

POTTER v. JERSEY CITY POLICE DEPARTMENT No. A-5242-10T3.

ROBERT POTTER, Petitioner-Respondent, v. JERSEY CITY POLICE DEPARTMENT, Respondent-Appellant.

Superior Court of New Jersey, Appellate Division.

Decided August 7, 2012.

D. Gayle Loftis argued the cause for respondent.

Before Judges Lihotz and St. John.

NOT FOR PUBLICATION

PER CURIAM.

The Jersey City Police Department (the Department) appeals from the May 13, 2011 order of the Division of Workers' Compensation awarding Robert Potter partial total disability. The appeal relates to the determined percentage of partial total disability, 7.5%, which is equivalent to forty-five weeks of benefits, awarded for residuals of a traumatic supraumbilical rectus diastasis hernia. In light of the record and applicable law, and following our review of the arguments on appeal, we affirm the decision of Judge of Compensation Rosamond.

I.

We derive the following facts from the evidence presented at trial. Potter was an employee of the Department on January 17, 2005 when, during the course of his employment, he was injured while effectuating an arrest. On January 21, 2005, Potter sent a written notice to his superior stating: "I believe I may have injured my right shoulder. I am not sure but I think I may have pulled a muscle. I am documenting this information at this time in the event it does not improve."

In the weeks following the incident, Potter asserted that his pain became worse so he visited a chiropractor, Dr. Wiley, and his own personal physician, Dr. Frank Rotello. He was given an MRI by Dr. Wiley on March 22. Following the MRI, in April 2005, Potter visited the Department's physician, Dr. Edward Boyland. Potter claims Dr. Boyland rebuffed his attempts to discuss the pain emanating from his abdomen and shoulder area during his initial visit, and subsequently referred Potter to Dr. Marc Urquhart. Dr. Urquhart performed surgery on Potter's shoulder on May 6, 2005. After undergoing physical therapy, Potter underwent a second shoulder surgery on September 23, 2005. Following additional physical therapy, Potter was cleared to return to light-duty work on March 21, 2006.

On November 10, 2005, the same day Potter filed his claim petition for workers' compensation, Potter's attorney sent a letter to the Department, providing notice of its failure to provide treatment for Potter's hernia, and requesting it do so within ten days. Potter asserted the Department never pursued or directed him to medical care for his hernia even though he expressed discomfort in his abdomen to Dr. Boyland. On his own accord, Potter visited Dr. Roxana Kline at the Hackensack University Medical Center, and had a CT examination of his abdomen and pelvis on January 27, 2006.

In a letter dated February 27, 2006, Dr. Kline determined that Potter had suffered a diastasis hernia and that it was her "recommendation to repair the hernia as soon as possible and that [Potter] pursue the opportunity for payment of such repair under his workman's compensation claim." Her letter noted, however, that the hernia "was not a threatening injury as much as a cosmetic flaw." Potter asserted he received a "disability certificate" from Dr. Kline, which was marked into evidence at trial, but not a part of the record on appeal. Potter contended that he gave the certificate to Dr. Boyland when he was on light-duty at the Department after his shoulder surgery. There is nothing in the record indicating when he visited Dr. Boyland after the CT scan administered by Dr. Kline.

A trial commenced before the Judge of Compensation on August 4, 2010. At the time of trial, Potter had recently retired from the Department. With regard to his hernia and his initial visit to Dr. Boyland, Potter stated: "The shoulder was the whole issue, and I couldn't lift things or hold my arm up." On direct examination, when asked if he complained about his abdomen area during the visit, Potter stated, "I was noticing that I was disfigured ... [w]hen I would get up, my muscle poked like a little alien, a bulge would occur." However, when asked whether he tried to tell Dr. Boyland about that complaint during his visit in April 2005, Potter stated Dr. Boyland "wouldn't hear anything" and "I tried to tell him about my shoulder, and I told him about the shoulder. My biggest concern was my shoulder at that moment ... [because] I was in a lot of pain and discomfort."¹

During Potter's second day of testimony, on direct examination, the following exchange occurred regarding his hernia:

Q: Now, as a consequence of your CT scan and your evaluation by Dr. Kline, ... once you gave this information to Dr. Boyland, did he alter his opinion on behalf of the City as to whether or not surgery would be authorized for the hernia? A: We never discussed it. ... I don't know if he said anything because I was still under therapy for my shoulder. There was nothing done. I stayed on light duty for my shoulder and he didn't pay any[] attention to it, in my experience. Q: And you had, [during your first visit], attempted to discuss with him your hernia and he refused to discuss it with you? A: Totally. Q: When you told the doctor that information, did he offer any treatment on behalf of the City? A: No. I think there was some discussion, I'm not one hundred percent sure of this, there was something about not having reported it within the proper time frame, something in that area.... At sometime during the discussion of the issue he advised me that in the case of the hernia, it wasn't reported in a proper frame or state of time, it wasn't reported in a proper frame or state of time and blah, blah, blah and that was the end of it until the finalization of my right shoulder. I was under the impression that I was going to get treated for the hernia after the rehab for the shoulder, that's what I'll say.

Potter's testimony was uncontradicted because the Department did not call either Dr. Boyland or his "associate" as a witness.

At the time of his testimony in September 2010, Potter stated he has "kind of worked around" his hernia and that "it bulges up ... [w]hen [he] get[s] up from a sitting position." He also stated, "I never noticed it" and that "now I don't pay attention to it," even though it is still present. After the incident, however, Potter noted: "I was in pain and I wasn't sure exactly where the incident could have arisen from. I knew I hurt myself that day, but I wasn't sure exactly what it was."

Potter called Dr. Arthur Tiger as an expert in orthopedic medicine. Dr. Tiger testified that he examined Potter on February 1, 2007, and he noted that with regard to Potter's hernia, there was a "bulge in the supraumbilical area," just above the bellybutton. Dr. Tiger stated that Potter's hernia is referred to as "diastasis of the rectus muscles," which is described as a disconnection between the vertical demarcations of the abdominal muscles that produces an opening where a portion of the abdominal contents poke through the skin, resulting in a bulge within three inches above the bellybutton. He noted that both the shoulder injury and the hernia were related to the arrest incident in January 2005. Dr. Tiger's estimate of disability for Potter's supraumbilical rectus diastasis was 25% of partial total disability.

On May 13, 2011, the Judge of Compensation issued an oral decision, finding that Potter's complaint with regard to his abdomen "has remained unchanged... [and] although not very painful, was considered disfiguring by [Potter]." Of significance, he noted that the testimony and the records pertaining to the hernia were not rebutted by the Department.

He found Potter can visually observe a bulge that protrudes from his abdomen area when he changes from prone to sitting positions. He further noted that according to Dr. Tiger, Potter's supraumbilical hernia is distinguishable from either an inguinal or umbilical hernia.

The Judge of Compensation grounded his conclusions in N.J.S.A. 34:15-15 (stating that an injured worker is entitled to medical, surgical, and other treatment as necessary to relieve the worker of the effects of the injury) and N.J.S.A. 34:15-36 (defining partial-permanent disability as an impairment that restricts the function of the body or of its members or organs). He rejected assertions that Potter's claim was barred by N.J.S.A. 34:15-12(c)(23) (setting forth a forty-eight hour notice requirement wherein, upon discovery, the worker informs the employer that he has suffered an inguinal hernia). Specifically, he found that Potter had given adequate notice to his employer via the report submitted to his supervisor on January 21, 2005, in which he stated, "I believe I may have injured my right shoulder. I am not sure but I think I may have pulled a muscle." The only testimony that interprets the report came from Potter, who stated at trial: "The subject [] I was advising my lieutenant during the arrest, I believed that I had injured my shoulder and I pulled my muscle." When asked about the muscle that he was complaining about, Potter explained, "My stomach."

The Judge of Compensation found that although the treatment request was made on Potter's behalf by his counsel, it was ignored or denied by the Department. As a result, the Judge of Compensation held that "[t]he injuries of the diastasis hernia, which created [an] observable abnormality of muscle pushing through torn rectus muscle in the abdomen" is a significant injury that qualifies as a disability permanent and partial in nature.

He also determined that even though N.J.S.A. 34:15-12(c)(23) states that notice of a worker's hernia should be given to the employer within forty-eight hours after the occurrence, our Supreme Court in *Swinton v. Gregory Steel Welding & Fabricating Co.*, 61 N.J. 538, 543 (1972), held that the history and development of the statute illustrates it is applicable only to inguinal hernias, which Potter clearly does not have, as confirmed by Dr. Tiger. Therefore, because Potter gave notice of the "pulling of the muscle" within days of the accident, and because Dr. Kline diagnosed the hernia as an abdominal diastasis hernia on February 27, 2006, Potter provided adequate notice within the provisions of the compensation statute, N.J.S.A. 34:15-17 (requiring the worker to give notice to the employer within ninety days of the occurrence of the injury).

With regard to Dr. Tiger's opinion as to the percentage disability suffered by Potter, the Judge of Compensation found it was exaggerated, and he reduced Tiger's determination of 62% disability to 40% disability, with the hernia accounting for 7.5%. He then ordered the Department to pay 7.5% of partial total, orthopedic in nature, for residuals of Potter's traumatic supraumbilical rectal diastasis hernia.

II.

On appeal, the Department argues that the Judge of Compensation's finding of proper notice by Potter was based on insufficient credible evidence, and the finding that Potter sustained a 7.5% partial disability was excessive, improper, and inconsistent with the complaints on the record. Based on our standard of review, we disagree.

We exercise a "limited" review of the decision, and a judge of compensation's "findings are binding when based ... on `sufficient credible evidence in the record.'" *Cooper v. Barnickel Enters., Inc.*, 411 N.J.Super. 343, 348 n.4 (App. Div.) (quoting *Sager v. O.A. Peterson Constr. Co.*, 182 N.J. 156, 164 (2004)), certif. denied, 201 N.J. 443 (2010). We also give "'due regard to the compensation judge's expertise and ability to evaluate witness credibility.'" *Lindquist v. City of Jersey City Fire Dep't*, 175 N.J. 244, 277 (2003) (quoting *Magaw v. Middletown Bd. of Educ.*, 323 N.J.Super. 1, 15 (App. Div.) (internal citation omitted), certif. denied, 162 N.J. 485 (1999)). "Deference must be accorded the factual findings and legal determinations made by the [judge of compensation] unless they are `manifestly unsupported by or inconsistent with competent relevant and reasonably credible evidence as to offend the interests of justice.'" *Id.* at 262 (quoting *Perez v. Monmouth Cable Vision*, 278 N.J.Super. 275, 282 (App. Div. 1994), certif. denied, 140 N.J. 277 (1995)).

Moreover, it is a long-standing principle that a "[judge of compensation] is not bound by the conclusional opinions of any one or more, or all of the medical experts." *Kaneh v. Sunshine Biscuits*, 321 N.J.Super. 507, 511 (App. Div. 1999) (quoting *Perez v. Capitol Ornamental, Concrete Specialists, Inc.*, 288 N.J.Super. 359, 367 (App. Div. 1996)). A Judge of Compensation is considered to have "expertise with respect to weighing the testimony of competing medical experts and appraising the validity of [the petitioner's] compensation claim." *Ramos v. M & F Fashions, Inc.*, 154 N.J. 583, 598 (1998). However, the judge of compensation must "carefully explain[] why he [or she] considered certain medical conclusions more persuasive than others. That [the Judge of Compensation] gave more weight to the opinion of one

physician as opposed to the other provides no reason to reverse th[e] judgment." Smith v. John L. Montgomery Nursing Home, 327 N.J.Super. 575, 579 (App. Div. 2000).

III.

In its challenge to the Judge of Compensation's determination, the Department essentially argues that he improperly relied on the medical opinion of Potter's expert. We disagree.

Considering the Judge of Compensation's expertise in weighing the testimony of medical experts and his ability to evaluate witness credibility in general, Lindquist, *supra*, 175 N.J. at 277, we conclude that the Judge of Compensation adequately explained why he considered the medical opinion of Dr. Tiger persuasive and why Potter's testimony and the January 21, 2005 notice serves as "sufficient credible evidence" in the record to support his conclusion. We conclude the Judge of Compensation's findings are well-supported in the record.

Affirmed.

FootNotes

1. Potter also testified that he first explained his complaints to an associate of Dr. Boyland's, who was "a young female doctor" or "a lady with black hair." When asked whether he explained or produced any information to Dr. Boyland about his hernia during his initial visit, he stated, "not to Dr. Boyland" but instead his "associate," who Potter testified he never saw again.