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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3701-12T1

STEVEN YANECKO,

Petitioner-Respondent,

v.

WASTE MANAGEMENT,

Respondent-Appellant.

Argued December 3, 2013 – Decided April 4, 2014

Before Judges Messano and Hayden.

On appeal from the New Jersey Department of Labor, Division of Workers' Compensation, Claim Petition No. 2005-36374.

Joseph A. Vastano argued the cause for appellant (Pietras, Saracino, Smith & Meeks, LLP, attorneys; Mr. Vastano, on the brief).

Victor B. Matthews argued the cause for respondent.

PER CURIAM

Following trial, the Judge of Workers' Compensation (JWC) entered an order for judgment, finding petitioner Steven Yanecko suffered a compensable occupational injury leaving him 25% permanently partially disabled due to "orthopedic residuals of [a] chronic lumbosacral sprain with findings of . . . disc

herniations and . . . disc prot[r]usion." Yanecko's employer, Waste Management (WM), now appeals. We affirm.

I.

The testimony at trial was that Yanecko had been employed by WM's predecessor-in-interest, Hamm's Sanitation, almost continuously from 1986, and, thereafter by WM, from 1996 until 2005. He started as a "helper," responsible for working on the back of the truck, picking up cans and dumping them into the truck, and running the hopper. He later worked five and one-half days a week as a "rack truck" driver on a commercial recycling route making between sixty and one hundred stops per day. At each stop, Yanecko would pick up cans of garbage and dump them into the truck. Yanecko was later assigned to a truck with a "lift gate" that lifted barrels up and down. Two or three times per shift after filling the truck, he would return to the yard, where he emptied the truck by hand. Twice a month, Yanecko performed "bulk cleanup," lifting refrigerators, stoves, safes, metal frames and heavy furnaces into the back of the garbage truck.

At some point during his employment, Yanecko began driving a "packer" truck that required him to lift the drums of recyclables several feet and deposit them onto the truck. Yanecko generally worked alone, except for three or four days a

month when he was assigned a "helper." For the last "couple of years" he worked at WM, Yanecko drove a "toter" truck, which made his job easier because the truck had a mechanism that attached to the recyclables, lifted them and dumped them into the truck. Yanecko stated that the truck he drove had uncomfortable seats and required him to "double[-]clutch all the time."

In 2001, Yanecko picked up a bundle of papers and felt pain in his back. He reported the incident to WM and his family doctor who referred Yanecko to a chiropractor. Yanecko obtained temporary, intermittent relief, but his back pain always returned. In August 2004, Yanecko's doctor placed him on short-term medical leave, and upon his return, WM placed him on "light duty," assigning him a route that used the "toter" truck. In October 2004, Yanecko was again placed on short medical leave by his doctor. Upon his return, WM advised that, if he was not fully cleared medically, Yanecko would have to apply for disability benefits.

Yanecko's last day of work at WM was October 13, 2005, after which he was on medical leave until January 5, 2006. Yanecko applied for, and received, state disability benefits, as well as Social Security Disability Benefits. On February 6,

2006, WM terminated his employment "for failure to return from leave."

After the expiration of his disability benefits, Yanecko first found work at a gas station and then drove a sanitation truck. In each instance, he resigned within months because of persistent back pain. Yanecko testified that he relocated to Texas in November 2007, continues to suffer back pain and takes pain killers prescribed by his doctor. He continues to have difficulty sitting for long periods and cannot go bowling, hiking or walk for more than a mile.

Dr. Arthur H. Tiger, a board certified orthopedic surgeon, testified as Yanecko's medical expert. He first evaluated Yanecko and rendered a report on October 26, 2007. Dr. Tiger opined that Yanecko had "the residuals of a chronic cervical strain syndrome with chronic myofascitis, multiple disc herniations in the cervical spine with aggravated arthritis . . . ." Dr. Tiger also concluded that Yanecko had suffered "a chronic lumbosacral strain syndrome with chronic myofascitis, with aggravated arthritis, as well as multiple levels of bulging discs . . . ." Dr. Tiger estimated a disability of 45% of partial total for the cervical spine, and 35% of partial total for the lumbar spine. Dr. Tiger conducted a second evaluation in October 2011, and his diagnosis remained unchanged. However,

he concluded the disability of Yanecko's lumbar spine had increased to 45% of partial total.

Dr. Tiger testified that his review of the MRI studies of Yanecko's lower back made over several years revealed "multi-level degenerative disc disease with evidence of disc herniations, as well as protrusions, as well as bulges." He noted "there were similar findings as well in the cervical spine." Dr. Tiger concluded that "the diagnoses [he] made . . . were due to the rigors of the work that [Yanecko] did over the years while working . . . in waste disposal." Dr. Tiger specifically concluded that respondent's condition was not related to "the normal aging process of [the] spine . . . ."

On cross-examination, Dr. Tiger admitted that he did not have Yanecko perform various movements during the evaluations, but, instead, relied upon Yanecko's own account of limitations on his daily activities. Dr. Tiger also could not cite to specific medical literature in support of his position that the "repetitive motions" Yanecko performed as part of his employment caused the problems in his spine.

Dr. Carl F. Mercurio, a board certified orthopedic surgeon, testified as WM's expert. He had also examined Yanecko on two occasions. In the report of his first examination on January 8 2007, Dr. Mercurio concluded that Yanecko suffered from "chronic

low back pain with multiple lumbar herniated discs" but had zero percent permanent, partial disability of the lumbosacral spine. In a second report from October 2011, Dr. Mercurio repeated his findings and conclusions.

At trial, Dr. Mercurio concluded that Yanecko's injuries were "not caused by his work." The doctor cited to a study that concluded "hereditary causes," obesity and muscle strength effected changes observed in MRIs of individuals' spines, but that "the type of work that an individual did didn't play a role in the changes [.]" Dr. Mercurio stated

> The injury model of repetitive motion at work causing back pain is slowly, slowly going its [sic] way. The hereditary model of causing changes on the MRI and problems [is] starting to be more prominent now.

In his written decision, the JWC specifically found that Yanecko's testimony regarding his daily work-related activities was "extremely detailed," "credible" and uncontroverted. He determined that Yanecko "regularly and repeatedly lifted heavy containers," and "utilize[ed] his arms and back in a manner quantitatively and qualitatively different from that required in the ordinary pursuits of life." The JWC found these activities were "peculiar to and characteristic of [Yanecko's] employment with [WM]."

The JWC denied any claim for permanent disability of the cervical spine, finding that Yanecko "himself denied any pain or restrictions arising from his neck." He reached a different result regarding Yanecko's lumbar spine. Referencing the various diagnostic reports, and noting that Dr. Mercurio was "unable to dispute the radiologist reports[] since he did not personally review the MRI films," the JWC concluded that Yanecko's "subjective complaints are supported by objective medical evidence."

Turning to whether Yanecko's condition was "causally related to the work activity established[,]" the JWC found Dr. Mercurio "was simply not a credible witness and appeared to be more focused on the legal interests of the party paying him than on the medical circumstances with which he was presented." Although noting that "Dr. Tiger was unable to provide a specific basis for his conclusion that repetitive activity can cause orthopedic symptoms," the JWC found "the rational[] basis for such a conclusion is self[-]evident." The JWC also noted that Dr. Tiger "failed to provide an adequate factual basis for the physical activity he opined on," but that Yanecko "himself provided that basis in great detail." The JWC found Dr. Tiger's explanation of how repetitive stress caused the degeneration of Yanecko's lower back to be "eminently reasonable and logically

sound." The JWC specifically found "that the repetitive occupational activity [was] causally related to the orthopedic condition of [Yanecko's] lumbar spine."

II.

WM contends that Yanecko failed to prove a compensable occupational exposure pursuant to N.J.S.A. 34:15-31. Citing the language of the JWC's written opinion, WM argues Dr. Tiger failed to provide an adequate factual and scientific basis for his conclusion that Yanecko's condition was the result of his work.

We begin by recognizing the limited nature of our review, which "is the same as . . . any nonjury case, [that is], '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." Close v. Kordulak Bros., 44 N.J. 589, 599 (1965) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). The findings of fact made by a judge of compensation are entitled to substantial deference, Ramos v. M&F Fashions, 154 N.J. 583, 594 (1998), and "due weight must be given to the expertise of a compensation court judge." Laffey v. City of Jersey City, 289 N.J. Super. 292, 303 (App. Div.), certif. denied, 146 N.J. 500 (1996);

Lindquist v. City of Jersey City Fire Dep't., 175 N.J. 244, 262 (2003).

A "compensable occupational disease" is one that arises "out of and in the course of employment" and is materially caused by conditions that are elements of either the occupation generally or the place of employment. N.J.S.A. 34:15-31; Brunell v. Wildwood Crest Police Dep't., 176 N.J. 225, 238 (2003). The development of an occupational disease is typically gradual and imperceptible over an extended period. See Brunell, supra, 176 N.J. at 239. To receive an award for a compensable occupational disease, "a petitioner must show that the alleged occupational exposure contributed to the resultant disability by an appreciable degree or a degree substantially greater than de minimus." Singletary v. Wawa, 406 N.J. Super. 558, 565 (App. Div. 2009) (quoting Peterson v. Hermann Forwarding Co., 267 N.J. Super. 493, 504 (App. Div. 1993)).

WM argues that the JWC's decision in this case is not entitled to any particular deference because Dr. Tiger's opinion lacked any scientific or medical basis that established a causal link between Yanecko's condition and the work he performed.

"It is well established that '[t]he absence of any objective medical or scientific evidence establishing a causal link between [a] petitioner's . . . employment and a claimed

occupational disease will usually be fatal to the petitioner's workers' compensation case.'" Lindquist, supra, 175 N.J. at 278 (quoting Magaw v. Middletown Bd. of Educ., 323 N.J. Super. 1, 13 (App. Div.), certif. denied, 162 N.J. 485 (1999)) (alteration in original). A "[p]etitioner's burden is to show by a preponderance of the evidence that the link is probable. The petitioner need not prove that the nexus between the disease and the [occupation] is certain." Magaw, supra, 323 N.J. Super. at 11 (citing Laffey, supra, 289 N.J. Super. 292, 303; Wiggins v. Port Auth., 276 N.J. Super. 636, 639 (App. Div. 1994)).

WM particularly relies on our decision in Laffey. There, we considered a claim brought by a nineteen-year veteran of the police department who asserted that his pulmonary disease resulted from exposure to dust, smoke, and fumes encountered while supervising school crossings, performing traffic duty, responding to fires and from the condition of the police station. Laffey, supra, 289 N.J. Super. at 295. We reversed the award made by the JWC, finding that the petitioner failed to prove "the conditions surrounding his work environment were peculiar to his employment," and "to demonstrate with objective medical evidence that his ailment [was] related to exposure to the environment as a result of his employment." Id. at 304. We held that

> where an employee seeks to recover on an occupational disease because of <u>exposure to the general environment to which the rest of the public is also exposed</u>, the employee must present sufficient, credible, objective evidence that will raise the compensation court's determination from one of conjecture to one of cautious reasoned probability.
>
> [<u>Id</u>. at 308 (emphasis added).]

We think WM's reliance upon <u>Laffey</u> is somewhat misplaced. Unlike the facts in this case, the petitioner in <u>Laffey</u> failed to establish that the fumes he was exposed to differed from those encountered by any other resident of Jersey City. <u>Id.</u> at 307. Here, Yanecko's specific detailed description of the work he performed, which the JWC found credible, clearly tethered his physical ailments to his occupation.

More to the point, in <u>Laffey</u>, given the entirely speculative nature of the nexus between the petitioner's occupation and his illness, we noted that his "expert's testimony . . . was based solely on the subjective characterizations of the petitioner and not on any existing medical, epidemiological, or scientific studies establishing causation." <u>Id.</u> at 306. But, WM mistakenly extrapolates that statement to mean that such scientific data <u>must be supplied in every case</u>. That is not so.

Clearly, "compensation judges must be particularly skeptical of expert testimony that supports or contests a

finding of causation on the basis of reasoning inconsistent with prevailing medical standards." Magaw, supra, 323 N.J. Super. at 13 (internal quotation marks and citation omitted). "Compensation cannot be justified when a medical witness merely asserts a 'reasonably probable contributory work connection' with no medical support." Ibid. (quoting Laffey, supra, 289 N.J. Super. at 306).

In Lindquist, supra, 175 N.J. at 278, the petitioner's expert "expressed the view that firefighting, rather than cigarette smoking, was the dominant cause of petitioner's emphysema." He cited no medical studies, but, rather based that opinion "on his years of experience evaluating pulmonary disease in patients including firefighters." Ibid. In reversing our decision that reversed the JWC's award, and after conducting its own review of various studies, the Court concluded that "[g]iven the current level of scientific knowledge about emphysema, . . . [petitioner's expert's] testimony was 'not a subjective guess or mere possibility.'" Id. at 281 (quoting Magaw, supra, 323 N.J. Super. at 15).

In this case, Dr. Tiger's testimony was not a "subjective guess or mere possibility." He had treated thousands of individuals who suffered from diseases of the spine. Although he could not cite to specific studies, the doctor clearly stated

that studies existed demonstrating long-term repetitive stresses on the spine could result in disc herniations and protrusions.

Moreover, Dr. Mercurio's testimony, if believed, actually described a scientific community in flux on the issue of causation. Dr. Mercurio himself recognized the scientific community accepted that repetitive stress could cause spine injuries, albeit describing that opinion as "slowly, slowly going its [sic] way." Dr. Mercurio testified that "[t]he hereditary model" was "starting to be more prominent now," but he certainly did not claim that it was necessarily accepted by the wide majority of those who treat spinal injuries. Lastly, the JWC specifically rejected Dr. Mercurio's testimony.

In short, the JWC's determination that Yanecko established a nexus between his spinal condition and the work he performed was based upon sufficient credible evidence in the record. Magaw, supra, 323 N.J. Super. at 15.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION