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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1265-16T1

DANA MUNCH,

Petitioner-Respondent,

v.

ATLANTIC HEALTH SYSTEM,

Respondent-Appellant.

Argued December 5, 2017 - Decided December 21, 2017

Before Judges Hoffman and Mayer.

On appeal from the Department of Labor and
Workforce Development, Division of Workers'
Compensation, Claim Petition No. 2016-20578.

John W. Pszwaro argued the cause for appellant
(Capehart & Scatchard, PA, attorneys; Stephen
T. Fannon, of counsel; John W. Pszwaro, on the
brief).

Kevin T. Kutyla argued the cause for
respondent.

PER CURIAM

Respondent Atlantic Health System (Atlantic) appeals from a
November 2, 2016 order of the Division of Workers' Compensation

awarding temporary disability benefits to petitioner Dana Munch. Atlantic contends that the Workers' Compensation judge mistakenly exercised his discretion and awarded benefits based on the limited record before the court. We agree and reverse.

Petitioner was a paramedic. On October 12, 2014, while working as a lead paramedic, petitioner witnessed the death of a child. She received authorized treatment and temporary disability benefits from November 14, 2014 to January 14, 2015, and then returned to work.

On June 18, 2015, petitioner suffered a hand injury at work. She was unable to work due to her injury, and Atlantic paid temporary disability benefits from June 22, 2015 to April 21, 2016. On January 18, 2016, petitioner began treating with Dr. Sangeetha Nayak, a psychologist, for a psychiatric injury related to the October 12, 2014 incident. Dr. Nayak treated petitioner from January 2016 through June 2016. Petitioner failed to return to work in June 2016 and was terminated.

On August 11, 2016, petitioner filed a claim petition alleging she suffered permanent psychiatric injury as a result of the October 12, 2014 incident. On September 1, 2016, Atlantic filed an answer to the claim petition and accepted that petitioner's injury was compensable. Petitioner did not file a motion for medical and/or temporary disability benefits in

connection with her claim. Nor did petitioner notify Atlantic that she intended to seek temporary disability benefits.

On November 2, 2016, the matter was listed for an initial pre-trial hearing before a judge of the Workers' Compensation court. While in the judge's chambers, petitioner's attorney submitted a letter written to counsel by Dr. Nayak dated October 28, 2016. The letter, which was subsequently read into the record by the judge, stated:

I am writing this letter in response to your request for my opinion on Ms. Dana Munch's ability to return to work. Ms. Munch's diagnosis of [p]ost traumatic stress disorder which occurred secondary to her work related trauma on 10/12/14 has resulted in continued symptoms of anxiety and depression that are being addressed in psychological and psychiatric treatment.

Due to these symptoms[,] Ms. Munch has not been able to return to work for the duration of the time that I have been treating her (since January 18, 2016). Furthermore, I believe within a reasonable degree of probability based on my expertise as a clinical psychologist that in Ms. Munch's current psychological state she will not be able to return to her old job as a paramedic at the present time.

Ms. Munch's ability to return to work will be contingent on the progress she makes with psychological and psychiatric treatment. At the present time she needs continued psychiatric and psychological treatment.

After reading this letter, the judge indicated that he was inclined to enter an order requiring Atlantic to provide temporary disability benefits to petitioner effective immediately.

When the judge went on the record, Atlantic objected to awarding temporary disability benefits to petitioner on several grounds. First, Atlantic's attorney noted that prior to the October 2016 letter, Dr. Nayak never indicated petitioner was unable to work due to her psychiatric injury, despite treating petitioner since January 2016. Second, Atlantic argued that Dr. Nayak's letter did not explain why petitioner was able to return to work for six months after witnessing the death of a child, but was unable to work in June 2016 after her wrist injury. Third, Atlantic contended that it was deprived of an opportunity to investigate petitioner's entitlement to benefits as it received Dr. Nayak's letter only a few hours before the judge awarded temporary disability benefits. Fourth, Atlantic noted that petitioner had not filed a motion for temporary disability benefits. Fifth, Atlantic claimed petitioner had not proven an actual wage loss.

After placing its objections to any award of temporary disability benefits on the record, Atlantic asked the judge for an opportunity to investigate petitioner's entitlement to benefits

and requested a one-cycle adjournment. Atlantic's request was denied by the judge without explanation.

The judge then held oral argument on the award of temporary disability benefits to petitioner, although no motion was pending. Based upon Dr. Nayak's opinion that petitioner could not return to work, the judge concluded petitioner was entitled to temporary disability benefits and ordered Atlantic to pay temporary disability benefits effective immediately.

Our review of a Worker's Compensation Division award is limited to examining "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 accord "substantial deference" to such factual findings. Bellino v. Verizon Wireless, 435 N.J. Super. 85, 94 (App. Div. 2014). We will only disturb a Workers' Compensation judge's decision if it is "manifestly unsupported by or inconsistent with competent[,] relevant and reasonably credible evidence as to offend the interests of justice." Lindquist, 175 N.J. at 262 (quoting Perez v. Monmouth Cable Vision, 278 N.J. Super. 275, 282 (App. Div. 1994)).

The Division of Workers' Compensation regulation governing motions for temporary disability are found at N.J.A.C. 12:235-1.1 to -14.2. This rule requires a petitioner who seeks temporary disability benefits to file a motion on notice to respondent. In the motion, petitioner is required to evidence that she "is currently temporarily totally disabled and/or in need of current medical treatment." N.J.A.C. 12:235-3.2(a). The notice of motion shall contain a detailed account of compensable time lost, with supporting affidavits or certifications by petitioner or petitioner's attorney. N.J.A.C. 12:235-3.2(b). Respondent has twenty-one days to respond to the motion. N.J.A.C. 12:235-3.2(d). The Division of Workers' Compensation then lists petitioner's motion for a hearing before a Judge of Compensation within thirty days of the filing of the motion. N.J.A.C. 12:235-3.2(e).

Petitioner never filed a motion for medical or temporary disability benefits. Petitioner did not undertake any of the steps pursuant to N.J.A.C. 12:235-3.2 to support an award of temporary disability benefits. Thus, Atlantic had no opportunity to respond to or oppose an award of benefits.

The Workers' Compensation judge did not afford Atlantic an opportunity to challenge the legal or factual basis for awarding benefits to petitioner despite Atlantic's request for a brief adjournment to submit such opposition. Moreover, there were no

depositions, sworn statements, or documentary evidence (other than Dr. Nayak's letter) submitted in support of petitioner's claim. Nor was there any opportunity for Atlantic to cross-examine Dr. Nayak or submit its own medical evidence. Atlantic contends that granting an award to petitioner without affording it an opportunity to be heard and present countervailing evidence was a mistaken exercise of judicial discretion.

In accordance with due process principles, the opportunity to be heard "includes not only the right to cross-examine the adversary's witnesses but also the right to present witnesses to refute the adversary's evidence." Paco v. Am. Leather Mfg. Co., 213 N.J. Super. 90, 97 (App. Div. 1986). "While the technical rules of evidence may be relaxed in work[ers'] compensation proceedings, they may not be relaxed to the point of infringing on the parties' due process rights or other fundamental rights." Id. at 95-96. Atlantic was not given the opportunity to proffer any medical records or reports, call witnesses, or submit any evidence in opposition to petitioner's claim. Based on the foregoing, we find that Atlantic was denied a meaningful opportunity to be heard in accordance with due process principles.

Petitioner also failed to demonstrate her entitlement to temporary disability benefits. To receive an award of temporary disability benefits, petitioner bears the burden of proving a wage

loss. See Cunningham v. Atl. States Cast Iron Pipe Co., 386 N.J. Super. 423, 432 (App. Div. 2006) (requiring workers' compensation claimants to prove that they were both available and willing to work and would have been working if not for the disability).

Here, petitioner was placed out of work from November 14, 2014 to January 14, 2015 as a result of the October 12, 2014 incident. She then returned to work for six months. On June 18, 2015, petitioner was again placed out of work for a wrist injury. During the period of time petitioner was out of work due to her wrist injury, she began treating with Dr. Nayak for her psychiatric condition related to the October 12, 2014 incident. Petitioner never mentioned her psychiatric condition or requested temporary benefits during this time. On April 21, 2016, petitioner reached maximum medical improvement for her wrist injury. However, petitioner did not return to work and was terminated on June 21, 2016. From the time petitioner reached maximum medical improvement for her wrist injury and the date she was terminated, petitioner did not request temporary benefits for her psychological injury, and no physician suggested that she was unable to work based on her psychological condition.

The first time petitioner claimed that she was unable to work due to a psychological condition was in the letter from Dr. Nayak dated October 28, 2016, four months after petitioner was

terminated. Dr. Nayak's letter did not address petitioner's ability to work in a different capacity or perform light duty assignments. Dr. Nayak did not testify before the Workers' Compensation judge or provide an affidavit in support of petitioner's claimed disability. Dr. Nayak's letter does not explain how petitioner was able to return to work for six months after the October 2014 incident but was unable to return to work in June 2016. More importantly, petitioner did not testify or present evidence that she suffered a wage loss as a result of her disability because she was available and willing to work and would have been working if not for the disability.

Under these circumstances, we agree that the award of temporary benefits to petitioner violated Atlantic's procedural due process guarantees. We also find that petitioner did not meet her burden of demonstrating entitlement to an award of temporary disability benefits. The award of temporary disability benefits to petitioner was unsupported by relevant and reasonably credible evidence as there were no fact or expert witnesses or evidentiary documents presented on the record during the November 2, 2016 hearing.

Reversed and remanded. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION