SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2588-16T1

NESTOR MORAN,

Petitioner-Respondent,

v.

COSMETIC ESSENCE, LLC,

Respondent-Appellant.

Argued February 13, 2018 – Decided March 14, 2018

Before Judges Fisher and Sumners.

On appeal from the Department of Labor and Workforce Development, Division of Workers' Compensation, Claim Petition No. 2016-8827.

Melissa Bialos Floyd argued the cause for appellant (Capehart & Scatchard, PA, attorneys; John H. Geaney, of counsel; Dana M. Gayeski, on the brief).

Eliot Skolnick argued the cause for respondent (Law Offices of Carmen Mendiola, attorneys; Eliot Skolnick, on the brief).

PER CURIAM

Cosmetic Essence, LLC, appeals from an order entered in favor of its former employee, Nestor Moran, in this workers' compensation

action. The order memorialized, in part, the judge's findings — rendered at the conclusion of a trial — that Moran suffered a work-related injury and, in part, Moran's entitlement to temporary disability benefits. We affirm the first part because the judge's findings of fact warrant our deference, but we vacate the second part and remand for further proceedings because the judge's other determinations exceeded the trial's scope.

Specifically, as to the first part, Cosmetic argues the judge's findings are unworthy of deference, claiming[1]:

> I. THE TRIAL COURT IGNORED SUBSTANTIAL ISSUES OF CREDIBIITY AND IMPROPERLY FOUND THAT A COMPENSABLE ACCIDENT HAPPENED, WHILE DISMISSING [COSMETIC'S] CROSS MOTIONS.
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> II. THE JUDGE OF COMPENSATION'S DECISION THAT [MORAN] DID NOT VIOLATE N.J.S.A. 34:15-57.4[2] SHOULD BE OVERTURNED BECAUSE THE PROOFS SUBMITTED AND TESTIMONY PRESENTED SHOW [MORAN] COMMITTED FRAUD.

As to the second part, Cosmetic contends an award of any benefits was premature at best because the trial was bifurcated and limited to whether a work-related injury occurred and, if such an injury

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[1] We have renumbered Cosmetic's arguments.

[2] Cosmetic's fraud claim is based on the fact that it is a fourth-degree crime for a person to make "a false or misleading statement, representation or submission concerning any fact that is material to [a workers' compensation claim] for the purpose of wrongfully obtaining the benefits." N.J.S.A. 34:15-57.4(a).

did not occur, whether Moran committed fraud by pursuing the matter; Cosmetic, in this regard, argues:

> III. [MORAN] HAS NOT PROVEN A WAGE LOSS THAT WOULD ENTITLE HIM TO TEMPORARY DISABILITY BENEFITS.
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> IV. THE LOWER COURT ABANDONED ALL NOTIONS OF FUNDAMENTAL FAIRNESS AND CONSTITUTIONAL GUARANTEES OF PROCEDURAL DUE PROCESS BY RELYING ON EVIDENCE IT SECURED ON ITS OWN AND NOT BIFURCATING THE TRIAL, AS AGREED BY THE PARTIES.

In the two sections of this opinion that follow, we explain (1) why we reject Cosmetic's Points I and II, and (2) why, in responding to Points III and IV, we agree the award of benefits exceeded the boundaries of the bifurcation agreement, deprived Cosmetic of a fair opportunity to address those issues, and, thus, warrants a remand for further proceedings.

I

A

It has long been recognized that an appellate court's review of a compensation judge's findings is limited. The Court recognized in Close v. Kordulak Bros., 44 N.J. 589, 599 (1965), that the appellate standard of review is the same as that applied "in any nonjury case." That is, an appellate court must consider whether the judge's findings "'could reasonably have been reached on sufficient credible evidence present in the record' . . . with due

regard to" the judge's opportunity to hear the witnesses and "judge . . . their credibility." Ibid. (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). Consequently, "[d]eference must be accorded the [compensation judge's] factual findings and legal determinations . . . unless they are 'manifestly unsupported by or inconsistent with competent relevant and reasonably credible evidence as to offend the interests of justice.'" Lindquist v. City of Jersey City Fire Dep't, 175 N.J. 244, 262 (2003) (quoting Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974)). The Court has not altered its view of the standard of review since. See Renner v. AT & T., 218 N.J. 435, 448 (2014); Hersh v. County of Morris, 217 N.J. 236, 242-43 (2014); Seger v. O.A. Peterson Constr., Co., 182 N.J. 156, 163-64 (2004).

A workers' compensation petitioner must demonstrate the complained-of injury occurred during the course of employment. Lindquist, 175 N.J. at 263. Judge King described this burden as focusing on "probabilit[ies] rather than certaint[ies]" and that the burden is satisfied "if the evidence preponderates in favor of the tendered hypothesis." Harbatuk v. S&S Furniture Sys. Insulation, 211 N.J. Super. 614, 620 (App. Div. 1986). This does not mean any "guess or conjecture" will suffice; the evidence "must be such as to lead a reasonably cautious mind to the given conclusion." Lister v. J.B. Eurell Co., 234 N.J. Super. 64, 72

(App. Div. 1989); see also Perez v. Monmouth Cable Vision, 278 N.J. Super. 275, 282 (App. Div. 1994).

B

Moran's contention that he was injured during the course of his employment was hotly contested. He claimed he was injured when, at approximately 2:30 p.m., on Thursday, January 28, 2016, while lifting a heavy box at Cosmetic's place of business, he felt a "pop" in his back. Moran did not then report the incident to Cosmetic because his back didn't bother him until after he left work and arrived home. And he did not communicate about it with Cosmetic the next day because he was not scheduled to work that day. Instead, in a manner he claims comported with a course of conduct of approximately twenty years working with Cosmetic, Moran texted his team leader, Rafael Perez,[3] at approximately 6:35 a.m., on Monday, February 1, 2016. That text message, as well as those sent to Perez on February 2, 3 and 4, were admitted into evidence.[4]

[3] The evidence supports the judge's finding that because Cosmetic's warehouse operations manager did not speak Spanish and because Moran's English was limited, Moran was instructed to communicate with Perez on such matters.

[4] The copies of the text messages in the record are written in Spanish. We asked at oral argument whether English versions were admitted in evidence, or contained in the appellate record, and were told they were not, probably because the judge was fluent in Spanish and did not require English versions. Notwithstanding the

The parties also did not dispute: that Moran telephoned Cosmetic's warehouse operations manager that week, as well; that his call was not answered; that Moran left a voicemail; and that this call was not returned.[5] Moran also sent Perez another text message, which was admitted into evidence, on Tuesday, February 9, advising he would return to work on Thursday, February 11.

Moran did in fact return to work on February 11. He then met with the plant's general manager and provided his doctor's notes in accordance with the advice previously relayed by Perez. The general manager, however, told Moran he had been absent too often and terminated his employment.

At trial, the judge heard Moran's testimony as well as the testimony of Cosmetic's plant manager, warehouse operations

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problems this causes for our review of the record, we gather from the text messages and the lack of any controversy about their content that Moran informed Perez he had back pains, was seeing a doctor, and was adhering to his doctor's advice about his return to work. The point Cosmetic would have us draw from all this is that while it may be true Moran advised Cosmetics of his back problems, he never attributed the cause to something occurring at work. The judge's findings about these texts are in accord with that proposition; she found the text messages timely informed Cosmetic of Moran's absences and the causes of the absences but they did not convey that his back problems were caused by a work-related injury.

[5] Cosmetic did not offer this voicemail — assuming it still existed — at trial. There was no dispute, however, that Moran did not convey in the voicemail that he was injured while working at Cosmetic's plant on January 28.

manager, and human resources manager. The judge determined, for reasons thoroughly discussed in a written opinion, which was later amplified by another written opinion, that Moran was "more credible" than Cosmetic's witnesses. We have been given no principled reason to question that credibility finding; the judge observed the witnesses as they testified, not us.

Cosmetic's contention that Moran did not suffer a work-related injury seems to revolve around two things. One, Moran did not report in his various messages in the days following January 28 that he was hurt at work. And two, that Moran's doctor made a note in his records that Moran stated he "was shoveling snow" when the back pain developed.

As to the first, the judge correctly recognized that Moran reported his inability to appear for work in a manner consistent with directions previously given to him by the warehouse operations manager. It is true Moran did not specifically state in his many early communications that the injury was work-related but, as Moran testified, he advised the general manager of the genesis of the injury when he was next at the plant on February 11. Moran recounted that the general manager would "not listen" to him, accused him of lying, and reproached Moran for not informing the warehouse operations manager. When Moran attempted to show the general manager the text messages he sent to Perez, the general

manager got "very upset" and had Moran escorted from the building. The judge's findings in this regard are supported by Moran's testimony, which the judge found more credible than the testimony of the other witnesses. We have been presented with no valid reason for rejecting the judge's determinations on this point. Indeed, having closely examined the trial transcript, it appears Cosmetic was more intent on proving it had a rational reason for terminating Moran's employment — a question having no bearing on whether Moran sustained or communicated his sustaining of a work-related injury to Cosmetic. Even if Moran imperfectly informed Cosmetic about the injury, it does not necessarily follow — as Cosmetic seems to contend — that the work-related injury must not have occurred.

The second prong of Cosmetic's attack concerns the doctor's notation in his file that Moran "was shoveling snow and developed severe low back pain with right leg radiation." Cosmetic waves this note about as if it were a smoking gun compelling a rejection of the judge's findings. But Moran testified — and credibly in the judge's eyes — that he and the doctor spoke of many things, including the severe blizzard that hit the northeast between January 22 and 24, 2016. Moran asserted that he never told the doctor that snow-shoveling was the cause of his injury. And Cosmetic never called the doctor to testify about the conversation; instead, Cosmetic was apparently content to rely on the doctor's

otherwise unexplained note. The judge was entitled to give the doctor's note whatever weight she deemed appropriate, particularly when she was not provided with a further explanation that may have come from the doctor's testimony. Common sense and human nature entitled the judge to assume that the severity of the blizzard days earlier was something Moran and the doctor spoke about and that such a conversation may have been conflated by the doctor when he memorialized in his file the genesis of Moran's complaints and discomfort.

Although the evidence presented genuine disputes about whether a work-related injury occurred, those were questions for the judge to answer based upon her credibility findings and the weight she chose to attribute to the various pieces of credible evidence received. Our role, as noted earlier, is more restricted. We are simply to determine whether a "reasonably cautious mind" could come to the conclusion the judge reached. Lister, 234 N.J. Super. at 74. Having thoroughly examined the factual record, and having considered the judge's meticulous findings on the contested questions presented, we conclude the judge was entitled to find from the credible evidence that Moran was injured on January 28, 2016, while lifting a box at Cosmetic's place of business. In

deferring to the judge's findings, we affirm that aspect of the order under review.[6]

II

The second part of the appeal need not long detain us. The parties agreed, with the judge's acquiescence, to bifurcate the issues so the judge might first determine whether a compensable injury occurred before the parties and the court invested time and energy on other issues not otherwise necessary to reach if the judge answered the preliminary question in Cosmetic's favor.

Despite bifurcation,[7] the judge found that Moran was entitled to temporary disability benefits and appears to have made other findings about the nature of the injury. These other issues were decided without warning and deprived Cosmetic of an opportunity

[6] We have not picked every leaf from the tree. Cosmetic has alluded to numerous other aspects about the factual record — developed over the course of four days in the compensation court — in attempting to persuade us that Moran fabricated the circumstances surrounding his injury and that the judge's findings to the contrary should not be sustained. We have focused only on the testimony and assertions that seem to have played the greater or more troubling roles in this dispute. We find insufficient merit in any of Cosmetic's other contentions in its Points I and II to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

[7] The actual bifurcation boundaries were never clearly placed on the record. Counsel represent that the terms of bifurcation developed during in-chambers discussions that never quite made it to open court.

to present evidence or to confront the evidence upon which the judge relied. Because the judge mistakenly exceeded the limits of the bifurcation agreement, we vacate those parts of the order under review that granted temporary disability benefits and other relief to Moran, and we remand those proceedings that would naturally have followed the determination that Moran sustained a work-related injury.

We lastly consider Cosmetic's argument in its Point IV that the judge sought out and relied on evidence the judge herself procured from outside sources. The judge in fact acknowledged in her written decision that, on her "own volition," she "contacted the State and was advised" that Moran "had been paid temporary disability benefits from" January 29, 2016, to July 5, 2016; the judge also determined, without an opportunity for the parties to respond, there existed "a lien of [$]4,292.08" for those temporary disability benefits.

Judges should not conduct their own factual investigation, let alone do so without notice and an opportunity for the parties to be heard. See Lazovitz v. Bd. of Adjustment, Berkeley Heights, 213 N.J. Super. 376, 381-82 (App. Div. 1986); Amadeo v. Amadeo, 64 N.J. Super. 417, 424 (App. Div. 1960). Because we have found other reasons to vacate those findings that exceeded the hearing's purpose — whether Moran sustained a compensable injury — any harm

caused has been remedied. We expect that going forward Cosmetic will be given a full opportunity to contest any remaining disputes in this matter.

Affirmed in part, vacated in part, and remanded for proceedings in conformity with this opinion. We do not retain jurisdiction.