

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5259-12T3
A-5260-12T3

ELAINE HUESSER,

Petitioner-Respondent,

v.

UNITED AIRLINES,

Respondent-Appellant.

Argued June 4, 2014 – Decided July 14, 2014

Before Judges Maven and Hoffman.

On appeal from the New Jersey Department of Labor and Workforce Development, Division of Workers' Compensation, Claim Petition Nos. 2005-29529 and 2009-30332.

Joseph V. Biancamano argued the cause for appellant (Biancamano & DiStefano, P.C., attorneys; Mr. Biancamano, of counsel and on the brief).

Mark Caira argued the cause for respondent (Caira & Nemeth, LLC, attorneys; Mr. Caira, on the brief).

PER CURIAM

Workers' compensation respondent United Airlines appeals the April 23, 2013 final judgment of the Division of Workers' Compensation (Division) in two consolidated cases involving petitioner-respondent, Elaine Huesser. The Division found

petitioner, a flight attendant, suffered a compensable injury while in the employ of respondent in 2005 and again in 2008. On appeal, respondent alleges the decisions were not based on adequate, substantial, credible evidence and were otherwise against the weight of the evidence, for both claims. After reviewing the record in light of the contentions advanced on appeal, we affirm.

I.

Petitioner, fifty-one years old, has been employed as a flight attendant with United Airlines since 1998.¹ On September 28, 2005, petitioner injured her left shoulder and lower back when her flight seat broke, causing her to fall to the floor. Petitioner subsequently filed a claim petition (2005 injury), which resolved in March 2009, with the judge entering an order approving settlement and awarding petitioner a 42.5% permanent partial total disability, apportioned 27.5% partial total for the left shoulder and 15% partial total for the lumbar spine.

Before the 2005 injury settled, petitioner suffered a massive rotator cuff tear in her right shoulder, on September 28, 2008, while lifting a suitcase into an overhead compartment. The medical records show petitioner subsequently underwent four separate shoulder surgeries culminating with a right shoulder

¹ Petitioner is married with five children and six grandchildren.

replacement. She was out of work from September 2008 through November 2010 while receiving treatment. For this injury, petitioner filed a claim petition (2008 injury) against respondent on November 10, 2009.

Then, on June 8, 2011, petitioner filed an "Application for Review or Modification of Formal Award" for the previously filed 2005 injury, alleging her lumbar spine condition had worsened. Thereafter, in July 2011, petitioner was temporarily prevented from working due to increased lower back pain. As a result, she received invasive pain management treatment, including lumbar injections and lumbar nerve ablations. The two claim petitions were consolidated for trial before the Division of Workers' Compensation. In the five-day trial that followed, the judge of compensation heard testimony from petitioner and her husband, two lay witnesses and three medical experts.

The trial record establishes that flight attendants, as part of their occupation, are required to occasionally lift items weighing seventy-five pounds, push metal carts weighing upwards of 250 pounds, lift bins of sodas, reach to close overhead bins, and open and close heavy flight doors. Flight attendants are also required to lift luggage, which can also weigh up to seventy-five pounds, into overhead bins; United Airlines does not have a weight limit for carry-on luggage.

Prior to 2004, petitioner had no physical work restrictions; however, because of her injuries, petitioner stated she now has difficulties and limitations that affect – but do not prevent – her from performing her necessary job functions. Petitioner testified she returned to work as a flight attendant in November 2010 and since then, her job still requires her to lift luggage, put luggage in the overhead bin and closet, and use a cart, all of which aggravate her right shoulder. Petitioner further stated she has had to adjust the way she does her job to prevent re-injury and every activity takes more time due to weakness and pain. Indeed, she has learned to compensate for the pain in her right shoulder and has learned "to be more guarded as to what" she does.

Petitioner noted her seniority with United Airlines allows her to avoid the responsibilities involving heavy lifting and maneuvering at least eighty percent of the time.² She is now an inflight "purser," a position that is physically "easier, [with] lighter bags," which permits her to do more in-flight supervisory work than physical work. Thus, she is rarely

² Though petitioner stated she does not have to lift seventy-five pounds often, she physically can lift this weight to qualify for her flight attendant position annually. Once a year, petitioner must participate in training, and during this training she is required to maneuver "the doors on all the airplanes;" she is able to do this, although she stated it hurts.

required to push or pull the metal cart, or open or close the flight door, though if she must perform such tasks, she physically can, but with painful side effects.

Petitioner testified she also experiences constant daily pain and weakness in her right shoulder causing a significant loss in her range of motion. Her pain increases when she reaches above her head or uses her right arm for any overhead activity. She further explained the pain and weakness in her right shoulder requires her to use her left shoulder more, which causes increased pain in her left shoulder as well.

Petitioner further testified she has constant daily pain in her middle to lower back and this pain has increased in intensity since she was in court for the 2005 injury in 2009. She added the pain now travels from her lower back to both the left and right sides of her buttocks and her sleep is greatly affected. When asked what day-to-day activities cause her pain, she answered:

Leaning forward, leaning over . . . pulling the cart, putting luggage away, just about every aspect of my job[,] serving the trays . . . even doing my safety checks. When I do my safety checks, I have to lean over, bend over, squat. . . . I can do that, but [there are] . . . consequences. I can bend over. I can squat, but there's always consequences. I have to ice.

Petitioner's husband also testified and corroborated petitioner's testimony. He testified petitioner is now a completely different person than before her injury; before, she was "always . . . able to cook, clean, [and] garden," but now she cannot do any of those activities. Further, he has observed her having increased physical difficulties performing daily tasks around the family home, and now needs a lot of assistance.

During trial, respondent presented two United Airlines employees as lay witnesses. Their testimony established petitioner was never written up for being unable to perform her job, and nothing in her employment file indicates she ever complained of being unable to do her job.

A. Expert testimony relating to petitioner's 2005 injury

Petitioner presented John Gaffney, M.D., who testified regarding her 2005 injury. After examining petitioner on February 1, 2012 and reviewing her medical records, Dr. Gaffney concluded petitioner's level of lumbar disability had markedly worsened from the date of the original award; he noted the pain affects her sleep and is "more persistent, more on a daily basis, and more intense compared to [her] previous [pain]. Her activity level appeared to be much more dramatically affected now versus before." Dr. Gaffney stated petitioner was "unable to pursue her usual recreational activities, including pursuing

sports with [her] children and grandchildren" in 2008, but her inability to pursue such activities has progressively worsened. Dr. Gaffney opined petitioner had an increase of 45% of permanent partial total disability due to the injury to her lumbar spine "above the previously noted [a]ward of compensation, which I had reviewed which was 15[%]. So that would be a total of 60[%]."

Respondent's expert, Lawrence Zazzo, M.D., also indicated petitioner suffered an increase in disability to the lumbar spine since the entry of the 2005 award. Dr. Zazzo indicated he would give petitioner an additional 2.5% percent partial total disability due to her complaints and the additional treatment to her lumbar spine. Dr. Zazzo also noted her loss in range of motion was the same in the 2007 and 2011 examinations. Dr. Zazzo testified petitioner's disability for her lower back is 7.5% partial total disability. Additionally, Dr. Zazzo found a 2.5% increase in petitioner's left shoulder disability due to overuse of the left shoulder subsequent to the right shoulder injury and replacement; notably, Dr. Gaffney did not find an increase in petitioner's disability for her left shoulder. Both doctors attributed causation to the work-related accident.

B. Expert testimony relating to petitioner's 2008 injury

Petitioner presented Sidney Tobias, M.D., to testify about her 2008 injury. Dr. Tobias testified petitioner had lost at least 50% of her range of motion in her right shoulder, causing significant impairment to petitioner who is right-hand dominant. He further testified he did not believe petitioner could lift bags at shoulder level or above using only her right hand, although he did believe petitioner could push or pull a cart requiring up to twenty-nine pounds of force. In total, he concluded petitioner's injuries to her right shoulder amounted to 75% permanent partial disability.

Respondent presented testimony from Dr. Zazzo regarding petitioner's 2008 injury; he found petitioner had significant permanent partial total disability resulting from her right shoulder injury. He indicated petitioner "had marked restriction of motion and pain when she tries to exceed the range of motion and also accompanied by a nocturnal flare" with regard to petitioner's right-shoulder injury. In his original report, Dr. Zazzo indicated he found petitioner's disability to be 33.33% partial total disability but during his testimony, he increased the disability rating to 38.5% partial total after reviewing petitioner's final operative report before trial. This report, Dr. Zazzo explained, revealed more significant

inflammation, fibrotic changes, and pathology in the right shoulder than he had originally determined.

C. The decision of the judge of compensation

At trial, the only issues were the nature and extent of petitioner's permanent disability resulting from her right shoulder injury, and the nature and extent of any increase in her lumbar disability. On April 23, 2013, the judge of compensation memorialized his decision in a comprehensive written decision in which he made both credibility findings and findings of fact, concluding petitioner had carried her burden of proof and entered judgments consistent with his findings in both cases. Specifically, the judge found "petitioner testified credibly when she described that she suffers from significant, increased low back pain, significant right shoulder pain, interrupted sleep and a compromised social and family life as a result of her injuries and her efforts to continue to work."

Next, the compensation judge went through each expert's testimony and found "Dr. Zazzo[] corroborated petitioner's proofs. Dr. Zazzo agreed that petitioner's injuries and limitations were due to her work related injuries. Dr. Zazzo agreed with Dr. Tobias that there was objective medical evidence to support a significant level of permanent disability attributable to petitioner's work-related right shoulder

injury." The judge further determined "all of the medical evidence that was presented clearly corroborated petitioner's complaints of more persistent and increased lumbar disability since the entry of the 2009 award."

The compensation judge noted although the doctors opined petitioner suffered from different percentages of disability, he did not adopt those specific percentages; rather, he stated he did adopt the doctors' "objective medical findings that petitioner suffered a massive right rotator cuff tear requiring four surgeries." He also adopted "the objective lumbar findings that resulted in additional authorized rhizotomies being performed on petitioner's lumbar spine." Accordingly, the judge found petitioner's partial, permanent disability in her lower back materially increased by 10%, after considering Dr. Zazzo's determination petitioner's lumbar disability increased by 2.5% and Dr. Gaffney's conclusion her disability increased by 45%. He did not find the disability in her left shoulder to have increased. Next he found petitioner's "right shoulder disability to be 45% permanent partial total due to traumatic, massive rotator cuff tear status post four surgeries including a right shoulder hemi-arthropasty."

Respondent now appeals from both judgments, arguing the decisions were unreasonable and not based on adequate,

substantial, and credible evidence. We disagree and affirm both judgments.

II.

The scope of appellate review of workers' compensation cases is limited to "'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.'" Lindquist v. City of Jersey City Fire Dep't, 175 N.J. 244, 262 (2003) (quoting Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)). We defer to the judge of compensation's factual findings and legal determinations, "unless they are 'manifestly unsupported by or inconsistent with competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Perez v. Monmouth Cable Vision, 278 N.J. Super. 275, 282 (App. Div. 1994) (quoting Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974)), certif. denied, 140 N.J. 277 (1995). Such courts are considered experts with respect to weighing the testimony of competing medical experts and appraising the validity of compensation claims. Ramos v. M & F Fashions, Inc., 154 N.J. 583, 598 (1998).

However, "[a] decision without proper factual findings and a reasoned explanation of the ultimate result 'does not satisfy the requirements of the adjudicatory process.'" Colon v. Coordinated Transp., Inc., 141 N.J. 1, 11 (1995) (quoting Lister v. J.B. Eurell Co., 234 N.J. Super. 64, 73 (App. Div. 1989)). "Where our review of the record 'leaves us with the definite conviction that the judge went so wide of the mark that a mistake must have been made,' we may 'appraise the record as if we were deciding the matter at inception and make our own findings and conclusions.'" Manzo v. Amalgamated Indus. Union Local 76B, 241 N.J. Super. 604, 609 (App. Div.) (quoting C.B. Snyder Realty Inc. v. BMW of N. Amer. Inc., 233 N.J. Super. 65, 69 (App. Div.), certif. denied, 117 N.J. 165 (1989)), certif. denied, 122 N.J. 372 (1990).

N.J.S.A. 34:15-36 defines "[d]isability permanent in quality and partial in character" as "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[.]" To obtain benefits for such a disability under our workers' compensation statute, our Supreme Court established a two-prong test to determine whether a petitioner has demonstrated a permanent disability under the statute.

[T]he employee must first prove by demonstrable objective medical evidence a disability that restricts the function of his [or her] body or its members or organs. Second, he [or she] must establish either that he [or she] has suffered a lessening to a material degree of his [or her] working ability or that his [or her] disability otherwise is significant and not simply the result of a minor injury.

[Perez v. Pantasote, Inc., 95 N.J. 105, 118 (1984).]

The Court explained that "[t]his determination can no[t] . . . rest upon petitioner's subjective complaints[]" and noted that "objective medical evidence is understood to mean evidence exceeding the subjective statement of the petitioner." Id. at 116. Indeed, "a subjective complaint of pain or discomfort without accompanying 'demonstrable objective medical evidence,' N.J.S.A. 34:15-36, does not satisfy a petitioner's burden of proving the existence of partial-permanent disability." Colon, supra, 141 N.J. at 9-10.

Noting appellate review is not an opportunity to reargue the facts found from conflicting evidence produced at a trial, see Lindquist, supra, 175 N.J. at 262, we reject respondent's first argument that the judge's decision was not based upon adequate, substantial and credible evidence. Rather we find, the judge of compensation correctly concluded there was ample credible objective medical evidence demonstrating petitioner's

injury. The medical records provide objective evidence of a disability restricting function and showing petitioner had a massive right rotator cuff tear in her right shoulder. She had four separate surgeries on her right shoulder, including shoulder replacement surgery.

The compensation judge further considered the testimony of all witnesses, including petitioner's own testimony which the judge found credible in deciding her right shoulder injury had a substantial effect on her daily activities at work and at home. She testified to the constant pain and weakness in her right shoulder causing a significant loss of range of motion; she noted the pain increases when she reaches or does any activity over her head.

The compensation judge also considered the physical nature of working as a flight attendant, including the need to lift seventy-five pounds, open and close the flight doors, and push or pull metal carts. Indeed, while petitioner was never written up for inability to perform her job, and there is nothing in her file to indicate she complained about being unable to do her job, petitioner noted her seniority status and position as a purser, allows her to avoid most of the lifting and reaching; however, she noted whenever she is required to perform such

tasks, she can do them, but then experiences pain which affects her everyday life.

Respondent argues the compensation judge's decision was against the weight of the evidence because the judge failed to consider petitioner's return to work. However, N.J.S.A. 34:15-36 specifically provides that "nothing in this definition shall be construed to preclude benefits to a worker who returns to work following a compensable accident even if there be no reduction in earnings." Notwithstanding this provision, the judge of compensation did consider petitioner's return to work in his decision:

I find that petitioner has difficulty with her on-the-job efforts and that those difficulties do have consequential effects that limit petitioner's out-of-work activities. I also find that petitioner's efforts to "save herself for work" does not show a "lack of functional loss" as respondent contends, but rather shows her dedication to her job. This dedication is evidenced by the fact she has taken it upon herself to make significant recovery efforts and significant lifestyle changes so that she can continue working at a job that she obviously loves.

He further noted her disabilities substantially affected both the quality of her work and her activities of daily living thus meeting the second prong of Perez, supra, 95 N.J. at 117.

Finally, the judge of compensation considered the opinions and conclusions of Drs. Tobias and Zazzo in concluding

petitioner's disability associated with her 2008 injury was based on objective evidence and had a substantial impact upon her life. The judge noted Dr. Tobias' testimony that petitioner's right shoulder injury represented a partial permanent disability of 75% and compared that with Dr. Zazzo's estimation of a partial permanent disability of 38.5%. The judge considered the opinions of both medical experts but rejected each of their conclusions as to the extent of disability in her right shoulder; rather, the judge determined the right shoulder disability to be 45% permanent partial total due to traumatic, massive rotator cuff tear status post four surgeries. As such, we find the judge considered all relevant and credible testimony in making his decision and accordingly defer to the judge's findings regarding credibility of witnesses and sufficiency of medical evidence.

We next address respondent's argument that the compensation judge inappropriately determined petitioner had a partial, permanent disability because the estimation of disability given by petitioner's expert was not based on a particular formula but was a rather simply a conclusion. Respondent encourages this court to overturn the judge's decision because Dr. Tobias failed to give the "why and wherefore" of his opinion. We review a trial court's determination and reliance on an expert's opinions

under an abuse of discretion standard. Riley v. Keenan, 406 N.J. Super. 281, 295 (App. Div.), certif. denied, 200 N.J. 207 (2009). Indeed, experts must "identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are . . . reliable." Koruba v. Am. Honda Motor Co., 396 N.J. Super. 517, 526 (App. Div. 2007), certif. denied, 194 N.J. 272 (2008). They must be able to point to generally accepted, objective standards of practice and not merely standards personal to them. Ibid.

Dr. Tobias provided explanations for his opinion after examining all medical records, taking a history from petitioner, performing a medical examination of petitioner, and considering the hypothetical in reaching his conclusions about petitioner's disabilities related to her 2008 right shoulder injury. Indeed, Dr. Tobias explained:

My estimate of disability is based upon the records that were made available to me, the treatment that the petitioner had undergone as a result of her diagnosis, and the physical findings, and my experience in having examined thousands of these people over the course of my past twenty-five years.

Furthermore, Dr. Tobias did in fact provide a lengthy explanation for his opinion and noted he considered that petitioner had returned to work as a flight attendant, she had to modify her duties at work and at home, to conclude her

partial permanent disability is at 75%. Moreover, Dr. Tobias' opinions and testimony were based upon the same material Dr. Zazzo considered in coming to his conclusions. Both doctor's agreed petitioner suffered a significant disability as a result of her 2008 shoulder injury; the doctors only disagreed regarding the extent of her disability.

Finally, we address respondent's argument the compensation judge's decision regarding the 2005 injury was against the weight of the evidence because the judge failed to consider petitioner's limitations prior to reopening the claim in estimating disability. Notably, respondent merely recites the different testimony from Drs. Gaffney and Zazzo and states the judge should not have considered Dr. Gaffney's opinion. However, the judge found petitioner's partial, permanent disability in her lower back materially increased by 10% partial permanent disability after considering Dr. Zazzo's determination petitioner's lumbar disability increased by 2.5% and Dr. Gaffney's conclusion her disability increased by 45%; he did not find the disability in her left shoulder to have increased. The judge noted:

Dr. Zazzo also agreed with Dr. Gaffney that there was objective medical evidence to support an increase in her work-related disability. A review of petitioner's authorized treating doctors also reveal objective medical findings of spasm and

radicular pain that necessitated additional respondent-authorized nerve ablations. In short, all of the medical evidence that was presented clearly corroborated petitioner's complaints of more persistent and increased lumbar disability since the entry of the 2009 award.


We find there is sufficient support in the record for the judge's determinations.

We recounted in detail the compensation judge's findings and conclusions because they demonstrate a comprehensive and thoughtful review of all of the testimony and evidence presented. The judge made credibility determinations and clearly set forth the basis for his findings and conclusions. We find the judge's determinations of disability are supported by the weight of the evidence. See R. 2:11-3(e)(1)(D). The judge properly evaluated the experts' credibility and made fact-finding determinations that are entitled to our "substantial deference." See Ramos, supra, 154 N.J. at 594. Confronted with disparate expert medical opinions, the judge used his "expertise with respect to weighing the testimony of competing medical experts and appraising the validity" of petitioner's claims. Id. at 598. 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.

Affirmed.

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


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