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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0006-16T3

MARION KORDEK,

Petitioner-Appellant,

v.

INNOVATIVE MANUFACTURING,

Respondent-Respondent.

Submitted February 14, 2018 – Decided March 23, 2018

Before Judges Alvarez and Geiger.

On appeal from the New Jersey Department of
Labor and Workforce Development, Division of
Workers' Compensation, Claim Petition No.
2012-652.

Craig Voorhees, attorney for appellant.

Ann P. Debellis, attorney for respondent (Ann
P. Debellis, of counsel and on the brief;
David P. Kendall, on the brief).

PER CURIAM

In 2011, petitioner Marion Kordek injured his right shoulder
and chest while working for respondent Innovative Manufacturing
as a machine operator. He appeals from an August 16, 2016 judgment

awarding him permanent partial disability benefits for a compensable workplace injury. Because the factual findings supporting the judgment were based on substantial credible evidence, and the compensation judge applied the correct legal principles, we affirm.

On November 2, 2011, Kordek injured his right shoulder and chest while sharpening a large piece of rebar on a lathe. According to Kordek, the lathe malfunctioned, causing the rebar to strike him multiple times, particularly about the chest and shoulder areas.

In his initial claim petition, Kordek claimed injuries to his "chest, hand, shoulder (right) and body resulting in orthopedic disability and aggravation of [his] heart condition." He did not specifically allege injuries to his cervical spine.

Kordek also filed an occupational claim petition alleging a permanent partial disability in the form of pulmonary impairment and injury to internal organs resulting from exposure to deleterious airborne particles. This petition was dismissed by the compensation judge at the conclusion of the trial for failure to sustain the burden of proof.

After completion of the trial, the compensation judge issued a comprehensive written opinion on August 9, 2016. A judgment was filed on August 16, 2016, awarding Kordek:

42.5% of permanent partial disability for permanent residuals involving partial thickness rotator cuff tear of the right shoulder; a labral tear of the right shoulder; a subacromial impingement syndrome of the right shoulder; and a severe adhesive capsulitis of the right shoulder with a frozen shoulder and blunt chest trauma with chronic chest wall pain. Breakdown: 37.5% partial total for the right shoulder and 5% partial total for the chest.

In making the award, the compensation judge made credibility and fact findings based on the testimony and evidence produced at trial. This included determining the nature and extent of the injuries causally related to the workplace accident and the appropriate weight to be given to the opinions expressed by the opposing experts.

The compensation judge issued the following factual findings:

Following the accident, Petitioner left work and went home. He later sought and received medical attention at Somerset Medical Center for injuries related to contusions of the chest, shoulder and right hand. He was released from the hospital on the same day. Petitioner later sought treatment from Shawn Seigler, M.D., on or about, December 2011 for ongoing complaints of pain in his shoulder, right hand, chest and upper back. Dr. Seigler released Petitioner to light duty work.

In January 2012, Petitioner was examined by Ira Kasoff, M.D., with the aid of his daughter serving as translator. He complained of pain over virtually his entire body. Petitioner underwent a cervical MRI on January 12, 2012 Essentially, the MRI revealed

age-related disc degeneration of the facet joints from C3-7.

The following month he underwent an MRI of his right shoulder, which revealed rotator cuff tendinopathy and mild tearing in the posterior aspect of the labrum, minimal glenohumeral joint osteoarthritis and mild AC joint osteoarthritis. . . .

. . . .

Petitioner called Arthur Becan, M.D., as an expert in orthopedic medicine without objection from Respondent. Dr. Becan conducted a physical examination two years following the accident at issue. He noted that Petitioner complained of daily cervical spinal pain and stiffness almost to the point of paralysis, daily right shoulder pain, stiffness and crackling. Upon his review of Petitioner's various medical records, including the MRI from 2012 . . . [,] Dr. Becan estimated disability for the C-spine at 75% permanent partial total (ppt), right shoulder of 60% ppt, and 25% ppt for the chest for the severe contusion. He related these conditions to the 2011 traumatic accident and opined that Petitioner did not initially complain about his C-spine because after the accident the extruded disc fragments only created minor neck pain, which grew more severe with the passage of time as the disc fragments began to settle and push against the nerve root.

With Kordek's consent, respondent admitted the report of it expert, Dr. Mark E. Maletsky, an orthopedic surgeon. Kordek waived his right to cross-examine Dr. Maletsky.

Dr. Maletsky examined Petitioner on September 30, 2013 and issued a report dated October 5, 2013. In that report, he noted his

review of the medical records dating back to the November 2, 2011 accident. He opined that Petitioner's multiple complaints are out of proportion to the objective findings on physical examination and is suggestive of symptom magnification. In particular, Dr. Maletsky noted that Petitioner reported paresthesias in both arms, face and neck and exhibited restricted range of motion in his neck and shoulders. However, he also noted that Petitioner had full wrist flexion and extension bilaterally although he was unable to test passive range of motion because of Petitioner's daughter who requested that he not stretch Petitioner's arms because it may cause pain.

. . . At the conclusion of his examination and review of medical records, he estimated a residual permanent disability of 2% of partial total for his right shoulder alone. He found no objective evidence of permanent disability related to his right hand, or chest. In a March 11, 2014 addendum, Dr. Maletsky provided an estimate for the C-spine of 5% of ppt disability regardless of cause. In reaching this conclusion, he specifically referenced Petitioner's failure to report neck pain immediately following the accident and more specifically, his denial of neck pain, which is noted in the December 5, 2011 report of Dr. Seigler.

Based on those findings, the compensation judge reached the following conclusions:

It is undisputed that petitioner sustained an injury to his right hand, shoulder and chest due to the work accident. However, another critical issue is whether and to what extent Petitioner has a claim for any permanent injury to his C-spine related to this work accident. The records are clear, Petitioner made no immediate complaints and

did not receive any medical evaluations for his C-spine until approximately two months following the accident in question. However, he testified that he felt pain immediately following the accident, which he described as, "terrible, terrible. Unimaginable."

On the critical issue of causal relationship concerning Petitioner's neck disability, the medical experts on either side have dramatically different opinions. Dr. Becan is of the opinion that Petitioner did suffer an injury and disability to his C-spine as a result of this accident, but that it was not the focus of immediate treatment because either there were more pressing medical concerns, or the pain did not manifest itself until months later.

Respondent's expert asserts that it is significant that Petitioner failed to immediately disclose or seek medical attention for his neck pain. He specifically relied upon the lack of medical support for Petitioner's claim of neck pain and concluded that any disability to the neck is unrelated to the accident. He relied upon Shawn D. Seiler, M.D., reports from December 5 and 29, 2011. Those reports contained notes wherein Petitioner specifically denied having neck pain and was noted to have had full range of motion. Moreover, these records also show that it was not until January 2012, two months post-accident, that Dr. Seiler mentioned Petitioner's complaints of neck pain.

In light of the divergent expert medical opinions, this court considered the objective medical evidence contained in the MRI of January 2012, which confirmed that Petitioner had multi-level age-related disc degeneration of the facet joints from C3-7 in addition to a disc herniation at C6-7. Moreover, it undertook a review of the Emergency Room records from the date of the accident, wherein

it is specifically noted that Petitioner had no tenderness or stiffness in the neck. In fact, the clinical impressions of the attending physician focused only on the chest, right shoulder and right hand contusions. These same complaints remained consistent until the December 29, [20]11 examination.

. . . In this case, Petitioner has failed to demonstrate by a preponderance of the evidence that his neck disability is causally related to the injuries he suffered in the November 2, 2011 accident. In reaching this conclusion, the court did not find Petitioner's testimony that he felt neck pain immediately following the accident to be credible or convincing given the absence of any such complaints in the records immediately following the accident. This court finds that it is reasonable to conclude that if Petitioner had complained about head or neck pain, it would have been noted in the hospital records and would have taken priority over some of his other injuries for which he was treated. Moreover, the absence of any such complaints in the December 5, 2011 report of Dr. Seigler is also problematic. In fact, the December 29, 2011 report is the first indication that Petitioner had extensive additional complaints that included: headaches, head numbness, dizziness, chest pain, numbness in both hands, both legs and feet. Yet, in spite of these increasing complaints, Dr. Seigler noted that he had full range of motion in the neck.

The January 23, 2012 report of Dr. Seigler and January 13, 2012 office record of Ira Kasoff are the earliest reports wherein it is noted that Petitioner complained about injuries to his head and neck, resulting in a CT Scan and an MRI. And, the January 12, 2012 MRI revealed diffused degenerative changes and disc disease throughout the C-spine and a left C7 disc herniation with moderate central

spinal stenosis. Such a diagnosis is not in dispute. However, Petitioner has failed to demonstrate that the accident at issue was the cause of this cervical disability. Moreover, this court finds that in light of the diagnosis of multilevel disc degeneration and stenosis, even at the level of the herniation, this pathology is unlikely to have been caused by the traumatic work accident that occurred only two months earlier.

Accordingly, Petitioner has failed to sustain his burden of proof in establishing a permanent disability to his C-spine as a result of this work accident.

Kordek appeals the August 16, 2016 judgment awarding him permanent partial disability benefits for his shoulder and chest but not his cervical spine. Kordek has not appealed the dismissal of his occupational claim petition.

On appeal, Kordek argues the compensation judge did not apply the correct legal standard when deciding whether his cervical conditions were caused by the work accident. Under the Workers' Compensation Act, N.J.S.A. 34:15-1 to -142, an employer is liable to an employee for disabling injuries sustained "by accident arising out of and in the course of employment." N.J.S.A. 34:15-7. The petitioner has "the burden of proof to establish all elements of [the] case." Bird v. Somerset Hills Country Club, 309 N.J. Super. 517, 521 (App. Div. 1998). Petitioner must show both medical and legal causation. Lindquist v. Jersey City Fire Dep't, 175 N.J. 244, 259 (2003). "[P]roof of medical causation means

proof that the disability was actually caused by the work-related event. Proof of legal causation means proof that the injury is work connected." Ibid. (citations omitted). "Thereafter, the burden to defeat [petitioner]'s claim and establish contrary facts and legal conclusions exonerating the employer or mitigating liability shift[s] to the employer." Bird, 309 N.J. Super. at 521 (citing Gulick v. H.M. Enoch, Inc., 280 N.J. Super. 96, 109 (App. Div. 1995); Pollack v. Pino's Formal Wear & Tailoring, 253 N.J. Super. 397, 410-12 (App. Div. 1992)). While not expressly reciting that case law, we find the compensation judge correctly applied those principles.

Kordek further contends the decision is not supported by substantial credible evidence in the record. We disagree. The compensation judge undertook a comprehensive review of the evidence and based her decision on the evidence she found credible.

Our role in reviewing a judge of compensation's decision is limited to examining "whether the findings made could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole, with due regard to the opportunity of the one who heard the witnesses to judge of their credibility." Lindquist, 175 N.J. at 262 (quoting Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)). We give those factual findings "substantial deference." Bellino v. Verizon Wireless,

435 N.J. Super. 85, 94 (App. Div. 2014) (citing Ramos v. M & F Fashions, Inc., 154 N.J. 583, 594 (1998)). "We may not substitute our own factfinding for that of the [j]udge of [c]ompensation even if we were inclined to do so." Ibid. (alterations in original) (quoting Lombardo v. Revlon, Inc., 328 N.J. Super. 484, 488 (App. Div. 2000)). We will only disturb the judge of compensation's decision if it is "manifestly unsupported by or inconsistent with competent relevant and reasonably credible evidence as to offend the interests of justice." Lindquist, 175 N.J. at 262 (quoting Perez v. Monmouth Cable Vision, 278 N.J. Super. 275, 282 (App. Div. 1994)).

A compensation judge is considered to have expertise in weighing the testimony of competing experts and assessing the validity of the claim. Ramos, 154 N.J. at 598. The judge is "not bound by the conclusional opinions of any one or more, or all of the medical experts." Bellino, 435 N.J. Super. at 95 (quoting Kaneh v. Sunshine Biscuits, 321 N.J. Super. 507, 511 (App. Div. 1999)). Accordingly, we will not reverse a judgment simply because the judge gave more weight to the opinion of one physician over another. Smith v. John L. Montgomery Nursing Home, 327 N.J. Super. 575, 579 (App. Div. 2000).

Kordek contends he presented sufficient medical evidence to establish his cervical spine conditions were work-related

compensable claims. Kordek is asking us to substitute our judgment and make different factual findings. The compensation judge made an express finding that Kordek had not carried his burden to prove the cervical spine conditions were related to the November 2, 2011 work injury. Given our deferential standard of review, we find no basis to disturb those findings, which are adequately supported by evidence in the record.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION