ly be ordered only when no lessor sanction will suffice to erase the prejudice suffered by the non-delinquent party ... or when the litigant rather than the attorney was at fault...." *Zaccardi v. Becker*, 88 *N.J.* 245, 253, 440 *A.*2d 1329 (1982). Dismissal is not the sole remedy, rather "a range of sanctions is available to the trial court when a party violates a court rule." *Id.* at 252–253, 440 *A.*2d 1329. And, of course, it is fundamental that the trial court has the "inherent discretionary power to impose sanctions for failure to make discovery," *Calabrese v. Trenton State College*, 162 *N.J.Super.* 145, 392 *A.*2d 600 (App.Div.1978), aff'd, 82 *N.J.* 321, 413 *A.*2d 315 (1980), and "is free to apply them, subject only to the requirement that they be just and reasonable in the circumstances...." *Lang v. Morgan's Home Equipment Corp., supra*, 6 *N.J.* at 339, 78 *A.*2d 705; *Calabrese v. Trenton State College, supra*, 162 *N.J.* at 151–152, 392 *A.*2d 600. We must not lose sight of the fact that "justice is the polestar and our procedures must ever be moulded and applied with that in mind." *N.J. Highway Authority v. Renner*, 18 *N.J.* 485, 495, 114 *A.*2d 555 (1955).

[4, 5] Thus, when a plaintiff has violated a discovery rule or court order the paramount issue is whether a lesser sanction than dismissal would suffice to erase the prejudice suffered by the non-delinquent party. The trial court must first determine the prejudice suffered by each defendant and then determine whether dismissal with prejudice is the only reasonable and just remedy available. If a lesser sanction could erase the prejudice against the non-delinquent party, dismissal of the complaint with prejudice would not be appropriate and would therefore constitute an abuse of discretion. The sparse record before us is not wholly informative with respect to the issue of whether each of the defendants in this matter would be prejudiced by reinstatement of the complaint. The record does not reveal the nature and extent of the prejudice each of the defendants allegedly has sustained by Cullen's failure to comply with the rules of discovery, court orders and failure to appear at the scheduled trial date. Moreover, it does not appear from the record whether the passage of time impaired the ability of any or of all of them to defend the claim. Therefore, we are constrained to remand the matter to the trial court for further proceedings to ensure the issue of prejudice with respect to each of these defendants is carefully reviewed.

Accordingly, we reverse the trial court's order denying plaintiff's application for reconsideration of the various orders of dismissal of the complaint with prejudice and remand the matter to the trial court and direct that an appropriate hearing be conducted to determine the prejudice that each defendant may have sustained as a result of the passage of time occasioned by Cullen's inattention, carelessness and negligence and whether a sanction other than dismissal with prejudice would be reasonable and just with respect to each. We do not retain jurisdiction.

199 N.J.Super. 121

John T. STACK, Petitioner-Appellant,

v.

BOONTON BOARD OF EDUCATION, Respondent-Respondent.

Superior Court of New Jersey, Appellate Division.
Submitted Oct. 11, 1984.
Decided Feb. 20, 1985.

Employee of board of education who held three positions with board, as mathematics teachers, head football coach and head golf coach, was injured in course of employment. The Department of Labor,

Division of Workers' Compensation, determined that three jobs were independent of each other, selected one and based compensation rate on salary paid for that one on theory that it was during employee's employment on that job that he was injured, and employee appealed. The Superior Court, Appellate Division, Fritz, P.J.A.D., held that proper manner of determining workers' compensation rate was to aggregate salaries from three positions.

Reversed and remanded.

Workers' Compensation ⇐829

Even though employee held three jobs for board of education, one as mathematics teacher, one as head football coach, and one as head golf coach, and duties with board of education were governed by three contracts, each describing amount of money allocated for three jobs, where employee needed teacher certification before he could be considered for football coaching position, and nature of various tasks confounded line drawing among three positions, proper method of computing workers' compensation rate was to aggregate compensation from three positions.

Balk, Balk and Mandell, Newark, for petitioner-appellant (Jack Mandell, Newark, on brief).

Braff, Litvak, Ertag, Wortmann, Harris & Sukoneck, Livingston, for respondent-respondent (Leo Ertag, Livingston, on the brief).

Zazzali, Zazzali & Kroll, Newark, filed a brief on behalf of amicus curiae New Jersey Educ. Ass'n (James R. Zazzali, Newark, of counsel; Robert A. Fagella, Trenton, on brief).

Before Judges FRITZ, GAULKIN and LONG.

The opinion of the court was delivered by

FRITZ, P.J.A.D.

In this workers' compensation matter the sole issue concerns the computation of wages for compensation purposes in a case in which the petitioner holds three jobs for the same employer. The judge of compensation concluded that the three jobs were independent of each other, selected one and based the compensation rate on the salary paid for that one on the theory that it was "during his employment" on that job that he was injured. We reverse.

On April 19, 1980, the day of the accident in question, John Stack was employed by the Boonton Board of Education (Board) in three capacities: a mathematics teacher, the head football coach and head golf coach. This employment came about a year prior to that date when Stack, then teaching and coaching at Ridgefield Memorial High School, responded to a newspaper advertisement placed by the Board. Stack sought the job because he had "recently moved into the Morris County area" and he was seeking employment "closer to home." The advertisement sought a head football coach. The testimony of Stack and that of the principal of Boonton High School differ respecting the availability of teaching positions at the time of the advertisement, but it is uncontested and uncontestable that there was a vacancy in the teaching ranks at the time of the hiring and that Stack was hired "as a teacher at Boonton High School and as head football coach." It is also factual, as demonstrated by the testimony of the principal, that in order to be considered for the coaching job "you had to have [teacher] certification." At the time of the accident, Stack's several duties with the Board were covered by three contracts, each describing the amount of money allocated for the three jobs.

On the day of the accident, Stack commenced his employment at 6:30 in the morning at a universal gym weight lifting program at the school open to all students. He was in charge of this program. The participation was not just by athletes but also by "kids in that also who were not

involved in sports but just wanted to be in a weight lifting program." According to his uncontradicted testimony, he then supervised his homeroom and taught his classes in mathematics, meeting just before lunch with a few of his football players who were having some scholastic difficulties. After his teaching assignments were through, he met with a college football coach respecting whether he "had any football players that ... met all his academic and football standards." Following the school day he devoted a half hour to "extra help for the math kids" and then he changed into his golf clothes and went to the Knoll Golf Club where he coached an interscholastic golf match, driving there in his automobile and taking two of the players with him. He returned to the school, changed into a suit, picked up the principal and the two of them went together to the Morris County Football Coaches' Association Banquet. Stack testified that while at the banquet in addition to conversation concerning football, he and the principal talked about both the mathematics classes and the golf team. The principal denied any recollection of the subjects discussed. The two sat together at the dinner.

Stack and the principal went home separately. On the way home Stack was involved in an automobile accident which left him a totally and permanently disabled paraplegic.

As noted above, the sole issue is whether the wages for the employment should be aggregated for determination of the compensation rate, or whether that rate should be determined only on the salary paid for coaching football, as the judge of compensation determined. The Board argues that the jobs are separate and distinct. Petitioner insists that they are a single employment, but even if they are not, they represent joint and concurrent employment.

We can conceive of no reason why the simple expedient of three separate contracts, allocating the salary which the Board was paying Stack for the work he did for them into proportionate amounts, should cause employment by the same employer of the same person to be considered three separate employments. This is especially so where the qualification for one of the jobs was conditioned upon qualification for another: Stack needed teacher certification before he would be considered for the football coaching position.

Beyond this, the nature of the various tasks confounds line drawing. When Stack supervised the weight lifting activity in the morning, was he employed as a football coach, a golf coach or a mathematics teacher? Did his efforts to assist football players having scholastic troubles with their schoolwork convert Stack from a football coach to a scholastic counselor or a math teacher if one of the difficulties the student was having was with mathematics? If Stack were to be believed—the judge of compensation made no finding in this respect—when he testified that at the dinner the night of the accident, he talked with the principal about "my math program—how it was coming along," does it not follow that the events were to be identified in part at least with the classroom teaching job?

The judge of compensation was disposed to his determination by his conclusions, "While petitioner worked for a single employer, he obviously operated under three contracts of employment. *His duties under each were separate and distinct from the others. Accordingly, petitioner held three separate jobs with the Boonton Board of Education and each was independent of the other.*" (Emphasis supplied.) The questions we have suggested above convince us that the italicized conclusions cannot spring from any findings reasonably reached on sufficient credible evidence in the whole record. The fact is inescapable that while Stack's employment was divided into three different jobs—and apparently a few more without portfolio—there was an ineluctable intermingling and overlapping.

While there are numerous dual employment and joint and concurrent employment cases, there is a paucity of case law in New

Jersey dealing with employment by one employer of one employee in several jobs which are undertaken essentially concurrently. Two old cases are informative.

In *Bollinger v. Wagaraw Building Supply Co.*, 18 *N.J.Misc.* 1, 11 *A.*2d 367 (C.P. 1939) the employee was employed as a machine operator and as a watchman. In addition to separately apportioned pay for those two jobs, he was provided with a house and utilities. A judgment was entered in the (then) Workmen's Compensation Bureau aggregating these salaries and including an allowance to represent the house and utilities. The judge of Common Pleas on his review agreed, concluding:

> ... Both employments ... are so connected and interrelated as to be but one within the contemplation of the act. The mere fact that Bollinger's hiring as a watchman and caretaker commenced at a time subsequent to his other employment does not change the situation. The contract of employment as a watchman and caretaker was a modification of, or supplement to the original hiring. On the day of the accident, Bollinger was rendering service to his employer in both capacities, and the contract of hiring, using this term in a broad sense, covered all of the work being performed by Bollinger. [18 *N.J.Misc.* at 4, 11 *A.*2d at 368–369.]

A similar result was achieved in *Lukawich v. Phelps Dodge Copper Products Corp.*, 18 *N.J.Misc.* 351, 13 *A.*2d 568 (C.P. 1940) by a different Common Pleas judge. Here petitioner was employed as a caster. His employer also paid him to keep the furnaces going over the weekend so that the casting could begin on Monday without delay. Here the judge held that "decedent was employed ... under one general employment, part of which was to act as caster and part to act as watchman." 18 *N.J. Misc.* at 353, 13 *A.*2d at 569. The wages were aggregated and the employment was held to be for a seven-day week.

In like fashion we are satisfied that petitioner here was employed in one general employment part of which was as a mathematics teacher, part as a football coach and part as a golf coach.

In a remarkably similar case, New York has come to the same conclusion. There a physical education teacher who received "an additional stipend" for coaching the track and football team, was held to have earned an aggregated salary in the employment. The court, eschewing a finding of dual and dissimilar employments, said:

> ... Clearly, this was not the case. The record indicates that all of the claimant's work activities and duties were totally integrated and had as their foundation one skill, that of teaching. Furthermore, even if there were dual employments rather than a single employment, they would be similar in nature and character and the average weekly wage would have to be determined by combining the weekly wages of the "dual" or "concurrent" employments [citation omitted]. [*Orbinati v. Utica Mutual Ins. Co.*, 64 *A.D.*2d 725, 725, 406 *N.Y.S.*2d 604, 605 (App.Div.1978).]

The result we reach is consistent with the apparent policy of the Department of Education. That policy considers scholastics and athletics as integrated parts of the school curriculum as is obvious from *N.J. A.C.* 6:29–6.3(a). This directs that "[n]o person not certified as a teacher and not in the employ of a board of education shall be permitted to organize public school pupils during school time or during any recess in the school day for purposes of ... coaching or for conducting games, events or contests in physical education or athletics."

The result is also consistent with our time-honored policy of construing "the workmen's compensation act so as to comport with its presumptive beneficent and remedial objectives favorable to injured workmen rather than to be bound by its coldly literal import." *Paul v. Baltimore Upholstering Co.*, 66 *N.J.* 111, 136, 328 *A.* 2d 610 (1974).

Since, concordantly with the authorities we have cited, we come to the conclusion

that petitioner's employment was a matter of one employment for one employer, we need not consider the various ramifications of our law relating to joint and concurrent employment.

We reverse and remand to the Division of Workers' Compensation for entry of a judgment in favor of petitioner based on an aggregation of his wages in the employment of the Boonton Board of Education.

199 N.J.Super. 127

Carol DALL'AVA, Administratrix Ad Prosequendum of the Estate of Gilbert Dall'Ava, deceased and Carol Dall'Ava, Individually, Plaintiff-Appellant-Cross-Respondent,

v.

H.W. PORTER COMPANY and Porter Hayden Company, Defendant-Respondent-Cross-Appellant.

Superior Court of New Jersey, Appellate Division.
Argued Jan. 7, 1985.
Decided Feb. 22, 1985.

In asbestos product liability case, plaintiff appealed from denial by the Superior Court, Law Division, Middlesex County, of award of prejudgment interest for certain period, and defendant cross-appealed from award of prejudgment interest for another period. The Superior Court, Appellate Division, Gaynor, J.A.D., held that: (1) trial court did not abuse its discretion in suspending the running of prejudgment interest for the four months that the litigation was delayed because of court-ordered stay following bankruptcy filing by a codefendant, allegedly the primary responsible party, even though the delay in completion of the litigation was no fault of plaintiff, and (2) defendant's claim for disallowance of prejudgment interest for period preceding the codefendant's bankruptcy was not raised below and, hence, would not be considered for first time on appeal.

Affirmed on appeal; cross-appeal dismissed.

1. Interest ⇐39(2)

Trial court did not abuse its discretion in asbestos product liability case in denying award of prejudgment interest for the four months the litigation was delayed because of court-ordered stay following bankruptcy filing by a codefendant who was alleged to be the primary responsible party, even though the delay in completion of the litigation was no fault of plaintiff. R. 4:42-11(b).

2. Appeal and Error ⇐173(2)

Contention of defendant in products liability litigation, raised for first time on appeal, that award of prejudgment interest for certain time period was not required under the circumstances would not be considered.

Ronald B. Grayzel, Edison, for plaintiff-appellant (Levinson, Conover, Axelrod, Wheaton & Grayzel, Edison, attorneys; Ronald B. Grayzel, of counsel and on the brief; Robert A. Negran, Edison, on the brief).

Stephen J. Foley, Asbury Park, for defendant-respondent (Campbell, Foley, Lee, Murphy & Cernigliaro, Asbury Park, attorneys).

Before Judges MORTON I. GREENBERG, O'BRIEN and GAYNOR.

The opinion of the court was delivered by

GAYNOR, J.A.D.

[1] In this asbestos product liability case, plaintiff appeals from the denial of an award of prejudgment interest for the four months the litigation was delayed because of the court ordered stay following the bankruptcy filing by Johns-Manville Corporation, a codefendant. We are satisfied the trial court did not abuse its discretion in suspending the running of prejudgment interest for this period and affirm.