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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3389-09T1

ADAM WILDSTEIN,

Petitioner-Appellant,

V.

MIDDLESEX COUNTY DEPARTMENT
OF WEIGHTS AND MEASURES,

Respondent-Respondent.

Argued March 14, 2011 – Decided June 17, 2011

Before Judges Lisa and Reisner.

On appeal from Department of Labor, Division of Workers' Compensation, Claim Petition No. 2008-12572.

Richard J. Marcolus argued the cause for appellant (Levinson Axelrod, P.A., attorneys; Mr. Marcolus, on the briefs).

Nicole M. Downs argued the cause for respondent (Hoagland, Longo, Moran, Dunst & Doukas, LLP, attorneys; Ms. Downs, of counsel and on the brief; Richard J. Mirra, on the briefs).

Thomas W. Polaski, attorney for amicus curiae New Jersey Advisory Council on Safety and Health.

PER CURIAM

Appellant, Adam Wildstein, appeals from an order denying him workers' compensation benefits. Appellant claimed he

suffered anxiety, depression and insomnia as a result of workplace stress due to unfair treatment, retaliation, and ethnic harassment by his supervisor, William Deinzer. After a trial, Judge of Compensation Adam M. Smith, Jr. found that any stress plaintiff suffered resulted from nothing more than merited criticism by his supervisor and did not satisfy the criteria for a compensable occupational disease within the meaning of N.J.S.A. 34:15-31 and -36, as interpreted by Goyden v. State Judiciary, Superior Court of New Jersey, 256 N.J. Super. 438 (App. Div. 1991), aff'd. o.b., 128 N.J. 54 (1992). Appellant argues that the judge applied the wrong legal principles and improperly applied the Goyden standard without medical proofs. We reject appellant's arguments. We are satisfied that the judge applied the correct legal principles and that his factual findings and legal conclusions are supported by the record. Accordingly, we affirm.

At the time of the events underlying appellant's claim petition, he was employed by the Middlesex County Department of Weights and Measures, for which he had worked since 2003 or 2004. He was ultimately discharged from that employment in June 2008. Appellant had previously worked as a park ranger for the Middlesex County Department of Parks and Recreation for about four years.

Appellant also had a business of his own, Mobile Sign Works, since 1999. Since his discharge by the Department of Weights and Measures, he has continued working in that business. During the time he was employed by Middlesex County, he operated the business on a part-time basis.

From 2003 until 2007, appellant was supervised by Michael Hendricks. His responsibilities included field inspections and field testing of items such as gas pumps and bar code scanners. Hendricks retired in February 2007 and was replaced by Deinzer as the superintendent of the Department of Weights and Measures. Deinzer had been an assistant superintendent within the Department from 1990 to 2005, and was made deputy superintendent in 2005.

The record clearly establishes that Hendricks managed the Department in a very lax manner. Employees were not held to requirements of strict time reporting, and were allowed to come and go without significant accountability. There was little concern under Hendricks' administration for employees keeping regular working hours or accurately tracking the actual hours worked. Employees frequently reported for work late and left early. Likewise, during the work day, their whereabouts and activities were not closely monitored.

When Deinzer took over, these conditions changed. He informed the staff that, regardless of how lax enforcement was in the past, the rules would be enforced strictly now that he was in charge. He required strict time-keeping enforcement and required employees in the field to sign in and sign out during the day. Everyone became much more accountable for their performance under this new regime.

During appellant's work as a park ranger, he had received no disciplinary charges and received favorable annual performance reviews. Hendricks considered appellant a good worker and testified that he never had to discipline him. Hendricks also gave appellant favorable performance reviews.

Under Hendricks' administration, appellant, like other employees, often left work early without accounting for his time. A co-employee testified that appellant sometimes conducted his sign company business during working hours. According to appellant, he only worked about two hours a week in his sign business. There was also testimony that appellant sometimes falsified inspection reports and improperly inspected gas station pumps and grocery store scales.

After Deinzer took over, appellant was "written up" for two time-related infractions. There was little testimony regarding the particulars of one of them. As to the other, Deinzer had

noticed that appellant's county-issued vehicle was in its parking space at noon, but appellant was not on the premises. Deinzer called appellant to find out where he was. Appellant lied and said he was at work, but later admitted he was home. Appellant had not signed out and did not have permission to leave work.

Appellant did not deny his wrongdoing regarding these two incidents. However, he believed the reprimands were unfair, contending he was the only person being held accountable, while other employees engaged in similar behavior.

On one occasion, Deinzer verbally chastised appellant for failing to follow instructions. He did this in a loud voice in front of several other employees, causing appellant to feel humiliated. Again, appellant felt he was being treated unfairly.

At some point, a fellow employee told appellant that Deinzer sometimes used an anti-Semitic expression in referring to him. It was also reported to appellant that Deinzer occasionally used inappropriate racial and ethnic slurs when referring to other individuals, such as African-Americans, Hispanics, Indians, and Arabs. Several of appellant's co-workers testified to this effect. Some of this testimony was based on hearsay regarding the inappropriate remarks, and some

was based on personal knowledge. Deinzer did not testify at the trial. Appellant acknowledged, and it is undisputed, that Deinzer never made any anti-Semitic remarks in appellant's presence.

Appellant contended that after learning of the anti-Semitic remarks made behind his back, he began experiencing depression and anxiety. On February 4, 2008, he applied for a medical leave of absence. On the same day, he filed a complaint with the Director of the Middlesex County Personnel Department, alleging that Deinzer created a discriminatory, hostile work environment by using the ethnic slurs. After investigating the complaint, the Personnel Department dismissed it, finding that it lacked merit and was brought in bad faith.

Appellant was subsequently charged with four additional disciplinary infractions. Two were for filing inspection reports that were incomplete or falsified. These charges were initiated as a result of complaints originating outside of the Weights and Measures Department. One involved a complaint that appellant's inspection report of scanners at a Kohl's Department Store was incomplete. Kohl's had no record that appellant had ever been to the store. The other was prompted by a complaint from the owner of a car wash, who complained about appellant's inspection report regarding his business. It was concluded that

appellant had filed his report without having visited the business.

The third disciplinary charge was for violating the Middlesex County residence policy. At all relevant times, appellant lived in Ocean County. He has never denied this. He claimed this fact was known all along by his superiors, but no action was previously taken against him to enforce the policy. Finally, appellant was charged with filing false accusations against his supervisor. Presumably, this was prompted by the finding of the Personnel Department that appellant's accusations against Deinzer were filed in bad faith.

Disciplinary hearings were conducted on April 28, 2008 and May 21, 2008. Appellant was represented by counsel. He was adjudicated guilty of the infractions and a sixty-day suspension was imposed. Appellant was offered a transfer out of the Weights and Measures Department and back to the Parks and Recreation Department. However, appellant declined the transfer, and he never returned to work.

Appellant contended that the disciplinary charges brought against him were in retaliation for his filing the complaint against Deinzer. Thus, although he does not deny his wrongdoing, he points to these charges as another example of unfair treatment of him.

The workers' compensation trial occurred over eight days between October 14, 2008 and January 20, 2010, when the judge issued an oral decision. Appellant testified on his own behalf, as did four co-employees of appellant, including Hendricks.

In issuing his decision, the judge recapped the testimony of the witnesses. The judge concluded that appellant had no problems under the relaxed work rules in the Parks and Recreation Department and in the Weights and Measures Department prior to Deinzer becoming superintendent. However, appellant's "problem seemed to arise" when Deinzer established "a pretty tight management style and expected everybody to sign in and sign out and to account for themselves, and [the judge was] satisfied that [appellant] didn't always conform to those requirements." The judge therefore concluded "that the principal reason for [appellant]'s anxiety was the fact that he got a new boss and the boss expected him to work harder." The judge was "not satisfied that [appellant] developed a compensable occupational disease . . . within the meaning of N.J.S.A. 34:15-36 because he had been reprimanded by Mr. Deinzer."

The judge did not make an express factual finding as to whether Deinzer occasionally used an anti-Semitic slur in referring to appellant out of appellant's presence. However,

the judge found that even if such a slur had been used, it was not the source of appellant's asserted stressful condition.

Referring to the Goyden standard, the judge found that there was nothing peculiar in appellant's work conditions that could have triggered the anxiety he claimed, but that any such anxiety resulted only from merited criticism. The judge provided the following analysis:

> The [c]ourt stated [in Goyden], "Merited criticism cannot be considered a cause or a condition or a characteristic peculiar to a particular trade, occupation, process or place of employment." Merited criticism is common to all occupations and places of employment.
>
> The gist of the Goyden decision is that the exercise of managerial prerogative in cases where a petitioner is considered by supervisors not to be conforming to work rules is not a compensable condition. Here we don't have a situation where there is any proof that [appellant] was ridiculed or directly called an ethnic derogatory name by his boss. There was hearsay evidence and that hearsay evidence was only obtained by [appellant] from Miss Maltby who, herself, had been written up for some work infractions.
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> I don't see anything here that would indicate that there was any direct confrontation between [appellant] and Deinzer in which Deinzer abused him or made fun of his ethnicity or his ethnic background. The evidence suggests that Deinzer was upset with him because he wasn't pulling his weight, not because he was Jewish.

> I think the evidence here would indicate that [appellant] got along all right in the Parks Department and also in the Department of Weights and Measures as long as no one was holding tight rein on him. Deinzer had a different management style, and I'm satisfied that the primary reason why [appellant] became upset was that Deinzer "cracked the whip" on everyone and made them sign in and sign out. Deinzer called him to task because he discovered that [appellant] had left early and was watching him for this reason. The fact that Deinzer may have been a bigot (or may not have been) does not mean that [appellant] had a viable cause of action here. There's no evidence [t]hat Deinzer was a bigot to [appellant's] face.
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> In looking at all the evidence I'm certainly not satisfied that it shows anything which was "peculiar to" [appellant's] "place of employment or business or occupation" that was the triggering factor for the anxiety he suffered. The fact that he may have been criticized for the way he did his job by his boss and the fact that he wasn't happy with the tougher rules and tighter discipline under Mr. Deinzer is not sufficient to constitute grounds under Goyden that would qualify him to receive Workers' Compensation benefits.

Appellate courts generally defer to the special expertise of compensation judges and give "due regard to the opportunity of the one who heard the witnesses to judge of their credibility." Close v. Kordulak Bros., 44 N.J. 589, 599 (1965). "Workers' compensation cases by their nature are fact sensitive." Ramos v. M & F Fashions, Inc., 154 N.J. 583, 601

(1998) (Pollock, J., dissenting). Even if a reviewing court would not have reached the same result in the first instance, it must defer to the judge's findings unless they are manifestly unsupported by the evidence. In re Taylor, 158 N.J. 644, 656-57 (1999); Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974). Accordingly, the review of a workers' compensation determination 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, supra, 44 N.J. at 599).

We first consider appellant's argument that the judge erred by applying an incorrect standard. We are satisfied that the judge correctly applied the Goyden standard and that his decision that appellant failed to establish the legal causation necessary to sustain his claim was supported by sufficient, credible evidence in the record.

Under our workers' compensation scheme, employees may be compensated for injuries caused "by any compensable occupational disease arising out of and in the course of [their] employment." N.J.S.A. 34:15-30. A "compensable occupational disease"

includes "all diseases arising out of and in the course of employment, which are due in a material degree to causes and conditions which are or were characteristic of or peculiar to a particular trade, occupation, process or place of employment." N.J.S.A. 34:15-31a.

Goyden sets forth five requirements for an actionable claim arising from a mental disability, which can collectively be called the "objective material element" test. The first four requirements are as follows:

> [F]or a worker's mental condition to be compensable, the working conditions must be stressful, viewed objectively, and the believable evidence must support a finding that the worker reacted to them as stressful. In addition, for a present-day claimant to succeed, the objectively stressful working conditions must be "peculiar" to the particular work place, and there must be objective evidence supporting a medical opinion of the resulting psychiatric disability, in addition to the bare statement of the patient.
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> [Goyden, supra, 256 N.J. Super. at 445–46 (internal quotation omitted).]

The fifth requirement is that the workplace exposure must have had a material impact upon the condition petitioner complains of. Id. at 458 (citing Williams v. W. Electric Co., 178 N.J. Super. 571, 585, certif. denied, 87 N.J. 380 (1981) ("The question is whether objectively verified stressful work conditions found in this case were established which were

'peculiar' to the work place and which justified the medical opinion that they were the 'material' causes of Goyden's disability.").

Appellant relies upon Lindquist, supra, 175 N.J. 244 to support his argument. In Lindquist, the Court traced the history of the workers' compensation statute in New Jersey, and noted that it represented a tradeoff in which employees lost the right to common-law tort recovery and gained a statutory vehicle for automatic recovery of certain benefits from a compensable injury. Id. at 257. Appellant notes that in Lindquist, the Court recognized that this tradeoff also meant that the burden of proof would be less than that required at common law. Id. at 258. Accordingly he claims that a "claimant's burden of proof is less than a mere feather on the scales of justice."

However, "the doctrine of liberal construction does not extend to 'the evaluation of credibility, or of weight or sufficiency of evidence.'" Ibid. (quoting Oszmanski v. Bergen Point Brass Foundry, Inc., 95 N.J. Super. 92, 95 (App. Div. 1967), certif. denied, 51 N.J. 181 (1968) (emphasis omitted)). Prevailing in a workers' compensation claim requires that a claimant prove both legal and medical causation. Id. at 259. Despite appellant's argument that one's burden is "less than a mere feather," Lindquist requires that a claimant "has the

burden to demonstrate by a preponderance of the evidence that his or her environmental exposure . . . was a substantial contributing cause of his or her occupational disease." Id. at 263 (emphasis added). Legal causation requires that the illness be "work connected." Id. at 259. Medical causation requires "proof that the disability was actually caused by the work-related event." Ibid. The workplace condition does not need to be the sole cause of a claimant's illness, but it must be proved by a preponderance of the evidence to be a contributing cause. Ibid.

The dual forms of causation outlined in Lindquist, and the "objective material element" test set forth in Goyden, are not mutually exclusive as appellant appears to argue. Rather, the Goyden test is used to determine whether or not a claimant has established the causation necessary to sustain a claim for psychological disability due to work stress. Here, Judge Smith found that petitioner did not provide sufficient evidence to establish that his claimed stress-related psychological injury was satisfied according to the test in Goyden. The judge applied these principles to the facts as he found them. Contrary to appellant's argument on appeal, the judge did not apply the wrong legal standard governing occupational disease claims.

We also reject appellants' argument that the judge improperly applied the Goyden standard without medical proofs. In their appellate briefs, the parties acknowledge that, by agreement, the matter was bifurcated and tried as to liability only. Appellant contends that the judge exceeded the scope of the liability-only trial "and entered the realm of the medical prong."

In our view, the judge decided the case based upon the legal causation prong, finding it unnecessary to determine the extent of any resulting disability claimed by appellant. The judge concluded that, based upon the evidence before him and the factual findings he made, any stress suffered by appellant did not provide a legal basis for workers' compensation benefits.

We agree with appellant's contention that he was not required to prove that work-related conditions were the principal cause of his asserted stress. However, we disagree with appellant's contention that because the judge found that "the principal reason" for appellant's stress was that his "new . . . boss expected him to work harder" the judge misapplied the Goyden standard. That finding does not preclude the judge's other conclusion that appellant failed to prove that any asserted disability was caused by objectively stressful working conditions that were peculiar to his employment.

As we have stated, all of the judge's factual findings and his legal conclusions are amply supported by the record evidence. Further, the judge applied the correct legal principles in reaching his ultimate decision. Accordingly, we have no basis to reverse.

Affirmed.