

CP# 95-35613 Capano v. Bound Brook Relief Fire Company #4
Joan L. Mott, Administrative Supervising Judge of Compensation
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DEPARTMENT OF LABOR
DIVISION OF WORKERS' COMPENSATION
Docket No. 95-035613

FRANK CAPANO,
Petitioner,
v.
BOUND BROOK RELIEF FIRE
COMPANY #4,
Respondent.

DECISION

Appearances:

Vogel & Gast, Esqs., by Theodore E. Gast, Esq. for Petitioner,
Convery, Convery & Shihar, Esqs. by Clark W. Convery, Esq. and Bernard Shihar, Esq. for the Respondent.

This is the court's decision in the bifurcated hearing to determine the nature and extent of disability and responsibility for payment of medical treatment in Claim Petition 95-035613, Frank Capano v. Bound Brook Relief Fire Company #4. The question of liability of respondent for Mr. Capano's accident was the subject of the court's opinion of April 14, 1999.

Unfortunately Frank Capano died on January 24, 1999, before this trial was complete.

The petitioner fell fracturing his hip on February 20, 1994. He was transported to the Somerset Medical Center and underwent left hip replacement surgery. On March 29, 1994, he was transferred to the Raritan Health and Extended Care Center where he remained until his death. At the time of his injury the petitioner was 93 years old. He lived with his daughter and occupied a bedroom on the second floor. He spent his time on many days walking to the barber shop of his nephew where he would spend several hours talking to friends and customers. He would return home and prepare a meal for himself. Afterwards he would clean up the kitchen. He took care of his personal needs. In the evenings he would be in attendance at the firehouse undertaking activities described in my decision finding liability of the fire company. Although he no longer drove a car he would do his own grocery shopping and carried his own packages into his home. Unfortunately, petitioner never returned to these ordinary activities after fracturing his hip. He spent the remainder of his life in a nursing home.

No evidence was presented to assist the determination of the period of temporary disability. While the records of Somerset Medical Center for the admission following the accident are in evidence all we know is that Mr. Capano underwent a hemiarthoplasty of the left hip. He continued to have physical therapy at the Raritan Health and Extended Care Center. There is no evidence of when Mr. Capano reached maximum medical recovery from that surgery. Since the only information available to fix the

period of temporary disability is the hospital admission I find that petitioner was temporarily totally disabled from the date of admission to Somerset Medical Center on February 20, 1994 to his discharge on March 29, 1994, a period of five and 2/7 weeks.

Concerning the issue of the nature and extent of permanent disability there is little disagreement about the functional loss of this petitioner. He was a functioning 93 year old, able to go on daily walks, cook for himself, take care of his own needs, and to contribute his volunteer services to Bound Brook Relief Fire Company #4. Following this accident he became an invalid only able to walk a few feet with the assistance of a walker, basically wheelchair bound, unable to even take care of his personal needs.

Having considered all of the expert medical testimony I am satisfied that Mr. Capano's disability falls in the orthopedic sphere perhaps with some overlapping neurologic disability. I do not find that petitioner has sustained his burden of proof of the depression which is the basis of the psychiatric disability described by petitioner's expert, Dr. Bruce Johnson. That determination is based upon my observation of Mr. Capano in the video deposition and the testimony of the neuropsychiatric experts.

Petitioner's expert, Earl C. Shaw, M.D., delivers the opinion that Mr. Capano is totally disabled because of his inability to even transfer from his wheelchair to an examining table, because of the restriction of motion in the left hip, and the inability of Mr. Capano to carry on the activities of daily living. Except for finding less restriction of motion of petitioner's left hip, respondent's orthopedic expert, Francis De Luca, M.D., described Mr. Capano in much the same way as Dr. Shaw. However, Dr. De Luca only estimated disability "in the hip", stating that disability to be 10% of the partial total. He specifically testified that he was not estimating disability of the entire body. It is respondent's contention that it should only be responsible for that disability and not be charged with the result of the "aging process" suffered by Mr. Capano. Mr. Capano became permanently and totally disable as the result of the fall and the fractured hip. The aging process was how respondent "found" Mr. Capano. It is well settled that an employer, here the fire company, takes an employee as he is, subject to all the weaknesses and infirmities he posses, even though they render the individual more susceptible to injury. *Borber v. Independent Planting Corporation*, 28 N.J. 160, 164 (1958). In *Belth v. Ferrante & Son, Inc*, 47 N.J. 38, 45-46 (1966), the court stated:

Over the years certain pertinent general principles have grown into firm acceptance in the administration of the Workmen's Compensation Act. When an employee is admitted to an employer's work force, he makes no warranty of the physical or mental fitness, or freedom from latent or patent disability for disease. The employer takes him as he is, handicapped by any physical impairments, whether or not observable, as well as to any underlying condition or unusual susceptibility or idiosyncrasy or quiescent disease, which when subjected to accidental work-connected injury may result in greater disability than would follow if such impaired physical condition or weakness were not present. In such cases if a compensable injury acting on the already existing impairment or condition or disease produces greater disability than might ordinarily flow therefrom, it has been held uniformly that the award of workmen's compensation must equal the full extent of the impairment."

Applying this standard to the facts of this case it is clear that the petitioner was entitled to receive total permanent disability compensation benefits regardless of his age.

Respondent urges that it should not be required to pay for the disability that befell petitioner because of his advanced age. N.J.S.A. 34:15-12 d. provides

"If previous loss of function to the body, head, a member or an organ is established by competent evidence, and subsequently an injury or occupational disease arising out of an in the course of the employment occurs to that part of the body, head member or organ where there was a previous loss of function, then the employer's insurance carrier at the time of the subsequent injury or occupational disease shall not be liable for any such loss and credit shall be given the employer or the employer's insurance carrier for the previous loss of function and the burden of proof in such matters shall rest on the employer." (emphasis added)

The respondent presented no proof as to the pre-existing functional loss of the petitioner therefore I must find that respondent is not entitled to a functional loss credit.

There remains the issue of cost of medical treatment. Respondent argues that neither Mr. Capano, nor his heirs, are entitled to the costs of medical treatment and the court agrees. However, it appears that the costs of treatment of Mr. Capano were borne by Social Security Medicare and/or Medicaid. Having found that the respondent is responsible for compensation benefits flowing from Mr. Capano's injury, I find that the costs for treatment related to the fractured hip and the subsequent nursing home care must be reimbursed to the Social Security Medicare/Medicaid. While bills have been submitted in evidence not all of those bills are the responsibility of the Fire Company. Therefore I direct that the parties confer and determine what bills do flow from the compensable injury, contact the Social Security Administration, and make the necessary reimbursement. Respondent argues that petitioner never requested medical treatment and that excuses respondent from its duty of providing same. First, I accept the testimony of petitioner's son that demand was made. Second, I find that it was clear to the Town of Bound Brook that petitioner had suffered an accident. Therefore the respondent had a duty to investigate and provide treatment. Last, since the respondent denied the claim it operates at its peril in not providing medical treatment which it can control.

It is requested that petitioner prepare an order in accordance with this decision. Permanent total disability benefits shall be due for the period March 30, 1994 to January 24, 1999.

Allowances will be determined at the presentation of the form of order.

February 20, 2001