To: New Jersey Law Revision Commission
From: Mark J. Leszczyszak
Re: Workers' Compensation Act – Definitions and General Provisions (NJ ST 34:15-36)
Date: September 8, 2014

MEMORANDUM

I. INTRODUCTION

This potential project arises out of Staff's review of the New Jersey Superior Court, Appellate Division's decision in *Burdette v. Harrah's Atlantic City*,[1] and aims to "[c]larify confusing [] provisions found in" the Workmen's Compensation Act ("the Act"). [2]

Burdette v. Harrah's Atlantic City arose out of a motor vehicle accident that occurred while Plaintiff Carla Burdette was leaving her place of employment.[3] The Plaintiff was a dealer at Harrah's casino and was leaving because she finished her shift.[4] "As Burdette's vehicle entered MGM Mirage Boulevard, a northwest-bound Toyota Camry collided with the Explorer, directly striking the Explorer's driver door. At the point of impact, Burdette's vehicle was located partially on MGM Mirage Boulevard, but was still partly over Harrah's driveway's apron."[5] The Court ultimately decided that "no error was committed" and affirmed the Division of Workers' Compensation's decision that Burdette was entitled to compensation pursuant to the premises rule.[6]

The issue on appeal in *Burdette* was whether "the judge of compensation misapplied the premises rule."[7] According to the Superior Court, the premises rule contained in N.J.S. 34:15-36 provides in relevant part that "employment shall be deemed to commence when an employee arrives at the employer's place of employment to report for work and shall terminate when the employee leaves the employer's place of employment, excluding areas not under the control of the employer."[8] According to this Court "[t]he pivotal questions under the premises rule are (1) where was the situs of the accident, and (2) did the employer have control of the property on which the accident occurred?"[9]

[1] No.2012–27907, 2014 WL 184412.
[2] Powers and duties, N.J.S. 1:12A-8.
[3] *Burdette*, 2014 WL 184412 at 1.
[4] *Id*.
[5] *Id*.
[6] *Id*. at 3.
[7] *Id*. at 2.
[8] *Id*.
[9] *Id*. at 3.

The word "control" was not defined in the relevant statute, and this led to confusion as to what the Legislature intended for "control" to cover.[10] There does seem to be a consensus among the Courts "that control as defined in the Workers' Compensation Act differs from the 'formal property law sense'; the former definition is more expansive."[11] Existing case law has established certain parameters regarding how expansive the definition is.

II. THE PREMISES RULE

Earlier case law explained that "[t]he [Workers'] Compensation 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.' Thus, the Act is 'construed and applied in light of this broad remedial objective."[12] The New Jersey Legislature amended "[t]he original 1911 legislation [which] contained no definition of employment; rather, the Act simply provided for compensation when employees were injured or killed in accidents 'arising out of and in the course of employment" in 1979 to primarily "eliminate awards for minor partial disabilities, to increase awards for the more seriously disabled, and to contain the overall cost of workers' compensation" by adding "the more specific definition of employment."[13] The amendment effectively eliminated what had previously been known as the "going and coming rule" and established the "premises rule." [14]

"Expressing its disagreement with the judiciary's broad reading of the statutory criteria for coverage, the Legislature drafted the amendments to the statute to 'establish relief from the far-reaching effect of the 'going and coming rule' decisions by defining and limiting the scope of employment.'"[15] Following the amendments the courts attempted to clarify "whether the Legislature intended to overrule the [so called] parking lot decisions" – cases in which the primary issue was whether the parking lot where the accident occurred was connected to the course of employment pursuant to the Act – and ultimately found that it did not.[16] The *Livingstone* Court, for example, relied on the Chief Judge of Compensation's article "Impact of the Reform Act of 1980,"[17] in addition to other Court findings, to reach the conclusion "that the Legislature impliedly approved of the principle established by those cases, namely, that lots owned, maintained, or used by employers for employee parking are part of the employer's

---

[10] *See*, *e.g.*, *Cressey v. Campus Chefs Division of CVI Service, Inc.*, 204 N.J.Super. 337 (1985); *Livinstone v. Abraham & Straus, Inc.*, 111 N.J. 89 (1988).

[11] *Burdette,* 2014 WL 184412 at 3.
[12] *Hersh v. County of Morris*, 217 N.J. 236, 243 (2014) (citations omitted).
[13] *Livinstone v. Abraham & Straus, Inc.*, 111 N.J. 89, 100 (1988).
[14] *See*, *Hersh v. County of Morris*, 217 N.J. 236, 244 (2014); *Kristiansen v. Morgan*, 153 N.J. 298, 316 (1998).
[15] *Livingstone*, 111 N.J. at 101.
[16] *Id*.
[17] Alfred J. Napier, *Impact of the Reform Act of 1980*, 96 N.J. Lawyer, 17 (Summer 1981).

premises, and had no intent to affect the validity of such decisions."[18] The Chief Judge of Compensation explained, in that 1981 article:

> that the new definition of employment 'sharply curtailed' the compensability of off-premises accidents, but also emphasized that the 'basic pattern and objectives of our Workers' Compensation Act remain unchanged' … [and] remove[d] from compensability certain cases heretofore held compensable where special hazards existed en route to the employer's premises, and off-premises injuries sustained during lunch hour.[19]

III. "EMPLOYER CONTROL" CRITERIA

Although the 1979 amendments defined employment and thus narrowed the Act's scope, the definition contained another term (i.e. control) that might benefit from clarification in order to delineate the relevant provision's scope. The cases in this area have been consistent in their interpretation of the undefined term "control" and what criteria need to be met in order for a claim to be compensable under the Act. In a recent case, *Hersh v. County of Morris*,[20] the Court held the Plaintiff was not entitled to compensation because "[t]he garage where she parked was 'not under the control of the employer' so as to trigger coverage."[21] The Plaintiff in this case was traveling from her employer-paid parking area in a garage near her place of employment when she was struck by a car while crossing a public street.[22] The *Hersh* Court followed the same reasoning established by earlier decisions discussed below, namely that "the pivotal questions under the premises rule are (1) where was the situs of the accident, and (2) did the employer have control of the property on which the accident occurred."[23] The *Hersh* Court further reasoned that "[the employer control] test is satisfied if the employer has the right of control; it is not necessary to establish that the employer actually exercised that right;"[24] "control should be dictated by the 'common-sense notion that the term implies simply use by the employer in the conduct of his business;"[25] "control exists when the employer owns, maintains, or has exclusive use of the property;"[26] and "[t]he employer's business benefit, along with the added hazard employees were forced to endure by the employer while they walked through the parking lot, made the injury compensable."[27]

---

[18] *Livingstone*, 111 N.J. at 102.
[19] *Id*. (citing Alfred J. Napier, *Impact of the Reform Act of 1980*, 96 N.J. Lawyer, 17 (Summer 1981)).
[20] 217 N.J. 236 (2014)
[21] *Id*. at 238.
[22] *Id*.
[23] *Id*. at 244.
[24] *Id*. at 245.
[25] *Id*.
[26] *Id*.
[27] *Id*. at 246.

In reference to the relevant provision – “excluding areas not under the control of the employer”[28] – the Court in *Cressey v. Campus Chefs Division of CVI Service, Inc.*[29] stated outright that “We [*sic*] find the meaning of this [] phrase ambiguous.”[30] However, reversing the Workers’ Compensation Court’s decision, the Appellate Division found that “the phrase [was] intended to exclude areas which are not physically part of the employer’s premises.”[31] The Appellate Division in *Cressy* reasoned that “[t]he line between compensability and noncompensability under the premises rule is very strict. Under that rule unless an employee is within the physical confines of the premises when an injury occurs, it is noncompensable.”[32] Yet, according to the Appellate Division, strict application of that rule “to an unusual risk created, at least in part by the employer, is unthinkable.” The Petitioner sustained her injury just outside the physical confines of her employer’s premises, but “[s]he cannot be denied compensation because the hazard incident to her employment was inches beyond the employer’s place of business … [since she] was required by [her employer] to traverse a hazardous route in leaving the place of employment.” [33] The Appellate Division noted this as a long-established, warranted exception to the Doctrine “that permits compensability where the off-premises point at which the injury occurred lies on the only route that the employee can traverse and therefore the special hazards of the route become hazards of the employment.” Thus, the Appellate Division held that the Plaintiff “has a right to obtain, as part of her employment, safe egress from the premises.”[34] In contrast, the *Hersh* Court found that although “[t]he County provided Hersh with the benefit of off-site but paid-for parking, [it] did not dictate which path Hersh had to take to arrive at her place of employment.”[35] Thus, even though the County in *Hersh* had control over the parking area “the accident occurred on a public street not under the control of the County. In walking a few blocks from the [parking area] to her workplace, Hersh did not assume any special or additional hazards.”[36]

In the earlier case of *Livingstone v. Abraham & Straus, Inc.*,[37] the Supreme Court of New Jersey held that the Respondent-Appellant, Abraham &Straus, was liable for compensation. The *Livingstone* Court reasoned that “[i]n this context, the ‘control’ standard set forth in the statute is fully satisfied: not only did Abraham & Straus have the ability to direct its employees to park in the designated area; it also had the power to appropriate th[e] far corner of the lot to its own use,

---

[28] Workmen’s Compensation Act: Definitions and General Provisions, N.J.S. 34:15-36.
[29] 204 N.J.Super. 337 (1985)
[30] *Id*. at 342.
[31] *Id*. at 343.
[32] *Id*. at 344.
[33] *Id*.
[34] *Id*.
[35] *Hersh*, 217 N.J. at 250.
[36] *Id*. at 249 – 250.
[37] *Livingstone*, 111 N.J. 89, 100 (1988).

and did so."[38] Additionally, this Court reasoned that Abraham & Straus "caused its employees to be exposed to an added hazard, on a daily basis, in order to enhance its business interests."[39] However, an argument was made by Justice Clifford in his dissent in *Livingstone* citing to Judge Michels who stated that "[t]he employer simply had the right to use the area for customer and employee parking. The right to use is not equivalent to control."[40]

Further, in *Kristiansen v. Morgan*[41], the Supreme Court of New Jersey found "[t]hat [the] phrase was intended to make clear that the premises rule can entail more than the four walls of an office or plant[,]" which is consistent with the notion that the Act's definition of control is more expansive than in the property sense. The Court further found that, citing to *Livingstone*, *supra*, "[a]lthough the Act does not define 'control,' this Court has stated that control exists when the employer owns, maintains, or has exclusive use of the property."[42]

Later, in *Brower v. ICT Group*[43] the Supreme Court of New Jersey found that the Petitioner's claim was compensable. According to this Court, seemingly answering Justice Clifford's dissenting opinion, the employer control "test is satisfied if the employer has the right of control; it is not necessary to establish that the employer actually exercised that right."[44] Given that "the situs of the accident and the employer's control of that location are the dispositive factors" the Court held ICT Group responsible for an injury that occurred on a rear stairway not owned by ICT Group because, in addition to ICT Group's knowledge of the fact that its employees used the stairway for entering and exiting the office as well as smoke breaks, and its failure to take action to change the behavior of those employee's actions, it also found that "the physical layout and location of the rear stairway prevents it from being considered a common area. It is tantamount to a private staircase used exclusively by ICT Group's employees."[45]

IV. PROPOSED ACTION

Modifying the statute to clarify the scope of the term "control" in the provision – "excluding areas not under the control of the employer"[46] – using the case law as a reference, could make the provision clearer on its face and limit ambiguity. Staff requests Commission authorization to conduct outreach to determine whether adding any additional language to define

[38] *Id*. at 105.
[39] *Id*. at 105-106.
[40] *Id*. at 109.
[41] 153 N.J. 298 (1998)
[42] *Id*. at 316.
[43] 164 N.J. 367 (2000)
[44] *Id*. at 373.
[45] *Id*. at 374.
[46] Workmen's Compensation Act: Definitions and General Provisions, N.J.S. 34:15-36.

the meaning of "control" in this context would be useful in clearing up the confusion evidenced in litigation regarding this issue.

V. RECENTLY INTRODUCED LEGISLATION

Since Staff has been researching this area of the law, it was noted that during the current legislative session, S2247 was introduced, which proposes an amendment that would expand the scope of the Workers' Compensation Act's to parking areas provided by the employer.[47] The proposed statutory amendments in relevant part state:

> Employment shall also be deemed to commence, if an employer provides or designates a parking area for use by an employee, when an employee arrives at the parking area prior to reporting for work and shall terminate when an employee leaves the parking area at the end of a work period; provided that, if the site of the parking area is separate from the place of employment, an employee shall be deemed to be in the course of employment while the employee travels *directly* from the parking area to the place of employment prior to reporting for work and while the employee travels *directly* from the place of employment to the parking area at the end of a work period.[48]

It is of concern to Staff that the proposed language may inadvertently raise additional questions. The provision regarding parking areas separate from the place of employment that deems employees traveling directly to and from the parking area and their place of employment may result in confusion on the part of those who must rely upon or interpret the statute.

It may be unclear what "travels directly" means in this context. For example, is it the route the employee *usually* or *on average* traverses to and from the place of employment and the parking area; is it the route that is closest or easiest to travel between the two destinations; or does it mean the employee must not deviate from a particular route (chosen by someone other than the employee) on the employee's travel between the destinations in order to be protected under the statute?

---

[47] S.B. 2247, 216th Leg., Reg. Sess. (N.J. 2014).
[48] *Id*. at 4 (emphasis added).