

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1551-12T1

DENNIS BLAKE,

Petitioner-Respondent/  
Cross-Appellant,

v.

CITY OF ASBURY PARK,

Respondent-Appellant,  
Cross-Respondent,

v.

SECOND INJURY FUND,

Respondent-Respondent.

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Submitted May 19, 2014 – Decided June 20, 2014

Before Judges Yannotti and Manahan.

On appeal from the Division of Workers' Compensation, Department of Labor and Workforce Development, Docket Nos. 2005-10852, 2006-35910 and 2007-4016.

Supple, DiPopolo & Watson, LLC, attorneys for appellant/cross-respondent City of Asbury Park (James F. Supple, on the brief).

Shebell & Shebell, LLC, attorneys for respondent/cross-appellant Dennis Blake (Raymond P. Shebell, of counsel; Robert A. Morley, on the brief).

John J. Hoffman, Acting Attorney General, attorney for respondent Second Injury Fund

(Lewis A. Scheindlin, Assistant Attorney General, of counsel; Jane G. Lafferty, Deputy Attorney General, on the brief).

PER CURIAM

Respondent City of Asbury Park (respondent) appeals and petitioner Dennis Blake (petitioner) cross-appeals from an order of judgment entered by the Division of Workers' Compensation Court awarding petitioner a 37.5% partial total orthopedic disability and a 42.5% partial total psychiatric disability. For the reasons that follow, we affirm.

Petitioner was employed by respondent as a police officer. In 2002, he sustained a compensable injury to his right shoulder while in the course of his employment. In December 2002, the shoulder was surgically repaired. After filing a compensation claim, an Order Approving Settlement for 15% partial total was entered. On February 7, 2005, petitioner injured the same shoulder while making an arrest. The injury resulted in a second surgery in March 2005. Petitioner received physical therapy for one month subsequent to the surgery. He was assigned to light duty for one month after returning to work. Thereafter, he returned to full-time duty.

On October 18, 2006, while on duty, petitioner responded to the crime scene of a shooting. The victim had sustained multiple gunshot wounds to the face. Afterward, petitioner told his

superior officer that he was upset because he knew the victim. According to petitioner, the superior officer told him to "suck it up." After this incident, petitioner began abusing alcohol and continued to do so until 2010.

On November 14, 2006, while on duty, petitioner responded to the scene of a gunshot suicide. Again, he knew the victim. Petitioner alleged that after this incident he felt depressed. He sought medical treatment from a physician, who prescribed him an antidepressant. The physician diagnosed him with posttraumatic stress disorder.

On December 18, 2006, the same day petitioner resigned from his employment, he was examined by a psychiatrist. The psychiatrist advised him that he needed extensive treatment. Thereafter, petitioner was sent by respondent to be examined by a psychiatrist who recommended advanced psychological therapy. He treated with a psychologist until April 2007.

On August 7, 2009, petitioner filed a verified petition seeking Second Injury Fund benefits. The petition was denied.

Petitioner filed three compensation claims: one for his psychiatric disorder, one for his right shoulder, and one for his left shoulder. A consolidated hearing of all petitioner's claims commenced on February 12, 2012, continued on various dates and concluded on August 7, 2012.

Petitioner had the burden of proof to demonstrate a work-related injury constituting either (1) "disability permanent in quality and partial in character" or (2) a "disability permanent in quality and total in character."

"Disability permanent in quality and partial in character" means a permanent impairment caused by a compensable accident or compensable occupational disease based upon demonstrable objective medical evidence, which restricts the function of the body or of its members or organs; included in the criteria which shall be considered shall be whether there has been a lessening to a material degree of an employee's working ability.

"Disability permanent in quality and total in character" means a physical or neuropsychiatric total impairment caused by a compensable accident or compensable occupational disease, where no fundamental or marked improvement in such condition can be reasonably expected.

[N.J.S.A. 34:15-36.]

During the hearing, petitioner and several other witnesses testified, including: petitioner's orthopedic expert, Dr. Floyd Krengel; respondent's orthopedic expert, Dr. Kelly Allen; petitioner's psychiatric expert, Dr. Vin Gooriah; and respondent's psychiatric expert, Dr. Walden Holl. There was marked disagreement between the petitioner's and respondent's experts regarding the extent and compensability of the injuries.

At the conclusion of the hearing, the judge awarded petitioner a 37.5% orthopedic injury and a 42.5% psychiatric injury. As the judge found that petitioner was not totally disabled, he was ineligible for Second Injury Fund benefits.

On November 26, 2012, respondent filed an appeal. On December 6, 2012, petitioner filed a cross-appeal.

Our review of a determination by a judge of compensation is equivalent to that used for review of a judgment in a non-jury case. Brock v. Pub. Serv. Elec. & Gas Co., 149 N.J. 378, 383 (1997). The appellate court determines "'whether the findings made could reasonably have been reached on sufficient credible evidence present in the record,' considering the 'proofs as a whole.'" 319 N.J. Super. at 380 (quoting Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)); see also Ramos v. M & F Fashions, 154 N.J. 583, 594 (1998) (quoting Bradley v. Henry Townsend Moving & Storage Co., 78 N.J. 532, 534 (1979)).

Due weight must be given to the compensation judge's "expertise in the field and his opportunity of seeing and hearing the witnesses." De Angelo v. Alsan Masons, Inc., 122 N.J. Super. 88, 89-90 (App. Div.), aff'd 62 N.J. 581 (1973); see also Kovach v. Gen. Motors Corp., 151 N.J. Super. 546, 549 (App. Div. 1977) ("It must be kept in mind that judges of compensation are regarded as experts" (citation omitted)). An appellate court

will therefore defer to the judge of compensation's expertise "where such expertise is a pertinent factor." Close, supra, 44 N.J. at 599.

The judge found petitioner's testimony credible.

In any matter credibility of witnesses is very important. In this matter Officer Blake testified at length. I had considerable time to observe his demeanor in conjunction with his testimony. During the entire time Officer Blake was very respectful to the Court and the attorneys. He answered questions directly to the best of his ability. Throughout his mood was downcast. At times when speaking of the incidents of October 2006 and November 2006 he appeared even more somber. His complaints relative to his orthopedic injuries were consistent with complaints relative to the type of injury he experienced. Likewise his explanation as to how the October 2006 and November 2006 incidents affected him were entirely believable.

Moreover, as the fact-finder, the court has the discretion to accept or reject any or all of an expert's testimony. See Model Jury Charge (Civil), "Expert Testimony" (1995) (citing State v. Spann, 236 N.J. Super. 13, 21 (App Div. 1989)). "The judge is obligated to evaluate a doctor's testimony according to his demeanor and qualifications, the trustworthiness of the testimony, and the quality of the underlying examination upon which the opinions are based." Goyden v. State Judiciary, 256 N.J. Super. 438, 443 (App. Div. 1991) (citing Margaritondo v.

Stauffer Chem. Co., 217 N.J. Super. 560, 563-64 (App. Div. 1985)), aff'd, 128 N.J. 54 (1992).

Dr. Gooriah testified there was a 65% neuropsychiatric disability, and 40% shoulder disability. The judge found Dr. Gooriah's testimony credible.

Dr. Gooriah provided credible testimony that the incidents experienced by Officer Blake in October and November 2006 resulted in [diagnoses] of major depressive disorder, anxiety disorder, and posttraumatic stress disorder secondary to the work incidents. I find he gave detailed analysis as to all 3 diagnoses and how they apply to Officer Blake. I find Dr. Gooriah's opinion to be well supported. He visually observed Officer Blake throughout the exam to objectively verify his mood. He clearly asked extensive questions to ensure accuracy. His diagnosis was made pursuant to the DSM IV. In substantial detail he explained his diagnosis on how Officer Blake's condition fit the criteria. His repeated and lengthy questioning along with his personal observations of Officer Blake enhanced the objectivity. In fact, there's no dispute that Officer Blake suffers from depression in that respondent's doctor agrees that Officer Blake has depression.

Dr. Holl testified that petitioner suffered from a personality disorder rooted early in his life. The judge found Dr. Holl's testimony "less than persuasive."

I find the doctor gave no plausible explanation for such a diagnosis. He could not point to anything of significance in Officer Blake's past that would evidence any pre-existing personality disorder. He further could not quantify the degree of

disability from depression regardless of cause since he did not remember Officer Blake and had nothing in his report. Until testifying he was unaware of [the] diagnosis of posttraumatic stress disorder. He testified he could not tell if Officer Blake could work as a police officer which was a very evasive response. On the whole his testimony was less than persuasive.

In his cross-appeal, petitioner argues that Dr. Holl's testimony was a "net opinion." Therefore, the court should have given no weight to his testimony. He also argues that because Dr. Gooriah's expert testimony was uncontradicted, the judge should have adopted his opinion regarding the percentage of neuropsychiatric disability.

We reject both arguments as without merit. First, the judge did not give any weight to the "less than persuasive" testimony of Dr. Holl. Second, as we noted above, the judge was well within his discretion as the fact-finder to accept or reject Dr. Gooriah's testimony.

The judge concluded that the incidents of October 18, 2006 and November 14, 2006 were the cause of the psychiatric disorder. However, the judge rejected the percentage of neuropsychiatric disability attribution argued for since petitioner had not sought treatment.

The judge found that petitioner was unable to meet the burden of persuasion that he suffered from a permanent and total



disability "where no fundamental or marked improvement in such condition can be reasonably expected." N.J.S.A. 34:15-36. The judge further found that petitioner's injuries, though significant, did not totally disable him and with the psychological treatment petitioner said he desired, he could be employed in the future.

Dr. Kregel testified that there was a 70% partial total in the right shoulder, and 40% partial total in the left shoulder as a result of overuse. Regarding the claim of injury to petitioner's left shoulder, Dr. Kregel calculated the disability as 55% in 2005, 66 2/3% in 2007, and then 70% in 2010 without citing to any new injury, only to the claim of subjective worsening pain. The doctor acknowledged there was "no strictly objective medical evidence, according to the Supreme Court of the State of New Jersey" regarding the overuse of petitioner's left shoulder.

Dr. Allen also testified that there was a 10% partial total disability of the right shoulder, with 5% predating the 2005 injury, and 5% related to the 2005 injury.

The court found:

In this matter both doctors find permanent disability. There is clear objective evidence of injury through the full thickness rotator cuff tear requiring surgery, a clear diminished working ability as well as affect [sic] on everyday

activities. Based upon the evidence presented and my experience as a Workers' Compensation Judge I find that Mr. Blake's disability as to his right shoulder to be 37 1/2 percent partial total disability for residuals of right shoulder sprain and rotator cuff tear with surgery. The Respondent is entitled to a credit of 15 percent for pre-existing pathology.

[Emphasis added.]

The judge awarded 37.5% partial total with a 15% credit in the right shoulder, but noted there was "insufficient objective evidence to find additional permanent disability associated with the left shoulder."

Confronted with disparate expert medical opinions, the judge of compensation used his "expertise with respect to weighing the testimony of competing medical experts and appraising the validity of [a] compensation claim." Ramos, supra, 154 N.J. at 598 ("The factual findings of the compensation court are entitled to substantial deference"). Absent evidentiary insufficiency or legal error, "we must defer to the judge of compensation's expertise in fixing percentages of disability." Perez v. Capitol Ornamental, Concrete Specialties, Inc., 288 N.J. Super. 359, 368 (App. Div. 1996).

We conclude that the judge's award was neither excessive nor inconsistent with the credible evidence. If "an appellate court finds sufficient credible evidence in the record to

support the agency's conclusions, that court must uphold those findings, even if the court believes that it would have reached a different result." Sager v. O.A. Peterson Constr., 182 N.J. 156, 164 (2004) (quoting State v. Locurto, 157 N.J. 463, 471 (1999)).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION