COMMENTARY

Uninsured Employers Should No Longer Receive the Benefits of the Exclusive Remedy Provision of the Workers' Compensation Act

By Christopher J. Keating and Mark R. Natale

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A hard-working laborer is struck in the eye with a nail, causing permanent physical injuries, vision loss, and pain and suffering, and requiring immediate medical attention. The nail was shot from a nail gun operated by a coworker at their industrial worksite. The coworker was clearly negligent and operating within the scope of his employment. As of the date of the injury, the laborer's employer failed to carry any workers' compensation insurance coverage, leaving the laborer with no option but to seek immediate and follow-up medical treatment through charity care at a local hospital. The laborer remained out of work without income for several months and eventually attained only a partial recovery of his vision.

Without available workers' compensation insurance coverage, the laborer could only receive delayed medical expense reimbursements and temporary disability benefits by filing a workers' compensation claim against the employer and the Uninsured Employers Fund. The Exclusive Remedy Provision of the Workers' Compensation Act prohibits the laborer from bringing any negligence claim against the employer in state or federal court—preventing any recovery for pain and suffering and other non-economic damages and certain forms of economic damages—even though the employer broke the law by failing to provide workers compensation coverage.

The question presented: why does an uninsured employer receive the protections of the Exclusive Remedy Provision if it does not hold up its end of the bargain? For over a century, the questionable underlying public policy has impacted these cases that exist at the intersection of employment law, personal injury, and workers' compensation law, often serving as a shield for uninsured employers and as a barrier to justice for injured workers.

This article examines the New Jersey Workers' Compensation Act (WCA) and its Exclusive Remedy Provision, and it calls into question the Exclusive Remedy Provision's application in favor of uninsured employers. This article, however, does not implicitly or explicitly advocate for any reforms to the laws as they presently exist concerning law-abiding employers that carry workers' compensation insurance. To the contrary, the reforms advanced in this article seek to level the playing field for insured employers, increase pressure on uninsured employers to opt into the New Jersey's workers' compensation scheme, and create more just causes of action to be brought against uninsured employers by their injured employees.

The New Jersey Constitution "guarantees that the 'right of trial by jury shall remain inviolate.'"[1] Plaintiffs bringing claims for the negligent acts of others are entitled to the benefits of New Jersey's trial courts and juries under the New Jersey Constitution, except for the limited circumstances under which the Legislature has decided to abrogate that right by statute, such as the Exclusive Remedy Provision of the WCA.[2]

In 1911, New Jersey joined a gradual nationwide movement to establish a workers' compensation system to replace the common law negligence system for injured employees.[3] In New Jersey, under the WCA, employees gained access to immediate medical treatment, timely payment of wages, and a permanency award for certain qualifying injuries, all without needing to prove their employer was negligent—instead just requiring proof that the injury occurred on the job. Meanwhile employers gained the benefit of avoiding costly litigation and unpredictable jury verdicts. Our Supreme Court has stated, "The ultimate purpose of the [WCA] is to provide a dependable minimum of compensation to insure security from want during a period of disability."[4]

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The WCA created an "elective system" that presented two options from which employers must choose to implement in their workplaces—one that opts out of the workers compensation framework (Article I) and one that opts into it (Article II).[5] Article II coverage is the no-fault scheme of compensation that is synonymous with the phrase "Workers' Comp" and is "built upon the principle that it provides the exclusive remedy against the employer for a work-related injury sustained by an employee."[6] Fundamental to the Exclusive Remedy Provision "is

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the premise that by accepting the benefits provided by its schedule of payments, the employee agrees to foresake a tort action against the employer."[7] Meanwhile, Article I coverage is the lesser known and far less employer-friendly option, and it allows employees to maintain the right to sue an employer for common law negligence, with the exception of willful negligence, and bars an employer from raising the defenses of contributory negligence, assumption of risk, or negligence of a fellow-employee.[8]

Article II is the default selection by operation of law.[9] It is implied into every employment contract unless there is an express, clear, and unambiguous written agreement between the employer and employee to select Article I coverage, which appears to require a knowing and voluntary waiver of Article II coverage by the employer and employee.[10] The public policy in favor of Article II coverage was so strong that the Legislature retroactively incorporated Article II coverage into every employment agreement existing as of July 4, 1911.[11]

The Uninsured Employers Fund (UEF)

As was foreseeable, some employers chose to accept the benefits of Article II protections without actually paying for and maintaining a workers' compensation insurance policy. In 1988, the Legislature amended the WCA to create the Uninsured Employers Fund as a safety net to "provide for the payment of awards against uninsured defaulting employers who fail to provide compensation to employees or their beneficiaries in accordance with the provisions of the [WCA]."[12] The fund is funded by an annual surcharge on law-abiding employers' workers' compensation insurance policies and penalties and assessments against uninsured employers.[13] An employee who is injured during the course of employment under an uninsured employer may seek compensation from the fund limited to reasonable medical expenses and temporary disability benefits,[14] subject to strict regulations governing procedures and relief.[15] After receiving a limited payment from the fund, an injured employee "may bring an action against the employer to recover all or part of any damages and costs sustained by the employee for any injury or death which has been deemed compensable under the WCA, and for which the employee or his estate has not received compensation from [the fund]."[16]

The delayed and limited right to a civil suit presumes that an injured employee can find a private attorney to bring a claim against the fund and then convince an attorney to bring a civil action against an uninsured employer for the balance of owed medical expenses and temporary disability benefits and, possibly, a permanency award governed by the values established under the WCA.

As a safety net, the fund plays a crucial role in providing much needed benefits to injured workers who would otherwise have nowhere to turn other than available health insurance coverage, Medicare or Medicaid, or charity care. This is especially true when an uninsured employer is assetless or otherwise judgement proof. However, in practice, the limited resources and statutory restrictions of the fund inherently disincentivize private attorneys from taking workers' compensation cases against uninsured employers. In the past five years, the fund issued payments in 2,105 cases.[17] During that period, the fund paid an average medical expense reimbursement of $341.00 per claim, temporary benefits of $112.07 per claim, and counsel fees of $110.25 per claim.[18] To be fair to the hard-working civil servants that administer the fund and pursue uninsured employers, this is not a critique of their work, and those numbers do not take into account the nuances of every case in which the fund is joined as a party to a workers' compensation claim.

	2018	2019	2020	2021	2022	TOTALS
Temporary Benefits Paid	$48,185	$52,967	$33,330	$65,071	$36,366	$235,918
Medical Paid	$275,163	$162,420	$179,264	$86,877	$14,082	$717,806
Counsel Fees Paid	$50,537	$77,614	$60,734	$23,501	$19,700	$232,085
Number of UEF claims filed	609	292	398	423	383	2,105

Legal Claims Beyond the Exclusive Remedy Provision

In the case of the laborer and the uninsured employer at the beginning of this article, a claim against the Uninsured Employers Fund is seemingly pointless where medical bills have already been absorbed by charity care, Medicare, or Medicaid. Under New Jersey law, the laborer's case would require additional facts and circumstances for there to be a cause of action that evades the Exclusive Remedy Provision. In prac-

tice, there are four potential common claims a plaintiff's attorney may investigate. First, a plaintiff's attorney will search for a third party that bears responsibility for the injuries, as third parties are not subject to the Exclusive Remedy Provision.[19] Second, in very limited circumstances, an ambitious plaintiff's attorney may plead a *Laidlow* claim and seek to prove that an "intentional wrong" was committed by the employer, forcing the personal injury claims outside the purview of the Exclusive Remedy Provision.[20] Third, if the employee was terminated in retaliation for requesting workers' compensation coverage, the employee could bring a common law claim for wrongful termination and workers' compensation retaliation.[21] Fourth, if the termination was based on a discrimination related to the employee's disability, or in retaliation for the employee requesting a reasonable accommodation, remedies under the New Jersey Law Against Discrimination may apply.[22] But short of those additional facts, an injured employee working for an uninsured employer is limited to pursuing a claim against the fund.

On paper, the WCA threatens a disorderly-persons offense for employers that failed to maintain Worker's Compensation coverage and a fourth-degree indictable offense for employers that knowingly failed to do so....However, criminal penalties were rarely, if ever, pursued by the state of New Jersey and any of its prosecutorial agencies.

Government Agencies Lack Resources, Enlist the Private Bar

New Jersey must enlist the ranks of the private bar to incentivize compliance with the WCA. Just as the threat of civil penalties and fines have made limited impact, the threat of criminal prosecution has failed to deter or change the unlawful conduct of uninsured employers in New Jersey. On paper, the WCA threatens a disorderly-persons offense for employers that failed to maintain Workers' Compensation coverage and a fourth-degree indictable offense for employers that knowingly failed to do so.[23] That same provision established liability for corporate officers of companies that failed to maintain Workers' Compensation coverage, and it placed liability on contractors for subcontractors that failed to maintain coverage.[24] However, criminal penalties were rarely, if ever, pursued by the state of New Jersey and any of its prosecutorial agencies.

Over-burdened county prosecutors' offices and the New Jersey Office of the Attorney General have historically lacked the resources to prioritize these offenses, and law enforcement agencies of all levels have been trained to view these offenses as a "civil issue." For the five-year period of Jan. 1, 2017, through Dec. 31, 2021, the New Jersey Office of the Attorney General charge did not charge any person or entity with a disorderly persons or indictable offence under N.J. STAT. ANN. 34:15-79.[25] However, in late 2022, the Division of Criminal Justice obtained an indictment against an owner of an uninsured company after an employee suffered a severe and permanent workplace injury that cost the Uninsured Employers Fund $194,582.85 in temporary disability benefits, medical benefits, counsel fees, and stenographic fees.[26] It is not yet clear whether that prosecution was a one-time event due to the egregious circumstances and associated costs to the Uninsured Employers Fund, or whether that prosecution indicates a policy shift involving the Division of Criminal Justice's newly created Worker Protection and Fair Labor Enforcement Unit.[27]

Proposed Reforms to the WCA

For an injured worker, limited benefits from the fund are better than nothing. But it is time to rethink the public policy underlying the WCA that allows uninsured employers to pass the costs onto everyone else while benefiting from a shield against liability that they simply do not deserve. Considering that uninsured employers have refused the proverbial carrot of the efficiencies of Article II, the Legislature should introduce a long overdue proverbial stick.

To level the playing field and expand access to justice, the New Jersey Legislature should revisit the application of the Exclusive Remedy Provision to uninsured employers. Simple revisions to Article I and Article II of the WCA could achieve a more just system: (1) remove the application of Article II's Exclusive Remedy Provision to an uninsured employer, (2) mandate that an uninsured employer is subject to the causes of

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action articulated in Article I without exception, and (3) modify the WCA to create personal liability for the owners, officers, and managing agents of an uninsured employer for damages an injured worker may seek to recover from an uninsured employer under Articles I and II. Without exception, an employee of an uninsured employer must retain the ability to file a Workers' Compensation petition and pursue safety net relief from the fund.

The WCA already includes individual criminal and civil liability against corporate officers who were "actively engaged" in the business of uninsured employers, limited to those damages compensable under the WCA.[28] The New Jersey Legislature has also adopted analogous individual liability models in other employee-protection statutes, including the New Jersey Wage Payment Law, which serves the primary purpose of ensuring employees received their owed wages on time and in full.[29]

New Jersey would not be alone or unprecedented in allowing for greater protections. Several states across the country, including neighboring Pennsylvania, revoke the protection offered by their respective exclusive-remedy limitations for a company that does not carry insurance.[30] By keeping its current statutory framework, New Jersey is providing fewer remedies for its injured employees and less deterrence for employers looking to avoid paying for workers' compensation insurance.

Reforming the WCA will enlist the support of more members of the private bar not only to directly combat uninsured employers, but also to aid in New Jersey's fight against employee misclassification and tax and insurance fraud. By implementing the proposed reforms, a misclassifying employer without insurance will have to reassess whether it is willing to assume the risk of Article I liability in the event a misclassified employee is injured on the job. These reforms could also relieve some burdens on the Uninsured Employers Fund and expand the pool of employers buying workers' compensation insurance.

Most importantly, the proposed reforms offer injured employees of uninsured employers access to justice that has long been denied. Absent some sensible and articulable public policy for maintaining the *status quo*, the New Jersey Legislature should adopt the proposed reforms after receiving input from all involved stakeholders. ■

Endnotes

1. *Jersey Cent. Power & Light Co. v. Melcar Util. Co.*, 212 N.J. 576, 589 (2013) (citing N.J. Const. art. I, ¶ 9.).
2. *See* N.J. Stat. Ann. 34:15-8; *see also Naseef v. Cord, Inc.*, 48 N.J. 317, 322 (1966).
3. Hon. Peter J. Calderone, J.W.C., *Honoring NJ's 100 years of workers compensation*, NJ.com, September 2, 2011, nj.gov/labor/forms_pdfs/wc/pdf/Honoring%20NJ's%20100%20years%20of%20workers%20compensation%20_%20NJ%20com.pdf.
4. *Naseef*, 48 N.J. at 325.
5. *Naseef*, 48 N.J. at 322-23 (1966).
6. *Ramos v. Browning Ferris Industries, Inc.*, 103 N.J. 177, 183 (1986) (*citing* N.J. Stat. Ann. 34:15-8; *Estelle v. Board of Educ. of Red Bank*, 14 N.J. 256 (1954)).
7. *Ramos*, 103 N.J. at 183 (citing *Morris v. Hermann Forwarding Co.*, 18 N.J. 195, 197-98 (1955)).
8. N.J. Stat. Ann. 34:15-1, 2; *Peck v. Newark Morning Ledger Co.*, 344 N.J. Super. 169, 177 (App. Div. 2001).
9. N.J. Stat. Ann. 34:15-9.
10. *Peck*, 344 N.J. Super. at 177 (citing N.J. Stat. Ann. 34:15-9; *Naseef supra* note 4).
11. *Id.*
12. *See* N.J. Stat. Ann. 34:15-120.1(a); *see also* 1988 N.J. ALS 25, 1988 N.J. Laws 25, 1988 N.J. A.N. 1784.
13. N.J. Stat. Ann. 34:15-120.1(b) and (c).
14. N.J. Stat. Ann. 34:15-120.2(b).
15. N.J. Admin Code § 12:235-7, *et seq.*

16. N.J. Stat. Ann. 34:15-120.9.
17. N.J. Labor and Workforce Development, email response to Open Public Records Act request W195573 (February 1, 2023).
18. *Id.*
19. *See Ramos v. Browning Ferris Industries, Inc.*, 103 N.J. 177 (1986) (holding that the WCA prohibits an employer from being a party to a negligence action and thereby from contribution to a third-party as a joint tortfeasor under the Comparative Negligence Act, N.J. Stat. Ann. § 2A:15-5.3).
20. *See Laidlow v. Hariton Machinery Co., Inc.*, 170 N.J. 602 (2002).
21. *Lally v. Copygraphics*, 173 N.J. Super. 162, 181-182 (App. Div. 1980) (applying the holding of *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 64 (1980) to workers' compensation retaliation cases); N.J. Stat. Ann. 34:15-39.1 ("It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim workmen's compensation benefits from such employer[.]"
22. *See Richter v. Oakland Bd. of Educ.*, 246 N.J. 507, 524 (2021).
23. N.J. Stat. Ann. 34:15-79.
24. *Id.*
25. N.J. Div. Crim. Justice, email response to Open Public Records Act request W195771 (February 24, 2023); *see* State Grand Jury Indictment No. SGJ-768-22-24, Docket No. 22-14-51-S; see also Complaint-Summons S-2022-000077-1604.
26. *Id.*
27. N.J. Div. Crim. Justice Highlights, njoag.gov/about/divisions-and-offices/division-of-criminal-justice-home/division-of-criminal-justice-highlights/ (last accessed February 26, 2023).
28. N.J. Stat. Ann. 34:15-79; *Macysyn v. Hensler*, 329 N.J. Super. 476, 482 (App. Div. 2000).
29. *See* N.J. Wage Payment Law, N.J. Stat. Ann. 34:11-4.1 (Expanding the definition of a liable "employer" to include "the officers of a corporation and any agents having the management of such corporation").
30. 77 Pa. Cons. Stat. § 501(d); *Liberty by Liberty v. Adventure Shops, Inc.*, 433 Pa. Super. 586 (Pa. Super. 1994); *see also* Wyo. Stat. Ann. § 27-14-104(c); Ark Code Ann. § 11-9-105(b); D.C. Code § 32-1504(b).