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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-3486-15T3

DAVID KALUCKI,

Petitioner-Appellant,

v.

UNITED PARCEL SERVICE,

Respondent-Respondent.

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Submitted August 8, 2017 — Decided August 15, 2017

Before Judges Sabatino and O'Connor.

On appeal from the New Jersey Department of  
Labor and Workforce Development, Division of  
Workers' Compensation, Claim Petition Nos.  
1998-28398 and 2002-21506.

Shebell & Shebell, LLC, attorneys for  
appellant (Danielle S. Chandonnet, of counsel  
and on the brief).

Brown & Connery, LLP, attorneys for respondent  
(Christopher M. Campanaro, on the brief).

PER CURIAM

Claimant David Kalucki appeals from a March 10, 2016 decision  
by a workers' compensation judge denying all but one of his claims  
for increased disability. The compensation judge issued his

decision after considering claimant's testimony and medical testimony from the parties' competing experts. Applying our limited scope of review and appropriate deference to the expertise of the compensation court, we affirm.

By way of background, claimant was employed in a clerical position by respondent United Parcel Service.<sup>1</sup> On June 24, 2009, claimant received two separate awards of disability from the compensation court for two separate claims that he litigated. In one claim (Docket No. CP #1998-28398) claimant received an award of 40% permanent partial total disability associated with left shoulder and cervical injuries, subject to a credit of 37.5% relating to a previous compensation award. The shoulder and neck condition had been the subject of two surgeries. On his other prior claim award (Docket No. CP #2002-21506), claimant received a 17.5% permanent partial total disability due to bilateral carpal tunnel syndrome, subject to a credit of 15% for a previous carpal tunnel award.

According to claimant, several of his conditions and symptoms worsened in the years following the 2009 awards, even though he has not sustained any intervening injuries. Among other things,

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<sup>1</sup> Since the time of the compensation judge's opinion, claimant has reportedly retired. However, he presents no argument in his brief that his retirement was forced due to the alleged increase in the severity of his disabilities.

he complained that his left shoulder and neck were more restricted in range of motion, and that it was painful for him to move his neck from side to side. He asserted that he cannot lay on his left side, and that his shoulder aches and is numb to the touch. Claimant further asserted an aggravation of his carpal tunnel condition, complaining of numbness in his left hand and a loss of grip strength. Claimant also separately complained of an increased loss of hearing.

Claimant presented at trial expert medical testimony and a written report from a general practitioner who examined him on November 22, 2011.<sup>2</sup> That same expert had previously examined claimant in 1999, 2002, 2004, and 2007 in connection with prior awards. In his most current report, claimant's expert noted tenderness and spasm in claimant's left shoulder, limited rotation of twenty percent in the head and neck, and abduction and forward elevation of the left arm and shoulder limited to ninety percent. The expert further observed generalized tenderness in claimant's wrists and arms, with flexion and extension of the wrists reduced by fifteen percent, and a limitation of radial and ulnar deviation

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<sup>2</sup> The record indicates claimant's expert is a Fellow of the American Academy of Disability Evaluating Physicians, and has been qualified as an expert in the compensation court on many occasions. Respondent's counsel at trial did not object to the expert's qualifications to testify, and recognized he has been performing disability evaluations for many years.

and rotation in both wrists. Based on his examination, claimant's expert found an increase in his disabilities since the time of the 2009 awards, estimating an increase of twenty-five percent in the right hand, twenty-five percent in the left hand, and thirty percent in the injuries relating to the neck. A separate medical expert diagnosed and quantified claimant's increased loss of hearing.

Respondent's expert, a board-certified orthopedic physician, markedly disagreed with the findings of claimant's expert. The orthopedist examined claimant on August 17, 2011, having previously examined him for the neck and shoulder injuries in 2007. The orthopedist took an x-ray of the shoulder and discerned no objective findings of any significant pathology or changes in the cervical area. On physical examination, the orthopedist found that claimant's range of motion had actually "significantly improved" from his last exam in 2007, and that claimant's prior disability level had not worsened.

With respect to claimant's carpal tunnel condition, the orthopedist found no objective worsening of his overall condition. The expert found no atrophy, and no decreased sensation, although he did note negative grip strength in the right hand. The orthopedist concluded that claimant's level of disability for the

prior awards had not changed, and that he was "at maximum benefit of treatment."

Sifting through this medical evidence, the compensation judge made the following findings<sup>3</sup> in his oral decision:

In considering the testimony of the various witnesses, the Court finds that the petitioner despite having increased subjective complaints with respect to his shoulder, neck and carpal tunnel problems never sought any medical treatment whatsoever to attempt to alleviate his alleged increased symptomatology. It is this Court's view that is the petitioner's pain and complaints were increasing to the level he alleges medical treatment would have been sought. Petitioner's decision not to seek any treatment displays to this Court that his shoulder, neck and carpal tunnel problems have not worsened to any material extent. The Court finds that the petitioner was also able to work his full-duty job and did not seek any accommodations in terms of either changing his duties or work hours. The Court believes that the petitioner would have requested some accommodation from the respondent if his problems had worsened as alleged. He also lost no time from work due to his medical problems. This does not support his position of increased disability.

. . . .

In analyzing the testimony of the medical experts, the Court rejects the opinion of [claimant's expert] as he is clearly less qualified than respondent's expert[.] . . . [The latter expert's] superior training in the area of orthopedics places him in a better

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<sup>3</sup> The record does not explain why the judge's decision was not issued until two years after the evidentiary record closed.

position with respect to the determination of petitioner's alleged increase in disability since his last appearance before the Court. A review of [claimant's expert's] examinations indicate[s] that many of the objective findings noted in [that] doctor's various reports showed no change whatsoever. Findings such as sidebending, flexion and extension, as well as abduction, remained the same which displayed to the Court that the petitioner's condition had not worsened. The fact that atrophy . . . was indicated in the doctor's report in 2007, but not in 2011, actually points to an improvement of the petitioner's condition. The Court finds that [claimant's expert's] finding of an over 100 percent disability when combined, does not ring true based upon petitioner's continued full-duty employment. [Respondent's expert's] finding of full motion with respect to petitioner's cervical spine, as well as lateral bending and rotation and normal reflexes, do not support a finding of an increase in the petitioner's disability. The negative Spurling's test, as well as lack of atrophy, further supports [respondent's expert's] view of no increase in disability. The Court accepts this view as it is supported by objective medical findings rather than [claimant's expert's] increase based upon petitioner's subjective complaints.

The Court also accepts [respondent's expert's] view with respect to the petitioner's allegation of carpal tunnel increase. The finding of full motion of dorsiflexion, pronation, supination along with no decreased sensation of the radial distribution supports his view that there is no increase in carpal tunnel disability. The petitioner presented with normal hand grip strength during the doctor's examination and the decreased sensation of an ulnar distribution is not caused by carpal tunnel. The fact that the dermatomal pattern as noted

by the doctor in his examination of the petitioner was not correct indicates that the petitioner's complaints were not as a result of an increase in his carpal tunnel problem. The Court believes [respondent's expert] and finds that there is no increase with respect to the petitioner's carpal tunnel disability.

[(Emphasis added).]

Apart from these findings as to parts of the body germane to the present appeal, the judge concluded that claimant had separately established a one-percent increase in occupationally-induced hearing loss, and made a corresponding award for that discrete injury. Neither party has appealed the hearing loss determination.

On appeal, claimant argues that the compensation judge erred in rejecting his claims for increased disability concerning his neck and shoulder, as well as his carpal tunnel injury. He contends that the judge should have adopted the opinions of claimant's own expert, and deemed credible his claims of worsening and causation. Claimant further asserts that the judge unfairly gave more credence to respondent's medical expert because that expert, unlike claimant's examining doctor, was a board-certified orthopedist. Claimant further asserts that the judge's decision was inconsistent in various respects and not supported by the evidence.

The applicable law imposes upon an injured worker such as claimant, who seeks additional compensation benefits following an earlier award, the burden of proving an increased incapacity or an increase in functional loss. N.J.S.A. 34:15-27; Yeomans v. City of Jersey City, 27 N.J. 496, 508-09 (1958); Brandt-Shaw v. Sands Hotel, 282 N.J. Super. 106, 109 (App. Div. 1995). Such an alleged increase in incapacity must be shown to arise from, and be causally connected with, the original workplace injury. Yeomans, supra, 27 N.J. at 508. Moreover, a claimant must satisfy the general principle of workers' compensation law requiring that disability be established by appropriate objective evidence, and that disability cannot be based solely upon a claimant's subjective complaints of a present level of incapacity. Perez v. Pantasote, Inc., 95 N.J. 105, 114-16 (1984).

Our scope of review of fact-laden decisions by compensation judges is limited. We must consider whether the findings made by the judge of compensation "'could reasonably have been reached on sufficient credible evidence'" in the record, "considering 'the proofs as a whole,'" giving due regard to the judge's opportunity to observe and hear the witnesses and to evaluate their credibility, and to the judge's expertise in the field of workers' compensation. Close v. Kordulak Bros., 44 N.J. 589, 599 (1965) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)); see also



Brock v. Pub. Serv. Elec. & Gas Co., 149 N.J. 378, 383 (1997); Perez v. Capitol Ornamental, Concrete Specialties, Inc., 288 N.J. Super. 359, 367 (App. Div. 1996). In particular, a reviewing court generally must defer to the findings of credibility made by a judge of compensation, as well as to the judge's expertise in analyzing medical testimony. Kaneh v. Sunshine Biscuits, 321 N.J. Super. 507, 511 (App. Div. 1999); see also Kovach v. Gen. Motors Corp., 151 N.J. Super. 546, 549 (App. Div. 1978) ("It must be kept in mind that judges of compensation are regarded as experts.") (citing Goldklang v. Metro. Life Ins. Co., 130 N.J. Super. 307, 311 (App. Div.), aff'd o.b., 66 N.J. 7 (1974)). Where there is sufficient credible evidence in the record, a compensation judge's findings of fact are binding on appeal, and those findings must be upheld "even if the court believes that it would have reached a different result." Sager v. O.A. Peterson Constr., Co., 182 N.J. 156, 164 (2004) (citations omitted).

Applying these legal principles, we affirm the determinations reached by the worker's compensation court, substantially for the reasons the judge set forth in his March 10, 2016 oral decision. There is more than sufficient proof in the record to sustain the judge's conclusion that claimant did not meet his legal burden of proving increased incapacity of his neck, shoulder, and carpal tunnel conditions causally related to his workplace activities.

The objective findings of respondent's expert in particular amply support the judge's conclusions.

Although claimant testified that he has experienced an increase in certain subjective symptoms, the judge had a reasonable basis to conclude that those subjective claims, apart from the hearing loss, were not sufficiently corroborated by objective proof. Claimant continued to work after his 2009 award without any material change in his duties. Apart from continuing to take over-the-counter pain medications, he did not pursue additional treatment to attempt to alleviate his symptoms. Although we recognize that respondent's expert acknowledged that further surgery would not be likely to benefit claimant, there is no evidence that claimant pursued any other methods of palliative care since the time of his prior awards.

In addition, respondent has identified several portions from claimant's testimony from the earlier 2009 proceeding that are essentially the same or similar in nature to his present complaints. As just one example, claimant's expert testified that plaintiff's range of motion in his neck on examination in 2011 was limited by twenty degrees, as compared with a higher limitation of twenty-five percent revealed on examination in 2007.

The compensation judge was entitled under case law to find respondent's expert more credible than claimant's expert. In

situations where qualified experts present opposing opinions on disputed issues, the trier of fact may accept the testimony or opinion of one expert, in full or in part, and reject the other. Angel v. Rand Express Lines, Inc., 66 N.J. Super. 77, 85-86 (App. Div. 1961) (citations omitted). See also Brown v. Brown, 348 N.J. Super. 466, 478 (App. Div.) (citing Carey v. Lovett, 132 N.J. 44, 64 (1993)), certif. denied, 174 N.J. 193 (2002). This principle flows out of the well-known proposition that jurors, or a judge in a bench trial, have the best "opportunity to hear and see the witnesses and to get a 'feel' for the case that the reviewing court [cannot] enjoy." Twp. of W. Windsor v. Nierenberg, 150 N.J. 111, 132 (1997) (citing State v. Whitaker, 79 N.J. 503, 515-16 (1979)).

Our appellate courts are consequently "reluctant" to interfere with a judge's decision, where the "error asserted is largely a matter of how much weight should be accorded [to] competing expert opinion." Peer v. Newark, 71 N.J. Super. 12, 31 (App. Div. 1961) (citing Coll v. Sherry, 29 N.J. 166, 173 (1959)), certif. denied, 36 N.J. 300 (1962). The Supreme Court has applied these principles specifically in the workers' compensation context. See Paul v. Baltimore Upholstering Co., 66 N.J. 111, 121-22 (1974) (concluding that it is within the province of the

compensation judge to accept the opinion of one party's expert and reject the opinion of the other party's expert).

As part of his credibility assessment, the judge reasonably took into account that claimant's expert, unlike the expert for respondent, is not a board-certified orthopedic physician.<sup>4</sup> Although we surely would not endorse a per se principle that medical experts who are board-certified are invariably more credible than expert physicians who are not, the compensation judge did not espouse such a rigid principle in this case. Instead, the judge cited the board certification as one of several factors in his credibility assessment. Moreover, respondent's expert performed an x-ray, an objective test, whereas claimant's expert did not. In addition, the judge posed his own pointed questions to the experts, which reflects his careful consideration of the evidence and his demonstrated knowledge as a jurist of the pertinent medical terminology and concepts.


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<sup>4</sup> "The American Board of Medical Specialties ("ABMS") and American Osteopathic Association ("AOA") recognize a number of specialty practice areas and offer 'board certification' in each specialty. A physician seeking board certification must satisfy heightened training and testing requirements." Nicholas v. Mynster, 213 N.J. 463, 469 n.1 (2013) (citing ABMS, About Board Certification, <http://www.certificationmatters.org/about-board-certified-doctors/about-board-certification.aspx>; AOA Board Certification, <http://www.osteopathic.org/inside-aoa/development/aoa-board-certification/Pages/default.aspx> (2013)).

Although claimant argues that respondent's expert's opinions are inconsistent or flawed in various respects, those alleged shortcomings, even if we accepted them as such, do not compel the repudiation of his overall conclusions that were found credible by the judge.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION