NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court." 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-5235-14T3

ROBERT HOLOWCHUK,

Respondent,

v.

O'SULLIVAN MENU PUBLISHING,

Appellant.

Argued March 16, 2017 – Decided April 6, 2017

Before Judges Alvarez and Accurso.

On appeal from the New Jersey Department of Labor, Division of Workers' Compensation, Claim Petition No. 2007-18569.

David P. Kendall argued the cause for appellant (Law Office of Ann DeBellis, attorneys; Ms. DeBellis, of counsel; Mr. Kendall, on the briefs).

John D. Kovac argued the cause for respondent (Law Offices of John D. Kovac, attorneys; Mr. Kovac, of counsel and on the brief; Jeffrey Zajac, on the brief).

PER CURIAM

O'Sullivan Menu Publishing appeals from an order of the Division of Workers' Compensation finding petitioner Robert

Holowchuk established a 10% increase in his permanent partial disability in a "re-opener" proceeding pursuant to N.J.S.A. 34:15-27. We affirm.

Petitioner injured his back in 2007 lowering two, five-gallon drums of chemicals to the floor while working as a pre-press operator at O'Sullivan Menu Publishing, resulting in a discectomy. He filed a claim petition which the parties resolved with an agreement that petitioner had sustained 35% permanent partial disability for "lumbar sprain/strain with herniations at L3-S1, with unresolved L5-S1 radiculopathy, status post discectomy at L4-L5."

In 2013, petitioner moved to re-open and modify the award. The case was tried on three different dates in 2014 and 2015. Petitioner testified, as did experts for both parties.

Petitioner, who was working when he settled the initial claim, testified he suffered a period of unemployment thereafter but returned to work in 2013 for about seven months delivering small car parts, such as belts and lights, using his own car. He worked full-time driving five to six hours a day. After he was laid off from that job, he took another working thirty hours a week using computer files to set up printing plates for press runs. The only lifting he performed was carrying the completed

plate, weighing one or two pounds, a short distance to where it would be picked up by another worker.

Notwithstanding the lighter work, petitioner testified his pain had sharpened and become more frequent. He had more difficulty sleeping and his relations with his wife were affected because of pain or his fear of pain. Petitioner testified the numbness in his left foot had spread to his entire foot and calf. And he now regularly experienced a dropped left foot.

Petitioner's expert in general surgery testified she examined him in 2010, 2012 and 2014. Based on petitioner's new complaints of numbness and tingling down his left leg and increased findings on physical examination of lack of flexion and increased restriction on straight leg raises, petitioner's expert put his disability rating at 85% of partial total, a 10% increase in her 75% of partial total rating in 2011. She attributed the increase to "[t]he natural progression of the underlying disease and additional degenerative process, which is ongoing."

In response to questions from the judge of compensation, the expert acknowledged a flattening of the normal curvature of petitioner's spine, indicating spasm, which the expert characterized as now chronic. In her report admitted in

evidence, she noted marked flattening of the lumbar and lumbodorsal curves, muscle spasm and painful withdrawal through the flanks, gluteal, posterior thigh and iliac crest areas bilaterally and that petitioner's "lower lumbar musculature is appreciably harder than it was at the start of the examination." She also testified petitioner could no longer do work entailing lifting, bending or twisting and would likely require ongoing pain management to make him more functional in the future.

Respondent's orthopedic expert testified he examined petitioner and concluded his condition was largely unchanged from 2011. He agreed with respondent's prior orthopedic expert who estimated petitioner's disability to be 12.5% of partial total, based, in part, on "unresolved L5-S1 radiculopathy."

Respondent's expert agreed with petitioner's counsel that he saw nothing to indicate petitioner was magnifying his symptoms and acknowledged another doctor petitioner consulted about his continuing low back pain in 2013 had recommended surgical intervention for "pain potentially facet, myofascial and sacroiliac in origin." Respondent's expert also admitted petitioner had fifteen to twenty degrees less range of motion on the left in a straight leg test than when he was examined by respondent's expert in 2010.

After hearing the testimony, the judge of compensation determined a modification of the earlier award was warranted. He found petitioner suffered the original work-related injury lifting two, five-gallon drums of liquid weighing "about 85 pounds" for which he was treated with "epidural injections and surgery" and thereafter "continued to have problems with his back." Based on petitioner's testimony, the judge concluded it was reasonable to infer petitioner "has more pain, and he is more guarded in moving those parts of his body than he was prior to that time." He found petitioner credible and not overstating his problems.

The judge noted respondent's expert acknowledged another doctor noted myofascitis and facet problems in petitioner's low back and the unresolved radiculopathy. Based on petitioner's own testimony and the testimony and report of his expert, the judge of compensation concluded petitioner "is less able to function. He's had a condition that goes back to 2007 and is not getting any better." Noting that N.J.S.A. 34:15-27 was designed for situations in which medical and surgical experts are unable to accurately "forecast with certainty the operation of nature's processes" and therefore fail "to secure the injured employee prescribed compensation for the disability that is suffered," the judge was satisfied petitioner had demonstrated

an increase in disability and incapacity of 10% and is now disabled "to the extent of 45 percent of partial total on an orthopedic and a neurological basis."

On appeal, respondent contends the judge of compensation erred in failing to require petitioner to establish an increase in disability by demonstrable, objective medical evidence and in finding that petitioner established any additional decrease in his ability to work. Alternatively, respondent argues the judge failed to adequately explain the bases for his decision. We reject those arguments.

"[T]he appropriate standard of appellate review of determinations made in 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)). "Deference must be accorded the factual findings and legal determinations made by the Judge of Compensation unless they are 'manifestly unsupported by or inconsistent with competent relevant and reasonably credible evidence as to offend the interests of justice.'" Ibid.

(quoting Perez v. Monmouth Cable Vision, 278 N.J. Super. 275, 282 (App. Div. 1994), certif. denied, 140 N.J. 277 (1995)).

Applying that standard here and deferring to the expertise of the experienced workers' compensation judge, Ramos v. M & F Fashions, Inc., 154 N.J. 583, 598 (1998), we are satisfied his decision finds adequate support in this record. Respondent's own expert acknowledged the record of petitioner's MRI findings of herniations at L3-4 through L5-S1 post discectomy with residual chronic lumbar radiculopathy, stable on repeated exams. Petitioner, who the judge of compensation deemed credible, testified his pain, several years later, was no longer stable but had sharpened and become more frequent. He now had increased complaints of pain, both in frequency and severity, broader numbness and a dropped left foot.

Petitioner's expert found objective evidence to confirm those complaints, marked flattening of the lumbar curves, muscle spasm across the flanks, gluteal, posterior thigh and iliac crest areas on both sides and appreciable hardness of the muscles of petitioner's lower lumbar area following manipulation. Although the judge's discussion of petitioner's increased functional incapacity is brief, the record demonstrates petitioner was working only thirty hours a week at

a job that did not require the lifting, bending and twisting his expert found was no longer possible for him.

Simply stated, our review of this record does not "leave[] us with the definite conviction that the judge went so wide of the mark that a mistake must have been made."[1] Manzo v. Amalgamated Indus. Union Local 76B, 241 N.J. Super. 604, 609 (App. Div.) (quoting Snyder Realty, Inc. v. BMW of N. Am., Inc.,

[1] We note in this regard that the judge of compensation rejected a settlement under N.J.S.A. 34:15-20 the parties had achieved through the Civil Appeals Settlement Program, which would have resulted in petitioner receiving a lump sum equal to the amount awarded "but cutting off his benefits to any further medical benefits for this serious back injury." Although the judge expressed his willingness to approve a settlement that would have fixed petitioner's percentage of permanent partial disability at less than 45% of total, he was not willing to approve one that required petitioner to relinquish his statutory right to seek medical benefits for an additional two years. In rejecting the settlement, the judge of compensation expressed the view that there is no requirement for "demonstrable objective medical evidence in cases such as this where there is already evidence of a severe disability which is corroborated by a doctor's opinion."

Shortly before oral argument, respondent filed a motion to supplement the record with an unpublished decision by another panel addressing the need for objective medical evidence establishing increased disability on a re-opener. Although we grant the motion permitting respondent to bring the case to our attention, we do not resolve that issue. Because this record contains demonstrable, objective medical evidence sufficient to support the judge of compensation's finding of petitioner's increased disability, see Perez v. Pantasote, Inc., 95 N.J. 105, 118 (1984); Yeomans v. City of Jersey City, 27 N.J. 496, 512 (1958), we have no need to address the judge's remarks, which were made long after he issued the order from which respondent appeals.

233 N.J. Super. 65, 69 (App. Div.), certif. denied, 117 N.J. 165 (1989)), certif. denied, 122 N.J. 372 (1990).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION