SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1690-15T3

TERESA D'ANGELO,

Petitioner-Respondent,

v.

ARCHDIOCESE OF NEWARK/CHRIST THE KING PREPARATORY SCHOOL,

Respondent-Appellant.

Argued September 25, 2017 – Decided October 30, 2017

Before Judges Sabatino and Rose.

On appeal from the New Jersey Department of Labor and Workforce Development, Division of Workers' Compensation, Claim Petition No. 2013-1923.

Joseph V. Biancamano argued the cause for appellant (Biancamano & DiStefano, PC, attorneys; Mr. Biancamano, on the briefs).

Teresa J. Gundersen argued the cause for respondent.

PER CURIAM

Respondent Archdiocese of Newark/Christ the King Preparatory School appeals from a November 17, 2015 order of the Division of Workers' Compensation finding petitioner Teresa D'Angelo permanently and totally disabled as a result of a compensable injury, and awarding her counsel fees. Respondent contends the decision of the Judge of Workers' Compensation is erroneous in numerous aspects. We disagree, and affirm.

I.

Petitioner was employed by respondent as a school bus driver when, on November 28, 2011, she sustained a gunshot wound to her hip from a stray AK-47 bullet that entered the side of the vehicle. The bullet lodged in petitioner's pelvis, and caused multiple internal injuries. Petitioner underwent surgery and treatment for her physical injuries, and suffered from post-traumatic stress disorder ("PTSD").

A seven-day trial was held before the compensation judge on non-consecutive days from October 14, 2014, through July 14, 2015. Having stipulated the incident was a compensable accident, respondent's sole focus at trial was upon the nature and extent of petitioner's disability. Petitioner testified and presented testimony of two expert witnesses; her employer presented competing testimony of two other expert witnesses.

Petitioner testified over the course of three trial days. She described her complaints and limitations at the time of her testimony compared to her health prior to the incident. For example, her energy level is reduced and her activities are limited. Petitioner testified further she suffers from anxiety attacks, fears being alone at night, and feels depressed.

Petitioner acknowledged she had been involved in two motor vehicle accidents prior to the incident. Although she did not recall the injuries she sustained in the first accident in 1999, petitioner testified she injured her cervical spine in the second accident in 2007. She did not miss work while she was treating for neck pain. Petitioner disclosed further she had treated with a psychologist during the seven or eight years prior to the accident for family issues, panic attacks, and difficulty sleeping.

Before petitioner presented the testimony of her medical experts, respondent sought to introduce testimony regarding her pre-existing medical condition to determine whether Second Injury Fund[1] participation was warranted. Although petitioner did not

[1] See N.J.S.A. 34:15-95; Sexton v. Cty. of Cumberland/Cumberland Manor, 404 N.J. Super. 542, 555 (App. Div. 2009) ("allow[ing] employers a credit if a work accident accelerates or aggravates a preexisting condition, resulting in total and permanent disability")(citing N.J.S.A. 34:15-95; N.J.S.A. 34:15-12(d)).

file a formal motion to quash the subpoenas, the compensation judge disallowed the testimony, finding it was not probative of the sole issue before the court, that is, "the nature and extent of [p]etitioner's permanent disability as it relates to the compensable accident." The compensation judge noted further that a Second Injury Fund petition was not pending before the court.

Both experts who testified on behalf of petitioner opined she is totally and permanently disabled from the incident. Petitioner's orthopedic expert, Dr. Cary Skolnick, evaluated her on November 4, 2013, and opined the injuries to her pelvis, hips, abdomen and spine all were related to the incident, rendering her one hundred percent totally and permanently disabled.

When asked about the term on cross-examination, Dr. Skolnick defined the concept of reasonable degree of medical probability as "[s]omething that is more probable than not." He was unable to state what respondent identifies as the three major classifications of workers' compensation disability, and could not provide the legal definition of permanency. Respondent moved to strike Dr. Skolnick's testimony as net opinion, and for failure to comprehend the applicable legal terms. The compensation judge reserved decision and instructed respondent to brief the issue as

part of its findings of fact and conclusions of law at the completion of trial.[2]

Dr. Peter Crain, a board-certified psychiatrist, testified as petitioner's neurology expert. Dr. Crain evaluated petitioner on December 18, 2013, and diagnosed her with lumbrosacral plexopathy and PTSD. Dr. Crain opined petitioner's physical symptoms were permanent, and ascribed a neurological disability of twenty-five percent. Dr. Crain opined further petitioner's PTSD was causally related to the incident and ascribed a psychiatric disability of thirty-five percent. Although petitioner informed Dr. Crain she had not had any panic attacks prior to the incident, he acknowledged her prior records indicated otherwise. Dr. Crain testified, however, that petitioner's prior panic attacks and anxiety had completely dissipated prior to the incident.

On cross-examination, Dr. Crain defined the term reasonable degree of medical probability as "that for more reasons than not based upon the evidence available, this person has the condition that I diagnosed based upon these facts that I base my opinion

[2] The compensation judge did not rule specifically on the motion in her final decision. However, it is unclear from the record whether respondent briefed the issue, inasmuch as its findings of fact and conclusions of law were not included in its appendix on appeal.

upon." Like Dr. Skolnick, he was unable to identify the three types of disability set forth in the workers' compensation statute. Respondent's motion to strike Dr. Crain's testimony, on the same bases as its motion to strike Dr. Skolnick's testimony, was denied.

Unlike petitioner's experts, both experts who testified on behalf of respondent opined petitioner is not totally and permanently disabled from the incident. Dr. Malcolm Coblentz, an expert in general surgery, determined partial total disability of twelve and one-half percent for petitioner's abdomen, left iliac vein, and umbilical hernia; fifteen percent partial total disability for her left hip and left iliac wing; ten percent for her left leg; and no evidence of disability for her right pelvis.

According to Dr. Coblentz, petitioner did not disclose to him her prior motor vehicle accidents. As such, respondent moved to dismiss the action based on petitioner's allegedly "fraudulent" answers to Dr. Coblentz.[3] The compensation judge denied the motion and respondent's subsequent attempt to produce in evidence, through Dr. Coblentz, petitioner's prior cervical MRI. The

[3] See N.J.S.A. 34:15-57.4(c)(1)(providing, "[i]f a person purposely or knowingly makes, when making a claim for benefits pursuant to [N.J.S.A.] 34:15-1 et seq., a false or misleading statement, representation or submission concerning any fact which is material to that claim for the purpose of obtaining the benefits, the division may order the immediate termination or denial of benefits with respect to that claim and a forfeiture of all rights of compensation or payments sought with respect to the claim.").

compensation judge reasoned respondent had not moved to dismiss petitioner's claim or suppress her defenses prior to trial and, as such, waived its discovery demand.

Dr. Erin Elmore, a board-certified neurologist and expert in neuropsychiatry, diagnosed petitioner with a sciatic nerve injury from the gunshot wound, and determined a partial total neurological disability of seven and one-half percent. Dr. Elmore also diagnosed petitioner with PTSD and recommended psychiatric treatment. Having refused that treatment, Dr. Elmore estimated petitioner's disability at five percent.

In her comprehensive written decision, the compensation judge found petitioner's testimony was "straightforward, to the best of her ability and recollection, and very credible." The judge detailed petitioner's testimony regarding the incident, treatment and complaints, the latter of which the judge found "are of the type one would expect given the nature and extent of her significant injuries."

In finding petitioner is totally and permanently disabled as a result of the incident, the compensation judge observed "both parties have significant findings of disability." The judge was influenced particularly by Dr. Coblentz's concurrence with Dr. Skolnick's findings, that is, the muscle petitioner injured controls "'balance and keeping people upright'" and "a torn or

ripped muscle will heal but with a scar that can cause pain, discomfort and spasm with certain motions." Thus, the compensation judge found the objective medical findings consistent with petitioner's subjective complaints of balance instability and muscle fatigue. The judge found, nevertheless, Dr. Coblentz's attempts to minimize petitioner's injuries as disingenuous.

The compensation judge also determined the objective findings of both neurologic experts, Dr. Crain and Dr. Elmore, "are consistent with petitioner's complaints of a dropped foot that causes her to fall." Further, the judge noted both neurologic experts concurred that petitioner suffers from PTSD due to the incident.

In her written decision, the compensation judge addressed respondent's motion to dismiss petitioner's claim for fraud for failing to disclose her 2007 motor vehicle accident to the respondent's evaluating physicians. In denying the motion, the judge found petitioner's prior orthopedic and psychiatric history had been disclosed to respondent during the course of discovery as early as August 13, 2012. The judge also found petitioner's cervical spine, injured in the 2007 motor vehicle accident, was not injured in the underlying incident; reiterated a Second Injury Fund application was not filed with the court; and considered

petitioner's testimony that her treatments for the 2007 motor vehicle accident did not prevent her from working.

In rendering her decision, the compensation judge emphasized she had the opportunity to observe petitioner on three trial days, hear her testimony, review the medical testimony and medical records in evidence, all of which led her to conclude petitioner is totally and permanently disabled as a result of the shooting incident. The judge's ruling included an award of 450 weeks, and also assessed against respondent an award of counsel fees in the amount of $2,500 for defense of "various" motions made during trial "based upon the history of the proceedings."

On appeal, respondent argues, among other things: (1) there is insufficient credible evidence to support the compensation judge's finding that petitioner was permanently and totally disabled based solely on the November 28, 2011 incident, and the compensation judge violated its due process rights by excluding evidence of petitioner's treatment for a prior motor vehicle accident; (2) the testimony of petitioner's medical experts was incompetent and should have been stricken from the record as net opinion, for failure to define pertinent medical/legal criteria, and for violating the requirements set forth in Allen v. Ebon

Servs. Int'l, Inc.[4] ("Allen requirements"); and (3) the compensation judge's imposition of counsel fees was unjustified. Having considered these and respondent's other arguments, we decline to set aside any of the judge's rulings.

II.

Our review of workers' compensation cases is "limited to whether the findings made could have been reached on sufficient credible evidence present in the record . . . with due regard also to the agency's expertise." Hersh v. Cty. of Morris, 217 N.J. 236, 242 (2014) (alteration in original) (quoting Sager v. O.A. Peterson Constr., Co., 182 N.J. 156, 164 (2004)); see also Renner v. AT&T, 218 N.J. 435, 448 (2014). We may not substitute our own factfinding for that of the judge of compensation. Lombardo v. Revlon, Inc., 328 N.J. Super. 484, 488 (App. Div. 2000). We must defer to the factual findings and legal determinations made by the judge of compensation "considering the proofs as a whole, with due regard to the opportunity of the one who heard the witnesses to judge their credibility." Lindquist v. City of Jersey City Fire Dep't, 175 N.J. 244, 262 (2003) (internal quotation marks and citations omitted).

[4] 237 N.J. Super. 132 (App. Div. 1989).

Importantly, compensation judges possess "expertise with respect to weighing the testimony of competing medical experts and appraising the validity of [a petitioner's] compensation claim." Ramos v. M & F Fashions, 154 N.J. 583, 598 (1998). In the end, a judge of compensation has the discretion to accept or reject expert testimony, in whole or in part. Kaneh v. Sunshine Biscuits, 321 N.J. Super. 507, 511 (App. Div. 1999); see also Kovach v. Gen. Motors Corp., 151 N.J. Super. 546, 549 (App. Div. 1978) ("It must be kept in mind that judges of compensation are regarded as experts.").

We will "appraise the record as if we were deciding the matter at inception and make our own findings and conclusions" only if the judge of compensation "went so wide of the mark that a mistake must have been made[.]" Manzo v. Amalgamated Indus. Union Local 76B, 241 N.J. Super. 604, 609 (App. Div.), certif. denied, 122 N.J. 372 (1990) (citations omitted). However, we afford no deference to a judge of compensation's interpretation of the law and instead review legal questions de novo. Renner, supra, 218 N.J. at 448.

Against this legal backdrop, and mindful of our standard of review, we affirm substantially for the reasons expressed by the compensation judge in her written decision of November 17, 2015. There is more than sufficient proof in the record to sustain the

compensation judge's conclusion that petitioner is totally and permanently disabled as a result of the incident. The objective findings of both parties' experts corroborate petitioner's subjective complaints, and amply support the judge's conclusions. We add the following comments on the main points presented by respondent.

A.

Contrary to respondent's contentions, the compensation judge did not violate its due process rights by excluding evidence of petitioner's 2007 motor vehicle accident. Our review of evidentiary rulings by trial courts, including workers' compensation courts, is limited. See Vitale v. Schering-Plough Corp., 447 N.J. Super. 98, 122 (App. Div.), certif. granted, 228 N.J. 421, certif. denied, 228 N.J. 430 (2016). "The general rule as to the admission or exclusion of evidence is that '[c]onsiderable latitude is afforded a trial court in determining whether to admit evidence, and that determination will be reversed only if it constitutes an abuse of discretion.'" State v. Kuropchak, 221 N.J. 368, 385 (2015) (citation omitted). "Under that standard, an appellate court should not substitute its own judgment for that of the trial court, unless 'the trial court's ruling "was so wide of the mark that a manifest denial of justice

resulted."'" Ibid. (quoting State v. Marrero, 148 N.J. 469, 484 (1997)).

Abiding by that standard of review, we agree with the compensation judge that petitioner's injuries from her 2007 motor vehicle accident were properly excluded at trial. As the judge found in her written decision, neither party applied for Second Injury Fund benefits pursuant to N.J.S.A. 34:15-95. Further, there is no evidence in the record that petitioner's injuries from her 2007 motor vehicle accident prevented her from working prior to the 2011 incident. On the contrary, as the judge observed, the injuries petitioner sustained in the 2007 motor vehicle accident did not affect her ability to work or function normally. Moreover, petitioner injured her cervical spine in the prior 2007 motor vehicle accident whereas her lumbar spine -- and not her cervical spine -- was injured in the instant incident. In sum, the compensation judge properly excluded evidence of the 2007 motor vehicle accident as irrelevant in the compensation trial.

B.

We next turn to respondent's claims that petitioner's expert medical testimony should have been stricken as incompetent. We "apply [a] deferential approach to a trial court's decision to admit expert testimony, reviewing it against an abuse of discretion

standard." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011).

Initially, we find no merit to respondent's claims that Dr. Skolnick and Dr. Crain rendered inadmissible net opinions. The doctrine barring the admission at trial of net opinions is a "corollary of [N.J.R.E. 703] . . . which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data." Townsend v. Pierre, 221 N.J. 36, 53-54 (2015) (alterations in original) (quoting Polzo v. Cty. of Essex, 196 N.J. 569, 583 (2008)). The net opinion principle mandates experts "give the why and wherefore" supporting their opinions, "rather than . . . mere conclusion[s]." Id. at 54 (quoting Borough of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115, 144 (2013)). An expert's conclusion, therefore, must be excluded "if it is based merely on unfounded speculation and unquantified possibilities." Vuocolo v. Diamond Shamrock Chems. Co., 240 N.J. Super. 289, 300 (App. Div.), certif. denied, 122 N.J. 333 (1990).

However, "[t]he net opinion rule is not a standard of perfection." Townsend, supra, 221 N.J. at 54. It does not require experts organize or support their opinions in a specific manner "that opposing counsel deems preferable." Ibid. Consequently, "[a]n expert's proposed testimony should not be excluded merely

'because it fails to account for some particular condition or fact which the adversary considers relevant.'" Ibid. (quoting Creanga v. Jardal, 185 N.J. 345, 360 (2005)).

As the compensation judge noted in her decision, "both [of petitioner's] experts testified as to the factual basis for their opinions and the causal relationship between the gunshot wound and [p]etitioner's current complaints." Indeed, the judge's decision is replete with references to testimony that supported each expert's opinion. For example, Dr. Skolnick testified that his opinion was based upon his physical examination of petitioner, her testimony at trial, and his review of the voluminous medical records. Dr. Crain's opinion was predicated upon his examination of petitioner, which he testified to at length at trial utilizing an anatomical model and the results of petitioners' CT scan. The experts gave the "why and wherefore" of their opinions and, as such, they were not "net."

Secondly, we find no merit in respondent's argument that the experts' failure to properly define the legal term, "reasonable degree of medical probability or certainty," is fatal to their respective testimony. We have defined "reasonable medical certainty or probability" as "the general consensus of recognized medical thought and opinion concerning the probabilities of conditions in the future based on present conditions." Schrantz

v. Luancing, 218 N.J. Super. 434, 439 (Law Div. 1986) (citing Boose v. Digate, 246 N.E.2d 50 (Ill. App. Ct. 1969)). If an expert cannot demonstrate that he understands the essential meaning of that phrase, his offered testimony "must be stricken because it cannot be said that the opinions he gave were based on reasonable medical probability." Ibid.

We have observed, however, in Eckert v. Rumsey Park Assocs., 294 N.J. Super. 46, 51 (App. Div. 1996), certif. denied, 147 N.J. 579 (1997) (quoting Aspiazu v. Orgera, 535 A.2d 338, 343 (Conn. 1987)), it is not necessary for a testifying expert to use the "'talismanic' or 'magical words' represented by the phrase 'reasonable degree of medical certainty.'" Instead, to admit the expert's testimony, a court only needs to be "persuaded that 'the doctor was reasonably confident of the relationship between the plaintiff's injury and [her] . . . diagnosis and treatment.'" Ibid. It is therefore merely necessary for an expert to "convey[]" the meaning of "reasonable degree of medical certainty" when offering his opinion. State v. McNeil, 405 N.J. Super. 39, 50-51 (App. Div.), certif. denied, 199 N.J. 130 (2009) (citing Eckert, supra, 294 N.J. Super. at 51).

We discern no reversible error, nor any manifest injustice, in the trial court's allowance of petitioner's experts' testimony, given their respective phrasing of the concept. Although the

compensation judge ruled during trial[5] that respondent's objections would bear upon the weight of the evidence, the concept does not require particular "talismanic" or "magical words" that must be invoked. Dr. Skolnick and Dr. Crain expressed their respective opinions in terms of medical "probabilities" instead of impermissible "possibilities." We are thus satisfied that neither expert misstated the basic concept.

Nor are we persuaded by respondent's similar argument that both experts' opinions were inadmissible because neither Dr. Skolnick nor Dr. Crain could properly define in legal terms "permanent disability," or identify the three types of disability set forth in N.J.S.A. 34:15-36. Notably, respondent has not cited any authority requiring an expert to define statutory terms or classifications. Having determined that Dr. Skolnick and Dr. Crain were qualified to testify in their respective areas of expertise, the compensation judge properly accepted their opinions, while rejecting the opinions of the respondent's experts. See Kaneh, supra, 321 N.J. Super. at 511. It was, therefore, within the compensation judge's discretion to impart

[5] As noted above, it is unclear whether respondent raised this objection in its post-trial submission to the court, inasmuch as that submission was not included in its appellate appendix.

more weight to petitioner's experts, despite their inability on the witness stand to recite on demand certain statutory terms.

Turning to respondent's contention that petitioner's experts failed to satisfy the Allen requirements, we are again unpersuaded. In Allen, supra, we reversed a workers' compensation award of permanent partial disability, and remanded for "redetermination of permanent disability after reexaminations have been conducted." 237 N.J. Super. at 133, 136. There, the compensation judge erred by failing to set forth the specific findings required under N.J.S.A. 34:15-36 and Perez v. Pantasote, Inc., 95 N.J. 105 (1984). Id. at 135. The compensation judge in Allen stated merely the petitioner had "objective signs of substantial injury[.]" Ibid. Instead, Perez, supra, requires the petitioner make "a satisfactory showing of demonstrable objective medical evidence of a functional restriction of the body, its members or organs." 95 N.J. at 116. We, therefore, held a mere conclusory statement that petitioner satisfied those requirements is insufficient pursuant to N.J.S.A. 34:15-36.

The present case, however, differs significantly from Allen. In the compensation judge's seven-page written opinion, she set forth specifically the objective medical evidence upon which she based her decision, noted her credibility findings, discussed petitioner's various medical issues and related explanations, and

reconciled those findings with the underlying law. In sum, the compensation judge's opinion far exceeds the mere conclusory statement that the petitioner in Allen had "objective signs of substantial injury" which warranted reversal.

Furthermore, as respondent contends, in Allen we also reversed the award because both treating physicians had evaluated the petitioner thirty-five months before the disability determination was made, and twenty-six months before the petitioner testified. "An award of compensation for partial permanent disability must be based on the disability that exists at the time of the determination." Allen, supra, 237 N.J. Super. at 135 (citations omitted). We decided a gap in time of thirty-five months did not satisfy that requirement because "'the validity of a medical finding of a permanent injury may decrease with the passage of time." Id. at 136 (quoting Perez, supra, 95 N.J. at 119).

The timing of the expert evaluations in the present case is distinguishable from Allen. Dr. Skolnick examined petitioner approximately two years after the incident, one year after her discharge from physical treatment, and seven months after the date of total disability. Dr. Crain examined petitioner approximately two years after the incident, thirteen months after her discharge from physical treatment, nine months after her last counselling

session, and eight months after the date of total disability. As we observed in Allen: "'the Legislature . . . did not intend that awards routinely be made on the basis of medical examinations performed shortly after the accidents and well before the hearings[.]'" Allen, supra, 237 N.J. Super. at 136 (quoting Perez, supra, 95 N.J. at 119). Significantly, here, two years had transpired between the incident and the experts' respective examinations, distinguishing this case from Allen, where the accident was much more recent and the evaluation occurred before the petitioner had time to improve.

C.

Lastly, we address respondent's argument that the compensation judge lacked a legal basis to impose counsel fees for filing a motion to dismiss for fraud pursuant to N.J.S.A. 34:15-57.4. Ordinarily, trial courts, including workers' compensation courts, possess wide discretion in ruling on counsel fee applications, and we afford substantial deference to those rulings on appeal. See Sroczynski v. Milek, 197 N.J. 36, 45-46 (2008); see also Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001); Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009).

However, appellate courts will provide relief from such rulings in instances where the trial court has misapplied the law

or relied upon impermissible grounds. See, e.g., Rendine v. Pantzer, 141 N.J. 292, 316-17 (1995) (recognizing the discretion commonly exercised by trial judges in deciding counsel fee applications); Walker v. Giuffre, 209 N.J. 124, 148 (2012) (holding that a trial court's failure to comply with the methodology prescribed by Rendine constitutes an abuse of discretion).

Pursuant to N.J.S.A. 34:15-64, a judge of compensation "may allow to the party in whose favor judgment is entered . . . a reasonable attorney fee[.]" N.J.S.A. 34:15-64(a). Moreover, by analogy, a Superior Court judge has "the inherent authority, if not the obligation, to control the filing of frivolous motions and to curtail "'harassing and vexatious litigation.'" Zehl v. City of Elizabeth Bd. of Educ., 426 N.J. Super. 129, 139 (App. Div. 2012) (quoting Rosenblum v. Borough of Closter, 333 N.J. Super. 385, 387 (App. Div. 2000)).

In her written decision, the compensation judge awarded petitioner a fee for "defense of the various Motions made during the pendency of the trial . . . based upon the history of the proceedings." Because judges of compensation are afforded substantial deference in assessing counsel fees, we are not convinced the compensation judge here abused her discretion. See Sroczynski, supra, 197 N.J. at 45-46. The compensation judge presided over the lengthy trial, and addressed various motions

raised by respondent throughout. Respondent, in solely addressing the motion to dismiss for fraud, while the judge assessed fee was for "various" motions, does not explain how this fee was an abuse of discretion, beyond claiming that it was "vindictive." Even if the motions were not frivolous, the compensation judge had discretion pursuant to N.J.S.A. 34:15-64(a) to award reasonable counsel fees. We see no reason to disturb this ruling.

Respondent's remaining arguments, to the extent we have not specifically addressed them, lack sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(1)(D) and (E).[6]

Affirmed.

[6] Because we denied respondent's motion to amend its notice of appeal regarding its claim that the compensation judge erred in granting petitioner's motion to enforce the order of total disability, this argument is improperly before us.