NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0204-14T2

JOSEPH TODARO,

Petitioner-Appellant,

v.

GLOUCESTER COUNTY DEPARTMENT
OF CORRECTIONS,

Respondent-Respondent.

Argued September 21, 2015 – Decided February 4, 2016

Before Judges Nugent and Higbee.

On appeal from New Jersey Department of Labor and Workforce Development, Division of Workers' Compensation, Claim Petition No. 2001-9531.

Adam M. Koltar argued the cause for appellant.

Prudence M. Higbee argued the cause for respondent (Capehart & Scatchard, P.A., attorneys; Matthew R. Litt, on the brief).

PER CURIAM

Petitioner Joseph Todaro appeals from a workers' compensation order denying his motion for additional counsel fees. Todaro sought the additional fees because respondent, Gloucester County Department of Corrections, had engaged in questionable discovery practice, causing Todaro to expend

unnecessary time and effort, and unduly delaying the proceedings. In a thoughtful and well-reasoned opinion, Emille R. Cox, Supervising Judge of Compensation, denied Todaro's motion. Having considered Todaro's arguments in light of the record, we discern no basis for concluding Judge Cox abused his discretion. Accordingly, we affirm the order denying Todaro's motion for additional counsel fees.

The parties do not dispute the procedural history. Todaro, a corrections officer employed by respondent, filed a claim petition in April 2011, alleging he had sustained injuries to his right shoulder, right arm, and right knee, as well as psychiatric injuries, in a September 2010 accident arising out of and in the course of his employment. Two months later, respondent filed an answer, admitting Todaro's accident was compensable and demanding "all records of medical treatment, examination and diagnostic studies." As Judge Cox would later explain, by the time respondent filed an answer, Todaro's treating physician had determined: "[Todaro] had reached maximum medical improvement. At this juncture the matter would normally be ready to proceed to a determination on permanency. However, [r]espondent, as is its custom, proceeded through counsel, to inquire into [Todaro's] medical history . . . ."

A month later, respondent's attorney sent Todaro's attorney a letter stating:

> In order for us to determine whether our client may be entitled to a credit under N.J.S.A. 34:15-12(d)[1] kindly provide us with the following:
>
> > 1. The name and address of [Todaro's] primary care physician for the previous ten years;
> >
> > 2. The name and address of any chiropractor that [Todaro] treated with in the previous ten years;
> >
> > 3. The name and address of any and all physicians who have treated [Todaro] for the conditions alleged in the above-captioned claim for the past [ten] years;

[1] 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 and in the course of an employment occurs to that part of the body, head, member or organ, where there was a previous loss of function, then the employer or 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.

> 4. The name and address of any allergist/pulmonary physician whom your client has treated with in the past [ten] years.

Respondent's letter enclosed medical authorizations, which included this language: "Pursuant to my privacy rights under the Health Insurance Portability and Accountability Act (HIPAA), by affixing my signature below I understand and voluntarily consent to the following[.]" The "following" was an authorization to release to respondent's counsel Todaro's medical records, including office notes, charts, diagrams, pathology reports, operative reports, physical and lab tests, x-ray and imaging reports, prescription notes, treatment plans, and discharge summaries "from the inception of your records to the present." Thus, the authorizations potentially requested more than ten years of medical information. Respondent's counsel made no attempt to restrict the request "to the body, head, a member or an organ" for which Todaro had filed his claim petition. See N.J.S.A. 34:15-12(d). In other words, respondent's counsel made no effort to restrict the scope of the discovery request to the very statute counsel purportedly relied upon as authority for such request.

Nearly six months later, respondent filed a motion to compel Todaro to comply with its demand for medical information. The record on appeal contains little information about what

happened during the intervening time period. There is reference in a certification to "several conferences" and a letter Todaro wrote to respondent five months after receiving the demand for medical authorizations. In the letter, Todaro refused to provide the authorizations.

In any event, six months after demanding the authorizations, respondent filed a motion to compel Todaro to sign them. In a supporting certification, respondent's attorney referenced a letter advising Todaro's attorney "that our investigation revealed he was in at least ten prior motor vehicle accidents[.]" Five months after respondent filed the motion, Todaro responded. Todaro argued respondent was not entitled to obtain the medical information it sought because the time for taking discovery had expired, respondent had "failed to establish even minimal meritorious legal grounds" to support its request, and the overly broad and invasive relief respondent sought violated the scope of N.J.S.A. 34:15-12(d) as well as HIPAA's privacy rules.

The motion was resolved after a hearing in which respondent's attorney was permitted to examine Todaro about the previous motor vehicle accidents.[2] Judge Cox denied respondent's

[2] The parties have not included a transcript of the hearing. The hearing is referenced in the judge's opinion.

motion in a written opinion, concluding respondent's demand for medical information was unnecessarily intrusive. The judge noted both that Todaro testified credibly he had received no treatment following each motor vehicle accident and respondent had "provided no evidence of any functional loss justifying the comprehensive disclosure [of Todaro's medical information]."

Judge Cox raised several concerns. He noted that respondent's stated objective of guarding against fraud "is not the function of a [r]espondent's counsel." The judge explained that instances of actual fraud were the exception, not the rule, and "[s]uch exceptions do not justify routine incursions into [p]etitioners' private unrelated medical history." The judge further noted that employers who were convinced that fraud is rampant in the workers' compensation system are free to utilize the services of investigators to eradicate the problem. Using the discovery process to accomplish the task is unacceptable.

Next, the judge noted that during argument, respondent's counsel stated her letter demanding medical information was "a standard form letter that was sent out by my office." Judge Cox explained that such letters surpass limited discovery practice contemplated by workers' compensation regulations. The judge also expressed concern that such letters would have a possible chilling effect on potential claimants with legitimate claims.

The judge asked, rhetorically: "Why should a [p]etitioner be forced to disclose an abortion or physical abuse by a spouse because she/he injured a knee?"

With respect to respondent's reference to the operative report, which demonstrated Todaro had "subacromial impingement with partial thickness and likely pre-existing bursal-sided rotator cuff tear," the judge explained that any concern respondent had could have been resolved by taking measures such as "interviewing supervisors, co-workers, and Human Resources personnel to determine whether there was any prior functional loss associated with [Todaro's] injured parts of the body."

Lastly, the judge recognized that the "inordinate delay" occasioned by the dispute over the medical records "run[s] counter to the intent of the workers' compensation program which was instituted to provide expedited relief to injured workers."

Following the judge's decision, but before the judge entered an order approving settlement, Todaro submitted a certification in support of a motion for counsel fees for having to oppose respondent's invasive and overly broad request for medical records. The certification included an itemization of more than forty-five billing entries spanning nine months and totaled nearly $15,000. Judge Cox denied the motion.

In a written decision, Judge Cox determined that Todaro's twenty-percent fee award adequately compensated his attorney for the attorney's efforts expended on Todaro's behalf. Judge Cox specifically found that "the time expended in defending the motion to compel discovery does not merit an additional counsel fee." Nevertheless, the judge addressed the arguments counsel raised in their respective briefs.

First, he pointed out that he never sought to apply Department of Human Services guidelines to workers' compensation discovery practice. Thus, Judge Cox rejected Todaro's successful defense against the motion "as the defense of a federally protected right[,]" characterizing the argument as somewhat of an embellishment. Acknowledging that Todaro's successful defense of respondent's motion accelerated the final resolution of the case, Judge Cox found that fact alone was not sufficient to justify an enhanced fee because it did not result in an additional tangible benefit to Todaro. Judge Cox reiterated his comments about respondent's attorney's routine practice of making overly broad and intrusive demands for medical records.

Judge Cox concluded:

> [W]hile I remain critical of the conduct of discovery in this case, I recognize that it represents an attempt at zealous advocacy on behalf of a client. This matter became as

> contentious as it was because of [Todaro's] counsel's equally zealous advocacy on behalf of his client. An award of an additional fee in this circumstance would be unnecessarily punitive. I remind [Todaro's] counsel that, in the past, this [c]ourt has been very tolerant of an associate whose conduct, under the guise of zealous advocacy bordered on contempt. This [c]ourt sought no punitive measures then and will seek none now.

The judge issued an implementing order from which Todaro appeals.[3]

On appeal, Todaro argues he is entitled to additional attorney's fees under two statutory provisions: N.J.S.A. 34:15-28.1, concerning delay or refusal of a respondent to pay temporary disability compensation; and N.J.S.A. 34:15-28.2, authorizing a judge of compensation to impose, among other things, "reasonable legal fees" if a party "fails to comply with any order of a judge of compensation or with the requirements of any statute or regulation regarding workers' compensation." Todaro also contends he is entitled to additional attorney's fees because respondent's discovery demands, motion practice, and deposition far exceeded discovery contemplated by the Workers' Compensation Act. Lastly, Todaro contends the judge of

[3] The court had entered an order approving settlement three months earlier. Consequently, the order disposing of petitioner's fee motion was final for purposes of appeal. R. 2:2-3.

compensation erred in determining his protection of HIPAA privacy rights provided him with no tangible benefit and by considering factors outside of the scope of the case.

Respondent replies that no authority permitted the judge to award additional fees; Todaro did not raise before the judge his right to additional fees under N.J.S.A. 34:15-28.1 or .2; the judge decided respondent's discovery motion based on workers' compensation regulations rather than federal HIPAA; and the judge did not consider factors outside the record. Respondent also argues Todaro's requested $350 per hour rate is unsupported and unreasonable.

We affirm, substantially for the reasons given by Judge Cox in his written decision, which is supported by sufficient credible evidence presented in the record. See Alvarado ex rel. Velez v. J & J Snack Foods Corp., 397 N.J. Super. 418, 425 (App. Div. 2008). In doing so, we have "give[n] due weight to the compensation judge's 'expertise in the field and his opportunity of hearing and seeing the witness.'" Ibid. (quoting De Angelo v. Alson Masons, Inc., 122 N.J. Super. 88, 89-90 (App. Div.), aff'd o.b., 62 N.J. 581 (1973)). We add only the following brief comments.

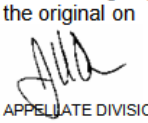
We agree entirely with Judge Cox that the routine practice of respondent's attorney in attempting to obtain such wide-

ranging discovery of a petitioner's medical records should not be tolerated. N.J.S.A. 34:15-12(d), concerning previous loss or function to the same body part, does not warrant such an intrusion into a petitioner's privacy rights. Moreover, respondent's attorney's conduct in this case contravened N.J.A.C. 12:235-3.7(b) (requiring discovery "be concluded within 180 days from the filing of respondent's answer or from petitioner's last authorized medical treatment, whichever date is later"), and N.J.A.C. 12:235-3.8(g)-(h) (allowing interrogatories and depositions "upon motion, for good cause shown"). These rules do not contemplate a respondent demanding that Todaro execute HIPAA authorizations for virtually every medical record generated by his visits to medical providers over a ten-year period.

On the other hand, a respondent's attorney, on motion, for good cause shown, may seek interrogatories or depositions. Although respondent's action in this case was procedurally flawed, when the parties' competing contentions came before the judge on a motion, the judge resolved the issue by permitting what in effect was a controlled deposition. Considering that Todaro had been involved in numerous prior automobile accidents, the judge acted well within his discretion by permitting this discovery.

Affirmed.

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



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