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June 7, 2024

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On the Letter-Brief

*LETTER-BRIEF AND APPENDIX ON BEHALF OF RESPONDENT-
APPELLANT, TOWNSHIP OF OCEAN SCHOOL DISTRICT*

Honorable Judges of the Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
Trenton, NJ 08625-0006

Re: Giuseppe Amato (Petitioner-Respondent) v. Township of
Ocean School District (Respondent-Appellant)
Appellate Docket No.: A-2543-23
Claim Petition No.: 2021-19450

Civil Action: On Appeal from an Order Declaring Decedent
An Essential Worker, from the State of New
Jersey Department of Labor and Workforce
Development, Division of Workers
Compensation, Freehold Vicinage

Sat Below: Honorable Joann Downey, J.W.C.

Dear Judges:

Kindly accept this Letter-Brief on behalf of respondent-appellant,
Township of Ocean School District, pursuant to R. 2:6-2(b).

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PRELIMINARY STATEMENT

This is an appeal from an Order from the Division of Workers Compensation, in which the petitioner decedent was declared to be a New Jersey essential worker under N.J.S.A. 34:15-31 during a period of occupational exposure.

Petitioner filed a dependency claim petition against respondent, alleging that his wife suffered COVID-19 in the course of her employment as a teacher employed by respondent, which caused her death. Petitioner moved to declare the decedent to be an essential employee as defined by N.J.S.A. 34:15-31.11. This statute is often referred to as the "Presumption Statute" because it entitles an essential employee to a rebuttable presumption that her COVID-19 disease was related to her employment.

The Judge of Compensation essentially treated petitioner's motion as a summary judgment motion, but relieved petitioner of the basic requirement to present affidavits from individuals with personal knowledge of the relevant facts. Nevertheless, the Judge of Compensation granted petitioner's motion without being presented with any competent evidentiary materials of any kind.

The Judge of Compensation declared the decedent to be an essential employee based on nothing but petitioner's attorney's certification and legal argument, despite the existence of genuine issues of material fact. The Judge

of Compensation concluded that teachers fall within the definition of essential employees and that this teacher, the decedent, would be declared to be an essential employee.

The Judge of Compensation ignored the fact that the clear language of N.J.S.A. 34:15-31.11 does not identify teachers and other educational employees as essential employees, and they are not deemed to be essential employees anywhere in the legislative history that lead to the enactment of the statute. There was no need to include teachers in the definition of essential employees because after the initial shutdown during the pandemic, schools were closed and learning occurred virtually.

The Judge of Compensation therefore erred procedurally and substantively by summarily declaring the decedent to be an essential employee.

The Order declaring the petitioner decedent to be an essential worker should be reversed, and the matter should be remanded to another Judge of Compensation for a trial on the merits.

PROCEDURAL HISTORY

On August 6, 2021, petitioner, Giuseppe Amato, filed a Dependency Claim Petition against respondent, Township of Ocean School District, alleging that his wife, Denise Amato, suffered an occupational disease when she was exposed to COVID-19 in the course of her employment with respondent that resulted in her death. (Ra1-2).¹ On September 8, 2021, respondent filed a Respondent's Answer to Dependency Claim Petition, admitting that the decedent was employed by respondent, but denying that her exposure occurred in the course of her employment. (Ra3).

Petitioner filed a Notice of Motion for Essential Worker Presumption seeking to declare the decedent to be an essential employee and entitled to the presumption set forth in N.J.S.A. 34:15-31.11 on November 4, 2021. (Ra4-40). Respondent filed an Answer to Motion for Essential Worker Presumption in opposition to petitioner's motion on December 13, 2021. (Ra41-43). On May 4, 2022, respondent filed an Answer to Motion Supplemental Pleading also in opposition to that motion. (Ra44-47).

Respondent filed a Notice of Motion to Recuse Judge Joann Downey on January 24, 2024. (Ra48-61). Petitioner filed an Answer to Motion to Oppose

¹ "Ra" refers to respondent's appendix to this letter-brief.

"1T" refers to February 21, 2024 motion transcript.

"2t" refers to March 14, 2024 motion transcript.

Respondent's Recusal on January 25, 2024. (Ra62-65). After oral argument on February 21, 2024, the Honorable Joann Downey, J.W.C., of the State of New Jersey Department of Workforce Development, Division of Workers Compensation, Freehold Vicinage, denied respondent's motion. (1T12-22 to 1T22-17, Ra66). Respondent moved to stay that Order. (1T33-20-25, 1T36-1 to 1T37-7). On March 14, 2024, Judge Downey denied respondent's motion to stay the Order denying recusal. (2T1-15 to 2T6-12, Ra67).

On March 14, 2024, after oral argument, Judge Downey granted petitioner's motion to declare the decedent to be an essential employee, and entered an Order on that date. (2T71-2 to 2T94-25, Ra68). Respondent moved to stay that Order. (2T94-3 to 2T96-9). Judge Downey denied respondent's motion for a stay. (2T96-10 to 2T97-21, Ra69).

Respondent filed a Notice of Motion for Leave to Appeal from the February 21, 2024 Order denying respondent's motion to recuse the Judge of Compensation on April 2, 2024. (Ra70). Leave to appeal was granted in an Order that was filed on April 23, 2024. (Ra71).

Respondent filed a Notice of Motion for Leave to Appeal from the March 14, 2024 Order declaring the decedent to be an essential worker on April 3, 2024. (Ra72). Leave to appeal was granted in an Order that was filed on April 23, 2024. (Ra73).

Petitioner filed a Notice of Motion for Judgment on Liability on April 4, 2024, which remains pending as of this filing. (Ra74-75).

STATEMENT OF FACTS

Petitioner's wife was employed by respondent as a teacher during the time period of January 2021 to May 18, 2021. (Ra1). Respondent disputes that petitioner contracted COVID-19 in the course of her employment with respondent. (Ra3).

Petitioner moved to declare the decedent to be an essential employee entitled to the presumption of compensability set forth in N.J.S.A. 34:15-31. (Ra4-5). (2T55-12 to 2T60-24). Petitioner's moving papers did not include any affidavit or certification from anyone having personal knowledge of the facts of this case, and did not include any competent evidentiary materials at all. (Ra6-40). Instead, petitioner submitted a certification from his attorney that contained conclusory allegations, a copy of Executive Order No. 103 signed by Governor Philip D. Murphy, a one-page document labeled, "Essential Employees," which is guidance promulgated by the Cybersecurity and Infrastructure Agency, an Advisory Memorandum, and a CISA Memorandum. (2T55-12 to 2T60-24, Ra61-15 to Ra69-13, Ra6-40).

Petitioner did not provide any evidence that the decedent should be considered to be an essential employee or that teachers, in general, should be considered to be essential employees. (Ra61-15 to Ra69-13).

LEGAL ARGUMENT

POINT I

THE PETITIONER DECEDENT SHOULD NOT HAVE BEEN SUMMARILY DECLARED TO BE AN ESSENTIAL EMPLOYEE.
(2T71-2 to 2T94-25, Ra28)

Petitioner was not entitled to a summary finding that the decedent was an essential employee within the definition of N.J.S.A. 34:15-31.11 because there existed material issues of genuine fact and because teachers are not essential employees.

N.J.S.A. 34:15-31.11 is often referred to as the "Presumption Statute" because it entitles an essential employee to a rebuttable presumption that her COVID-19 disease was related to her employment. N.J.S.A. 34:15-31.11 states that:

"Essential employee" means an employee in the public or private sector who, during a state of emergency:

(1) is a public safety worker or first responder, including any fire, police or other emergency responders;

(2) is involved in providing medical and other healthcare services, emergency transportation, social services, and other care services, including services provided in health care facilities, residential facilities, or homes;

(3) performs functions which involve physical proximity to members of the public and are essential to the public's health, safety, and welfare, including transportation services, hotel and other residential services, financial services, and the production, preparation, storage, sale, and

distribution of essential goods such as food, beverages, medicine, fuel, and supplies for conducting essential business and work at home; or

(4) is any other employee deemed an essential employee by the public authority declaring the state of emergency.

An employee who is an employee of the State who is offered the option of working at home but has refused that option shall not be regarded as an essential employee.

"Health care facility" means any non-federal institution, building or agency, or portion thereof, whether public or private, for profit or nonprofit, that is used, operated or designed to provide health services, medical or dental treatment or nursing, rehabilitative, or preventive care to any person. Health care facility includes, but is not limited to: an ambulatory surgical facility, home health agency, hospice, hospital, infirmary, intermediate care facility, dialysis center, long-term care facility, medical assistance facility, mental health center, paid and volunteer emergency medical services, outpatient facility, public health center, rehabilitation facility, residential treatment facility, skilled nursing facility, and adult day care center. Health care facility also includes, but is not limited to, the following related property when used for or in connection with the foregoing: a laboratory, research facility, pharmacy, laundry facility, health personnel training and lodging facility, patient, guest and health personnel food service facility, and the portion of an office or office building used by persons engaged in health care professions or services.

"Health care worker" means an individual employed by a health care facility.

"Public safety worker" includes a member, employee, or officer of a paid, partially-paid, or volunteer fire or police department, force, company or district, including the State Police, a Community Emergency Response Team approved by the New Jersey Office of Emergency Management, or a correctional facility, or a basic or advanced medical technician of a first aid or rescue squad, or any other nurse, basic or advanced medical technician.

N.J.S.A. 34:15-31.12 then provides for the following rebuttable presumption:

If, during the public health emergency declared by an executive order of the Governor and any extension of the order, an individual contracts coronavirus disease 2019 during a time period in which the individual is working in a place of employment other than the individual's own residence as a health care worker, public safety worker, or other essential employee, there shall be a rebuttable presumption that the contraction of the disease is work-related and fully compensable for the purposes of benefits provided under R.S.34:15-1 et seq., ordinary and accidental disability retirement, and any other benefits provided by law to individuals suffering injury or illness through the course of their employment. This prima facie presumption may be rebutted by a preponderance of the evidence showing that the worker was not exposed to the disease while working in the place of employment other than the individual's own residence.

The foregoing statute does not identify teachers explicitly or implicitly in the class of essential employees who are entitled to the rebuttable presumption of compensability. The statute was not intended to designate teachers to be essential workers for the simple fact that after the initial shutdown during the pandemic, schools were closed and learning occurred virtually. Nevertheless, the Judge of Compensation granted petitioner's motion to declare the decedent to be an essential employee and entitled to that presumption.

The Court Rules generally do not apply in the Division of Workers Compensation. The Rules of Workers Compensation do not provide for a motion that is tantamount to a summary judgment motion. The Judge of

Compensation nevertheless heard and granted petitioner's motion essentially as a summary judgment motion, but did not hold petitioner to the requirements of R. 4:46-2 or Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). The Judge of Compensation based her decision on nothing but her personal beliefs about the Presumption Statute.

In fact, before petitioner's motion was heard, the Judge of Compensation revealed that she was of the opinion that teachers were essential employees, and that this teacher would be entitled to this presumption. Respondent moved to recuse the Judge of Compensation when it became evident that that the Judge of Compensation formed that opinion when she served as an Assemblywoman in the New Jersey State Assembly and advocated as a primary sponsor of the Presumption Bill. The Judge of Compensation denied respondent's recusal motion (1T12-22 to 1T22-17). That denial order is now the subject of the companion appeal, Giuseppe Amato v. Township of Ocean School District, Docket Number A-2542-23.

As to petitioner's motion, after deciding to hear the motion summarily, the Judge of Compensation should have been bound by the summary judgment standard in the Court Rules. R. 4:46-2(c) provides that summary judgment shall only be rendered if there is no genuine issue as to any material fact

challenged and that the moving party is entitled to a judgment as a matter of law.

Under Brill, *supra*, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidentiary materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issues in favor of the non-moving party. The "judge's function is not... to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 540, quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986).

The Judge of Compensation granted petitioner's motion without any "competent evidentiary materials." Petitioner provided no affidavits from any individual with personal knowledge of the relevant facts or any competent evidentiary materials. Petitioner only provided his attorney's certification with conclusory uncorroborated allegations and argument about the relevant statute. Petitioner did not even provide a statement of material facts, which is specifically required by R. 4:46-2(a). Summary judgment requirements are not optional. Petitioner's failure to provide the required statement alone warranted the denial of the motion.

Petitioner's "proofs" consisted of nothing more than his attorney's certification of conclusory allegations, a copy of Executive Order No. 103 signed by Governor Philip D. Murphy, a one-page document labeled, "Essential Employees," which is guidance promulgated by the Cybersecurity and Infrastructure Agency, an Advisory Memorandum, and a CISA Memorandum, touching on workers that are essential to critical infrastructure. (Ra6-40). These materials fall short of the statement of material facts, affidavits, and other competent evidentiary materials that are required in a summary judgment motion.

Moreover, petitioner's motion papers did not establish that there are no disputed issues of material fact. Governor Murphy's Executive Order does not state that a teacher is an essential employee. The "Essential Employees" document is from a federal agency that has no power to enact any statute or regulation that addresses the compensability of a New Jersey worker's compensation claim. The CISA Advisory Memorandum states that earlier versions were meant to assist officials and organizations identify essential work functions and to allow essential workers access to their workplace. However, allowing access to the workplace differs from conferring a presumption of compensability in the context of a worker's compensation claim. The CISA Memorandum is merely guidance on the essential, critical

infrastructure workforce, but certainly does not conclusively resolve the issue of whether a teacher is an essential worker. In fact, the document was dated August 18, 2020, which predates the passage of the Presumption Statute.

The flaws in proceeding with a summary judgment motion without requiring a statement of material facts with citations to supporting materials was revealed during oral argument. Discovery was not complete, petitioner had not provided the names of all lay witnesses, medical documentation, and other requested documentation. (2T209-13). Petitioner also did not produce an affidavit or testimony from anyone from the Department of Education, the Department of Health, the Teachers Union, or anyone at all in any official capacity to state that teachers are considered essential workers. (2T62-19-24, 2T66-14-20, 2T68-15 to 2T69-8). Petitioner also failed to produce any evidence of the dates and hours that she was actually working on school grounds for respondent when she contracted COVID-19. In fact, it is undisputed that the decedent tested positive for COVID-19 during the time period that the school was closed and in remote session. (2T41-12 to 2T42-9).

The Judge of Compensation found that while the Workers Compensation Rules do not provide for summary judgment motions, petitioner's motion could be considered under N.J.A.C. 12:235-3.5, which provides for "other motions," and strict compliance with the requirements for summary judgment under the

Court Rules do not apply. (2T71-1 to 2T72-19). If a motion that essentially seeks summary judgment is to be considered in the Division of Workers Compensation, the Court Rules pertaining to summary judgment should be followed.

Moreover, even if the Workers Compensation Rules are applied, N.J.A.C. 12:235-3.5(b) requires that the motion "shall be supported by affidavit made on personal knowledge setting forth facts which are admissible in evidence to which the affiant is competent to testify." Here, petitioner only provided a certification from his attorney, but did not provide an affidavit from anyone with personal knowledge. While the Judge of Compensation found that she was not strictly bound by the summary judgment requirements of R. 4:46, the Judge of Compensation did not articulate what standards she employed to satisfy N.J.A.C. 12:235-3.5 or otherwise.

Even if the Judge of Compensation applied N.J.A.C. 12:235-3.5, the Judge of Compensation still improperly relieved of petitioner of his proof requirements, finding that the pleadings and exhibits that were submitted were sufficient. (2T72-20-25). Petitioner's pleadings contained nothing but allegations, and did not provide a "factual and legal basis for the requested relief" as required by N.J.A.C. 12:235.3.5(a).

The Judge of Compensation found that teachers, including this decedent, should be included in the definition of essential workers. (2T71-2 to 2T94-25). This conclusion was not based on any competent evidence submitted by petitioner about the decedent, but was based only on the Judge of Compensation's interpretation of N.J.S.A. 34:15-31.11.

The Judge of Compensation reached this conclusion after finding that during the pandemic, it was important for educators and students to return to school. The Judge of Compensation found further that that the educational system is critical and teachers are critical to that system, and even though teachers are not named in the statute, they perform functions which involve physical proximity to members of the public and essential to the public's health, safety, and welfare. (2T892-17).

However, the section of N.J.S.A. 34:15-31.11 that the Judge of Compensation was citing specifically referred to an employee who is a "public safety worker or first responder, including any fire, police or other emergency responders." Decedent was not a "public safety worker or first responder," and therefore should not be entitled to the benefit of this statutory presumption.

Workers' Compensation is a summary proceeding. The parties do not have the right to discovery afforded litigants in Superior Court cases. There is not a unilateral right to depositions. There is not a unilateral right to

interrogatories except in proscribed cases. Typically, the parties' witnesses are not even disclosed until the pretrial memorandum is executed which is shortly before trial. See N.J.A.C. 12:235-1.1 et seq.

Workers' Compensation does not have what would be considered any type of normalized motion practice, particularly summary judgment practice. The structure of the practice is such that the Rules of the Division of Workers' Compensation recognize that to allow such motion practice would impinge upon the due process rights of the parties. It is both impractical and unfair to summarily rule on such a motion without giving the parties an opportunity to be heard.

To allow the Judge of Compensation's ruling to stand would be to deny respondent these basic rights of due process, which would include the right to a hearing on these issues. In fact, while this appeal has been pending, on April 4, 2024, petitioner has seized upon this denial of respondent's right to due process by filing a Notice of Motion for Judgment on Liability, in which he seeks to resolve the issue of liability in his favor without further proceedings. (Ra74-75).

In this matter, there was no testimony of any kind. There was not a single affidavit from any individual with personal knowledge of any pertinent facts including but not limited to any individual from the Department of

Education, the decedent's co-workers or the petitioner himself. The respondent was not even aware whether the motion was going to be heard until the Judge of Compensation denied the motion for a stay on the morning of the hearing.

The Rules of Evidence may not be relaxed to the point of infringing on the parties' due process rights or other fundamental rights. In Paco v. American Leather Mfg. Co., 213 N.J. Super. 90, 97 (App. Div. 1986), the court explained that:

Our holding today is merely a recognition of a fundamental tenet of our Anglo-American system of justice that no court or administrative agency is so knowledgeable that they can make fair findings of fact without providing both sides the opportunity to be heard. Larson, supra, § 79.84 at 15-426.295-96. As previously indicated, this opportunity to be heard includes not only the right to cross-examine the adversary's witnesses but also the right to present witnesses to refute the adversary's evidence. See, id. § 279.63 at 15-426.206; General Chemical Division, supra, 47 Del. at 547, 94 A.2d at 601. Thus, due process in administrative hearings requires that both parties have the right to present oral testimony in critical areas. Larson, supra, § 79.11, 12.

Here, respondent was denied these basic fundamental rights of the opportunity to be heard at a full hearing, to present witnesses and evidence, to cross-examine petitioner's witnesses, and to refute petitioner's evidence.

The Judge of Compensation therefore erred procedurally and substantively in declaring the decedent to be an essential worker. Respondent should be given the right to have all of these issues fully litigated after appropriate discovery has been exchanged, and should not be summarily

barred from litigating whether the decedent should be found to be an essential employee.

The Order declaring the decedent to be an essential worker should therefore be reversed, and this matter should be remanded for a trial on the merits. For the reasons expressed in the companion appeal of Giuseppe Amato v. Township of Ocean School District, Docket Number A-2542-23, this matter should be remanded to another Judge of Compensation to avoid the appearance of bias.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Order declaring the decedent to be an essential worker should be reversed, and this matter should be remanded for a trial on the merits. For the reasons expressed in the companion appeal of Giuseppe Amato v. Township of Ocean School District, Docket Number A-2542-23, this matter should be remanded to another Judge of Compensation.

Respectfully submitted,
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By: s/Randolph Brause
RANDOLPH BRAUSE

NEW JERSEY SUPERIOR COURT
APPELLATE DIVISION
DOCKET NO.: A-002543-23

Giuseppe Amato, :
Petitioner – Appellee, :
v. : Dept. of Labor & Workforce Dev.,
Division of Workers’ Compensation,
: Freehold Vicinage.
Township of Ocean School District, : Sat Below: Hon. Joann Downey, J.W.C.
Respondent-Appellant. :

Petitioner-Appellee’s Brief Submitted in Opposition To
Respondent - Appellant’s Appeal of Order of Workers’
Compensation Judge Declaring Petitioner -Decedent
An Essential Worker

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PRELIMINARY STATEMENT

This Brief is submitted in opposition to Respondent-Appellant’s appeal to the Appellate Division from an interlocutory Order of the Workers’ Compensation Court, in which Petitioner’s Decedent was declared to be an essential worker under N.J.S.A. 34:15-31. In sum, the decision of the Workers’ Compensation Court should be affirmed.

The Covid 19 virus was raging in New Jersey during the Covid State of Emergency from March 9, 2020, through June 4, 2021. Thousands of New Jerseyans were seriously sickened and many of those, including the Petitioner’s Decedent, died. During the State of Emergency, New Jersey needed “essential workers” to report to work to secure “the public’s health, safety and welfare.” Decedent, a schoolteacher, was one such “essential employee” who was summoned back for in person instruction by N.J. Executive Order 175. The Judge of Workers’ Compensation Court correctly ruled on Petitioner’s motion that Decedent was an “essential employee” pursuant to the statute (N.J.S.A. 34:15-31.11), during the period of claimed occupational exposure of January 2021 to Decedent’s Covid-related death on May 18, 2021.

Purpose of the Presumption Statute

To protect the “essential workers” summoned to work during the State of Emergency, New Jersey passed N.J.S.A. 34:15-31 (the “Covid Presumption

Statute”). (Pa1). The presumption statute identified classes of workers who were entitled to a presumption of causal relationship if they contracted Covid-19 during the period of the State of Emergency delineated by N.J. Executive Orders. The fact that a given individual fell into a “class” or had a “status” as an essential worker did not relieve them of the duty to prove that they actually contracted Covid 19 during the period of the State of Emergency and did not relieve them of the duty to prove that the infection caused permanent injury, or in this case, death. N.J.S.A. 34:15-31.

In making her determination that Petitioner’s Decedent had the requisite status as an essential worker, Judge Downey was cognizant that Decedent’s status as a full time, in the classroom teacher, was (and remains), admitted by the parties. (Ra, Vol. I, pages1-3; 2T93-21 to 25). It is also undisputed that the N.J. State of Emergency was in effect during the entire time of Decedent’s occupational exposure (January 2022 through May 18, 2022, when she passed away). (N.J. Executive Order #103, Pa18 to 23).

In sum, the statute relieved “essential workers” who contracted Covid during the Covid State of Emergency from having to prove that their Covid infection was causally related to their work. Perhaps most importantly, the presumption statute relieved “essential workers” from having to eliminate every possible vector of the virus that could have caused their infection as part of their *prima facie* case. The remedial legislation shifted the burden as to causal relationship to their employer. In

a rational analysis, it would be well-nigh impossible for any essential worker to prove the specific viral vector came from the workplace as opposed to every other possible contact in the essential worker's life.

Furthermore, the Respondent does not claim that Judge Downey inappropriately took Judicial Notice of any documents filed in support of Petitioner's essential worker motion. Every item of Judicial Notice that was recognized by Judge Downey in making her determination has been unopposed throughout the motion proceedings and throughout this appeal.

Statute Allows Respondent to Rebut The Presumption

Even after the "essential worker" finding by the Workers' Compensation Court, the Petitioner still needs to prove that Decedent: 1) contracted the virus during the claimed occupational exposure period (January 2021 through her passing on May 18, 2021); and 2) that the Covid 19 virus was a material cause of her death. The statutory presumption is rebuttable and the Respondent has the right to prove by a preponderance of the evidence that Decedent contracted Covid 19 outside the workplace.

The decision of the Workers' Compensation Judge should be affirmed because Decedent, as a teacher, was correctly determined to be an essential worker during the time of the presumption period under N.J.S.A. 34:15-31. The case should proceed to trial in the Workers' Compensation Court.

PROCEDURAL HISTORY

Petitioner-Appellee, Guiseppe Amato (hereinafter “Petitioner”), filed a Dependency Claim Petition on behalf of himself as surviving spouse and on behalf of their two young sons, Christian (then age 14) and Luca (then age 11). (See Claim Petition at Ra, Vol. I, pages 1-2).¹ Respondent-Appellant, the Township of Ocean School District filed an Answer and admitted that Decedent was employed by the Respondent School District but denied that Decedent’s occupational exposure to COVID occurred in the course of her employment. (Ra, Vol. I, page 3).

Pre-trial discovery took place, expert reports were exchanged, and settlement negotiations were conducted, in which the Court was actively involved. In the workers’ compensation court, Petitioner filed a Motion to declare Decedent as an Essential Employee under the presumption statute, N.J.S.A. 34:15-31.11 (Pa1), based on her status as a school teacher for Respondent, Township of Ocean Township School District during the claimed period of occupational exposure. In Respondent’s filing and throughout all the proceedings, Decedent’s status as a school teacher during that period has never been disputed or contested. (Ra, Vol. II, page 30).

¹ Respondent-Appellant will be referred to as “Respondent” and Petitioner-Appellee will be referred to as “Petitioner.”

The Workers' Compensation Judge granted Petitioner's Motion, finding that Decedent was an essential employee. (Ra, Vol. III, page 68). Respondent filed a Motion for Leave to File an Interlocutory Appeal of the Judge's decision and the Motion for Leave was granted on April 23, 2024. (Ra, Vol. III, page 73). Respondent submitted additional briefing and Petitioner now files this timely opposition.

STATEMENT OF FACTS

The Spouse of Petitioner and the Mother to their two sons, Decedent, Denise Amato, was age 43 and a full-time schoolteacher at Respondent's middle school, when she passed away on May 18, 2021. (*See* Ra, Vol. I, page 1 and *see* copy of death certificate at Pa2). Decedent was required by Respondent to return to in school instruction as part of the "school reopening plan" which went into effect in September 2020 for the 2020-2021 school year. (Pa3-17) This reopening plan was implemented through Executive Order No. 175. (Ibid.).

It is admitted in Respondent's Answer that Decedent was employed as a full-time teacher during the January 2021 through May 2021 period of occupational exposure set forth in the Claim Petition. (Ra, Vol. I, page 3). It is also undisputed that that the New Jersey Covid State of Emergency, which triggers the applicability

N.J.S.A. 34:15-31.11 granted a presumption of occupational causality as to COVID-19 contracted by “essential workers” during the aforesaid state of emergency and it had been passed by the legislature and signed into law by Gov. Murphy on September 14, 2020, retroactive to March 9, 2020. (*See* Executive Order 103 at Ra, Vol. I, pages 8 to 15). The State of Emergency was not lifted until June 4, 2021, via Executive Order 244. (Pa26-33). Thus, the N.J. Covid State of Emergency began on March 9, 2020, and concluded on June 4, 2021.

There is really only one undisputed fact involved in the essential employee motion and Respondent has admitted this fact in its pleadings and throughout its briefing: *Decedent was a full-time school teacher for the Respondent during the period of occupational exposure, i.e. January 2021, until her death on May 18, 2021.* (*See* Ra, Vol. I, pages 1–3). The balance of the essential employee motion involved statutory construction, evaluation of Executive Orders, and directives from the N.J. Department of Health, all properly the subject of judicial notice. There are no genuine issues of material fact and no issues of fact have been alleged in Respondent’s subsequent filing for Motion for Leave and in Respondent’s current letter brief. The determination by the Workers’ Compensation Judge of Petitioner’s motion was clearly decided as a matter of law. The Judge of Compensation correctly decided the motion declaring that Decedent was an essential employee and this decision should be affirmed.

LEGAL ARGUMENT

POINT I STANDARD OF REVIEW

The Appellate Division granted Respondent's Motion for interlocutory review. The standard for review of a decision of a Judge of Compensation by the Appellate Division is the same as that on appeal in any non-jury case, "whether the findings made could reasonably have been reached on sufficient credible evidence present in the record" considering "the proofs as a whole." Hersh v. City of Morris, 217 N.J. 236, 242 (2014). Judges of Compensation judges are regarded as experts and their findings are entitled to deference, such findings must be supported by articulated reasons and grounded in the evidence. *See, e.g.* Lewicki v. New Jersey Art Foundry, 88 N.J. 75 (1981).

The Workers' Compensation Judge correctly determined that Decedent was an essential worker under N.J.S.A. 34:15-31. The Appellate Division should affirm this decision.

POINT II
BASED ON THE APPLICABLE STATUTES, EXECUTIVE ORDERS, AND
DIRECTIVES FROM THE BOARD OF HEALTH - DECEDENT WAS
CORRECTLY DETERMINED TO BE AN ESSENTIAL EMPLOYEE

A. THE STATE OF EMERGENCY

It is not disputed by either side that New Jersey was under the Covid State of Emergency, from March 9, 2020 to June 4, 2021, pursuant to Executive Order No. 103 to Executive Order No. 244. (*See* N.J. Executive Order No. 103 at Pa18-25) and N.J. Executive Order 244 at Pa26-33). This time period covered the Decedent’s period of occupational exposure: from January 2021, until her passing on May 18, 2021, as per the filed Dependency Claim Petition. (Ra, Vol. I, pages 1-2).

B. THE PUSH TO RETURN TO IN SCHOOL INSTRUCTION (SUMMER 2020)

The Judge of Compensation took appropriate Judicial Notice of the then “Trump” Administration’s Executive Order to reopen schools for in person instruction. (Pa34-36). Judicial Notice was taken of the amendment to the United States List of Critical Infrastructure Employees of August 18, 2020 to include “educators” such as Decedent, as per the Administration’s directive. (Pa47). The

Judge also took notice of the N.J. Executive Order No. 175 promulgated by Governor Murphy on August 13, 2020, ordering the reopening of schools for in-person school instruction for the 2020 to 2021 school year. (Pa3-17).

**C. DECEDENT IS ENTITLED THE BENEFIT OF
THE PRESUMPTION BASED ON DEFEINITION
SECTION 3 OF N.J.S.A. 34:15-31.11**

Definitional Subsection 3 of the statute provides that during the State of Emergency an *“essential employee” includes employees who “perform functions which involve physical proximity to members of the public and are essential to the public’s health, safety, and welfare.”* N.J.S.A. 34:15-31.11.

It would seem axiomatic that a public school teacher, who was required to return to in-school instruction by virtue of an Executive Order during a raging pandemic, would be performing a function “which involve[d] physical proximity to members of the public and [was] essential to the public’s health, safety and welfare.” (Ibid).

Pursuant to the instructions of the Governor and her employer, the Decedent returned to work for in school instruction for students for the 2020 to 2021 school year starting in September of 2020 as per the admission by Respondent. (Ra, Vol. I, page 3).

The Judge of Compensation took judicial notice of supporting evidence in the manner set forth in N.J.R.E. 203 to support her decision in finding Decedent to have been an “essential employee” entitled to the presumption of causation. The Judge of Compensation also took judicial notice of Executive Order No. 175, which states at page 3, wherein Gov. Murphy declares:

“WHEREAS, the Department of Education has found that the reopening of schools for in-person instruction is critical in facilitating the social and emotional health of students and providing educators with ability to actively participate in student learning. . . .”

[Executive Order 175, page 3, at Pa 5.]

and further:

“WHEREAS, NEW JERSEY’s schools serve a critical function for our State’s workforce in that they provide safe supervision of children during the day, allowing parents and guardians to work and move the economy forward... .”

[Id. at Pa6.]

The Executive Order added that the prior Executive Orders closing New Jersey Schools were superseded and the schools were reopened for in-person

instruction. (Pa8 & 9). Pursuant to those directives, Decedent returned to in-person instruction at Respondent's public school as admitted by the parties; thereby, qualifying for New Jersey's "essential worker" status as per the statute as the Judge of Workers' Compensation properly found.

The Judge of Compensation also took judicial notice of the New Jersey Department of Health Covid 19 Vaccination Plan effective October 16, 2020 which declared "**Critical Populations**" that "**Other essential workers in sectors which include, but not limited to**" . . . "**Education and Child Care Workers.**" (Pa53-54). This plan prioritized the precious supplies of the Covid 19 vaccine to critical essential workers, which included teachers. (*Ibid.*). The Judge of Compensation further stated in her decision that "it's important to take judicial notice of all of these things" (2T91:10 to 12).

**D. DECEDENT IS ALSO ENTITLED TO THE
BENEFIT OF THE PRESUMPTION BASED
UPON DEFINITIONAL SECTION 4**

NJSA 34:15-31.11, Section 4 reads as follows:

(4) is any other employee deemed an essential employee by the public authority declaring the state of emergency.

The public authority declaring the State of Emergency is Gov. Murphy. On March 9, 2020, well before Petitioner fell ill in February 2021, Governor Murphy issued Executive Order 103 (Pa18-25), declaring the Covid State of Emergency and

which delegated the power to protect New Jersey citizens from the effects of the Covid pandemic and to issue directives to both the public and private sectors. (*See* paragraph 1 on page 5 of Executive Order 103 at Pa22). The Order delegated the authority to the New Jersey Director of Emergency Management, who is also the Superintendent of the State Police. (Pa22).

Thereafter, the Superintendent of the State Police issued a Memorandum entitled “Essential Workers” by which the New Jersey Public Authority incorporated by reference the Department of Homeland Security List of Essential Critical Infrastructure Workforce, amended and published on August 18, 2020, wherein, it was made applicable to “Education.” (*See* Homeland Security List at Pa47). The cited paragraph clearly lists “teachers” such as Decedent as critical essential workers. Note: While the Department of Homeland Security List of Essential Critical Infrastructure Workforce list itself was “advisory,” meaning that the actual adoption of the list was left up to the individual states, New Jersey formally adopted the list in the New Jersey Department of Emergency Management Memorandum. (*See* N.J. State Police Memorandum at Pa37-42).

It has been argued by Respondent that the New Jersey “Memorandum” is “advisory only,” but such is not the case. The proof that the Memorandum was actually adopted and implemented in New Jersey is set forth on the face of the memorandum itself. *See* Pa37, where the New Jersey Office of Emergency

Management clearly adopts the Memorandum when it pointedly directs New Jersey Employers as follows:

“If per this guidance you can identify as an Essential Employee, please refer to the attached documents.” (See highlighted section, Pa37).

The Memorandum then links the reader to a N.J. State Police credentialing system which generates an “ID Card” for essential employees in case they are stopped or questioned by law enforcement while in transit to their jobs. Obviously, the Memorandum was not advisory but was adopted by New Jersey. Ibid.

The determination of essential worker status by the Judge of Workers’ Compensation does not constitute the entire *prima facie* case for Petitioner. Petitioner still must prove that Decedent contracted the virus during the period of occupational exposure and that Covid 19 was a material factor in causing her death.

The ruling by the Judge of Workers’ Compensation only allows Petitioner the presumption as to causal relationship to Decedent’s employment and Petitioner still must prove through competent medical evidence the other prongs of the *prima facie* case. It relieves the essential employee from having the burden at trial to exclude every other possible vector of this virus and shifts the burden to Respondent.

POINT III

JUDICIAL NOTICE WAS PROPERLY TAKEN BY THE
WORKERS' COMPENSATION JUDGE

The broad parameters of Judicial Notice are set forth in N.J.R.E. 201. Certainly the Court can take notice of the law of this State, Acts and Resolutions of the United States, as well as “regulations and determinations of all governmental subdivisions and agencies thereof.” In fact, judicial notice is **mandatory** “if requested by a party on notice to all other parties and if supplied with the necessary information.” N.J.R.E. 201.

The Workers' Compensation Judge took proper Judicial Notice of New Jersey Executive Orders, regulations and determinations of the State Police, State Department of Emergency Management, New Jersey Department of Health, Federal Department of Homeland Security as well as the Death Certificate. N.J.R.E. 201 (a).

The Court below also had the discretion to take Notice of Facts of generalized knowledge that cannot reasonably be the subject of dispute; facts pertinent to the event (such as the existence of the pandemic). The transcripts of the proceedings below profoundly demonstrate that the Workers' Compensation Judge afforded Respondent full opportunity to be heard pursuant to N.J.R.E. 201 (e).

Respondent has not made any argument in the Workers' Compensation proceedings or at the Appellate Division that Judge Downey inappropriately or

incorrectly took Judicial Notice of any of the documents filed in support of Petitioner's essential worker motion. Every item of Judicial Notice that was recognized by Judge Downey in making her finding has been, and remains unopposed by Respondent.

Judicial Notice was properly taken by the Workers' Compensation Court.

POINT IV

**RESPONDENT'S ARGUMENTS
ARE REPLETE WITH MISREPRESENTATIONS
AND WITHOUT ANY BASIS**

Pursuant to the motion and evidentiary procedure in the N.J. Workers' Compensation Court, as stated in N.J.S.A. 34:15-56 titled "Rules of Evidence," it provides: "At such hearing, evidence, exclusive of ex-parte affidavits, may be produced by both parties, but the official conducting the hearing shall not be bound by the Rules of Evidence."

Respondent argues that the Judge of Compensation should have been bound by the summary judgment standard in the Court Rules. (See Rb, page 9).

However, as stated in the comments to the summary judgment rule:

"Nevertheless, although the requirements of paragraph (a) and (b) are stated in mandatory terms, summary judgment may be

granted even if these requirements are not met when there is a single critical and undisputed issue.”

[Court Rule 4:46-2, Comments, para. 1.2, *citing, e.g., Kenny v. Meadowview Nursing Center*, 308 N.J. Super. 565, 569-570 (App. Div. 1998).]

The motion regarding the essential worker status of Decedent was not a summary judgment motion but was a motion regarding the “essential worker status” on the pleadings. However, even if it were considered a motion for summary judgment, the Judge of Compensation correctly decided “the single critical and undisputed issue” relying on the applicable statutes and Executive Orders.

Respondent also argues that the Judge of Compensation “based her decision on nothing but her personal beliefs about the Presumption Statute.” (Rb 8). Nothing could be further from the truth. As shown by the statutes and Executive Orders upon which the Judge based her decision, her conclusion was not based on any personal belief. Respondent adds to its argument that the Judge granted Petitioner’s Motion “without any competent evidentiary materials.” (Rb 10). A Judge is required to take judicial notice of statute and executive orders and it was these laws upon which the Judge of Compensation based her decision.

There are no issues of material fact. It is difficult to fathom how Respondent can make this assertion when the statutes and Executive Orders make it very clear that the Decedent was an essential worker. In making its argument, Respondent

states that Petitioner “failed to produce any evidence of the dates and hours she was actually working on school grounds for Respondent when she actually contracted Covid 19.” (Rb14). This “evidence” is not to be decided at this time and by way of the motion, but Petitioner will need to prove at trial that Decedent contracted Covid 19 during the Covid State of Emergency as per the Petitioner’s Claim Petition. (Ra1).

In summary, the finding by the Judge of Workers’ Compensation of a school teacher’s “status as an essential worker” simply affords Petitioner the presumption of occupational causation. The Petitioner still needs to prove that Decedent contracted Covid 19 during the claimed period of occupational exposure, and that it was a material factor in her demise. To put it even more simply, if Decedent were a health care worker during the same period of time, the Petitioner would still need to prove, at trial, through medical proofs that Decedent contracted Covid 19 during that period and that it was a material factor in causing her death. This was the limited and appropriate finding by the Judge of Workers’ Compensation who decided the issue below.

CONCLUSION

Petitioner, Giuseppe Amato, contends that there is no issue of fact to be contested. The Judge of Compensation thoroughly reviewed the law and official promulgations in deciding her well founded decision that Decedent schoolteacher was an essential worker pursuant to NJSA 34:15-31.11 and that her surviving spouse and children are entitled to the presumption of occupational causation provided by that statute by virtue of definitional section (3) or (4) or both.

The decision of the Workers' Compensation Judge should be affirmed as Decedent was properly determined to be an essential worker under the presumption statute. The matter should proceed in the Workers' Compensation Court.

Respectfully,
MARTIN MELODY, LLC.

A handwritten signature in black ink, appearing to read "Eugene J. Melody". The signature is written in a cursive, somewhat stylized font.

Eugene J. Melody, Esq.

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CERTIFIED BY THE NEW JERSEY SUPREME COURT AS A WORKERS' COMPENSATION LAW ATTORNEY

July 3, 2024

Randolph Brause, Esq.
Attorney ID # 031651986
On the Letter-Brief

*REPLY LETTER-BRIEF ON BEHALF OF RESPONDENT-APPELLANT,
TOWNSHIP OF OCEAN SCHOOL DISTRICT*

Honorable Judges of the Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
Trenton, NJ 08625-0006

Re: Giuseppe Amato (Petitioner-Respondent) v. Township of Ocean School
District (Respondent-Appellant)
Claim Petition No.: 2021-19450
Appellate Docket No.: A-2543-23

Civil Action: On Appeal from an Order Declaring Decedent An
Essential Worker, from the State of New Jersey
Department of Labor and Workforce Development,
Division of Workers Compensation, Freehold
Vicinage

Sat Below: Honorable Joann Downey, J.W.C.

Dear Judges:

Kindly accept this Reply Letter-Brief on behalf of respondent-appellant
pursuant to R. 2:6-2(b).

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PROCEDURAL HISTORY

Respondent-appellant, Township of Ocean School District ("respondent"), relies upon and incorporates the Procedural History set forth in its initial Letter Brief (Rb3-5).¹

STATEMENT OF FACTS

Respondent relies upon and incorporates the Statement of Facts set forth in its initial Letter-Brief. (Rb5-6).

¹ "Rb" refers respondent's initial Letter-Brief filed on Jun 7, 2024.
"Ra" refers to respondent's appendix to its initial Letter-Brief.
"Pb" refers to petitioner's Brief filed on June 21, 2024.
"1T" refers to February 21, 2024 motion transcript.
"2t" refers to March 14, 2024 motion transcript.

LEGAL ARGUMENT

POINT I

THE PETITIONER DECEDENT SHOULD NOT HAVE BEEN
SUMMARILY DECLARED TO BE AN ESSENTIAL
EMPLOYEE.
(2T71-2 to 2T94-25, Ra28)

The Judge of Compensation erred procedurally and substantively by summarily declaring the decedent to be an essential employee as defined by N.J.S.A. 34:15-31.11.

Regardless of whether the Judge of Compensation treated petitioner's motion to declare the decedent to be an essential employee as an "other motion" under Workers Compensation Rule N.J.A.C. 12:235-3.5, or as a motion for summary judgment under R. 4:46-2, petitioner failed to satisfy his burden to establish that he was entitled to a judgment on the issue as a matter of law and that there were no genuine issues of disputed material facts.

If treated as an "other motion" under the Workers Compensation Rules, N.J.A.C. 12:235-3.5(b) required petitioner's motion to "be supported by affidavit made on personal knowledge setting forth facts which are admissible in evidence to which the affiant is competent to testify."

If treated as a motion for summary judgment, R. 4:46-2(a) required petitioner's motion to be supported by a statement of material facts, which "set forth in separately numbered paragraphs a concise statement of each material

fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted. The citation shall identify the document and shall specify the pages and paragraphs or lines thereof or the specific portion of exhibits relied on."

Petitioner did not provide the requisite support for his motion for the Judge of Compensation to even consider the motion, regardless of which of the foregoing Rules applied. These are not mere technicalities that may be so cursorily dispensed with as urged by petitioner by simply arguing that the Judge of Compensation was permitted to take judicial notice of the documentation attached to petitioner's motion to satisfy his burden. (Pb14-17).

The foregoing Rules must be enforced to afford respondent its basic right to due process, which includes the right to a full hearing to litigate the issue of whether the decedent in this case fell within the purview of the definition of essential employees under N.J.S.A. 34:15-31.11. Workers compensation claims proceed by way of summary proceedings. The parties are afforded limited discovery and limited rights to depositions. See N.J.A.C. 12:235-3.8 and 3.9. To permit the finding below to stand based on a summary decision that did not even follow the basic requirements of the Workers

Compensation Rules or the New Jersey Court Rules would deny respondent its right to due process.

Here, the Judge of Compensation summarily found that the decedent was an essential employee without any affidavit from any individual with personal knowledge of any pertinent facts or any other competent evidence.

Respondent was denied due process and its right to a full hearing, the right to call witnesses, and the right to cross-examine witnesses.

Assuming that the Judge of Compensation could take judicial notice of the documents that petitioner submitted, those documents were not dispositive and did not eliminate the existence of genuine issues of material fact. The documentation that petitioner and the Judge of Compensation relied upon were only advisory. They were not dispositive just because petitioner argued that they were dispositive (Pb12-13), particularly in the absence of any affidavit of any individual from the Department of Education, the Department of Health, the Teachers Union, or anyone at all in any official capacity to state that those documents are dispositive on the issue of whether teachers in general or this decedent are essential workers.

Furthermore, as set forth in respondent's companion appeal, Giuseppe Amato v. Township of Ocean School District, Docket Number A-2542-23, the Judge of Compensation considered information that she obtained from her

service in the New Jersey State Assembly to reach the conclusion that this decedent as all teachers are to be considered essential employees. This is not a permissible use of judicial notice under N.J.R.E. 201, or otherwise. See Route 15 Assocs. v. Jefferson Twp., 187 N.J. Super. 481, 490 (App. Div. 1982).

Petitioner also attempts to downplay the significance of the finding that the decedent is an essential employee, arguing that petitioner still must prove that the decedent contracted COVID-19 during the claimed occupational period, and that COVID-19 was a material cause of her death. (Pb3, 13). This argument is not accurate and even if true, is irrelevant. A finding that the decedent was an essential employee under N.J.S.A. 34::15-31.11 provides petitioner with the presumption that the decedent contracted COVID-19 in the course of her employment with respondent. This is just about the most fundamental disputed issue in this and most disputed worker's compensation claims, as evidenced by the fact that petitioner pursued this finding by way of a motion to avoid having to litigate it.

The Judge of Compensation therefore erred procedurally in declaring the decedent to be an essential employee. The Judge of Compensation also erred substantively because teachers are not essential employees.

Teachers are conspicuously omitted from the workers that are specifically identified as essential employees in N.J.S.A. 34:15-31.11 and

31.12. The statute was not intended to designate teachers to be essential employees for the simple fact that after the initial shutdown during the pandemic, schools were closed and learning occurred virtually. Thus, while teachers, and this decedent in particular, returned to work virtually during the relevant time period, they were not required to return to "in-school instruction" "during a raging pandemic," as argued by petitioner. (Pb9). The "proofs" relied upon by petitioner certainly do not prove otherwise or eliminate all genuine issues of material issues of fact with respect to this decedent.

The Judge of Compensation found that it was important for educators and students to return to school. The Judge of Compensation found further that that the educational system is critical and teachers are critical to that system, and even though teachers are not named in the statute, they perform functions which involve physical proximity to members of the public and essential to the public's health, safety, and welfare. (2T892-17).

However, the section of the statute that the Judge of Compensation quoted (N.J.S.A. 34:15-31.11(3)) goes on to identify employees "including transportation services, hotel and other residential services, financial services, and the production, preparation, storage, sale, and distribution of essential goods such as food, beverages, medicine, fuel, and supplies for conducting essential business and work at home." The Legislature's omission of teachers

from the foregoing list of employees or places of employment is critical in this analysis, but was ignored by the Judge of Compensation. The Judge of Compensation was not presented with any evidence during the motion to summarily find that this decedent was an essential employee.

In Lewicki v. N.J. Art Foundry, 88 N.J. 75 (1981), the Court explained a Judge of Compensation's obligation to make adequate findings based upon sufficient proofs in the record:

Although it must be kept in mind that Compensation Judges are regarded as experts, and their findings are entitled to deference, such findings nevertheless must be supported by articulated reasons grounded in the evidence. Even a tribunal with expertise must predicate its ultimate determination on findings suggested by proofs to which it applies its special knowledge. (Citations omitted).

Id. at 89-90.

Here, the Judge of Compensation's findings were not supported by articulated reasons that were grounded in the evidence. The Judge of Compensation erred procedurally and substantively in declaring the decedent to be an essential worker. Respondent should be entitled to have all of these issues fully litigated after appropriate discovery has been exchanged, and should not be summarily barred from litigating whether the decedent should be found to be an essential employee.

The Order declaring the decedent to be an essential employee should therefore be reversed, and this matter should be remanded for a trial on the merits. For the reasons expressed in the companion appeal of Giuseppe Amato v. Township of Ocean School District, Docket Number A-2542-23, this matter should be remanded to another Judge of Compensation to avoid the appearance of bias.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Order declaring the decedent to be an essential worker should be reversed, and this matter should be remanded for a trial on the merits. For the reasons expressed in the companion appeal of Giuseppe Amato v. Township of Ocean School District, Docket Number A-2542-23, this matter should be remanded to another Judge of Compensation.

Respectfully submitted,
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