 28.1 to Subsection 28.2. *Ibid.* Subsection 28.2 “provides the judge of compensation with further remedy to address non-compliance with orders,” and also lacks a limitation on attorney fees. *Ibid.* More importantly, the court recognized that during debate in the Assembly, Subsection 28.2 was amended “to delete language that would have limited the fee to 20% of the sum awarded to enforce the order.” *Ibid.* The court found that the congruence of language between the statutes indicated that they “are designed to provide similar remedies, [and t]he deletion of the cap in the subsequently adopted remedial section is further evidence that section 28.1 legal fees are not capped at 20% of the penalty assessed.” *Ibid.*

In summary, the court held that attorney fees are mandatory under Subsection 28.1, and attorney fees are not subject to the 20% restriction found in Subsection 64(a). Staff modified *N.J.S.* 34:15–28.1, to reflect the court’s decision.

***N.J.S.* 34:15-28.1. Delay or refusal in payment of temporary disability compensation; penalty**

If a self-insured or uninsured employer or employer's insurance carrier, having actual knowledge of the occurrence of the injury, or having received notice thereof such that temporary disability compensation is due pursuant to R.S. 34:15-17, unreasonably or negligently delays or refuses to pay temporary disability compensation, or unreasonably or negligently delays denial of a claim, it shall be liable to the petitioner for an additional amount of 25% of the amounts then due ~~plus~~ and it shall be liable to the petitioner for any reasonable legal fees and costs incurred by the petitioner as a result of and in relation to such delays or refusals. Any legal fees granted under this subsection shall not be subject to the 20% statutory limit under N.J.S. 34:15-64(a). A delay of 30 days or more shall give rise to a rebuttable presumption of unreasonable and negligent conduct on the part of a self-insured or uninsured employer or an employer's insurance carrier.

COMMENT

The revision in *N.J.S. 34:15-28.1* reflects the extent to which an employer who unreasonably or negligently delays or refuses to pay temporary disability payments is liable to pay reasonable attorney fees to the petitioner. The revision codifies the Appellate Division's interpretation of the statute in *Quereshi v. Cintas Corp.*, 413 *N.J. Super.* 492 (App. Div. 2010).

In *Quereshi*, the court found that "the judge must award both the statutory penalty and a reasonable legal fee," because the use of the word "shall" in Subsection 28.1 denotes mandatory action and the preposition "plus" subsequent to "shall" means "increased by." *Id.* at 498. To clarify the court's statutory interpretation, this revision removes the word "plus" and instead reuses the word "shall" to denote mandatory action.

Additionally, in *Quereshi*, the court stated that reasonable attorney fees "should reflect the actual cost to obtain the previously ordered benefits." *Id.* at 502. In congruence with typical attorney fees provisions, and reflecting the Commission's guidance at the October 2011 meeting, the revision allows for reasonable attorney fees and costs.

Furthermore, this revision reflects the court's finding that reasonable attorney fees granted under *N.J.S. 34:15-28.1* are not limited by the 20% cap under *N.J.S. 34:15-64(a)*. *Ibid.*