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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2065-14T3

LOIS SCAFURI,

Petitioner-Appellant,

v.

SISLEY COSMETICS, USA, INC.,
NEIMAN MARCUS GROUP, INC.,
BLOOMINGDALE'S/MACY'S, INC., and
SECOND INJURY FUND,

Respondents-Respondents.

Argued March 8, 2016 – Decided June 24, 2016

Before Judges Reisner and Leone.

On appeal from the New Jersey Department of Labor and Workforce Development, Division of Workers' Compensation, Claim Petition Nos. 2008-016183, 2008-016184, and 2011-025146.

Mark M. Tallmadge argued the cause for appellant (Bressler, Amery & Ross, attorneys; Mr. Tallmadge, on the briefs).

Galen W. Booth argued the cause for respondent Sisley Cosmetics, USA, Inc. (Law Offices of Galen W. Booth, attorneys; Mr. Booth, on the brief).

Thomas E. Miller argued the cause for respondent Neiman Marcus Group, Inc. (Viscomi & Lyons, attorneys; Mr. Miller, on the brief).

Daniel A. Lynn argued the cause for respondent Bloomingdale's/Macy's, Inc.

(Braff, Harris, Sukoneck & Maloof, attorneys; Mr. Lynn, on the brief).

John J. Hoffman, Acting Attorney General, attorney for respondent Second Injury Fund (Linda A. Lockard-Phillips, Deputy Attorney General, on the statement in lieu of brief).

PER CURIAM

Petitioner Lois Scafuri appeals the November 19, 2014 order for dismissal of her claims for workers' compensation and the Second Injury Fund benefits. We affirm.

I.

The facts and procedural history are set forth in the comprehensive November 19, 2014 memorandum of decision written by Judge of Workers' Compensation (compensation judge) Kay Walcott-Henderson. Thus, we provide only the following brief factual and procedural history.

Petitioner was born in 1948. In May 2004, she began working as a dual employee for respondents Sisley Cosmetics, USA, Inc. (Sisley), and Neiman Marcus Group, Inc. (Neiman Marcus). She worked at the Sisley counter of the Neiman Marcus store at the Mall at Short Hills. Her duties included: receiving, cataloguing, and stocking product; sales; calling customers; and applying make-up to potential customers. She was also occasionally required to transport product to and from a stockroom.

On March 18, 2005, petitioner slipped in the stockroom and hit her head on a metal shelving unit. She reported the incident to Sisley and Neiman Marcus that day.

Petitioner saw a doctor after the injury. She later claimed that the doctor recommended that she "not do any stock work at all," and that she avoid lifting. However, petitioner continued to perform her duties as before.

On August 3, 2005, five months after the stockroom injury, petitioner had an MRI and was diagnosed with cervical spondylolisthesis and a small midline disk protrusion at the C3-C4 level with significant compression of the spinal cord at the C4-5 levels.

On February 5, 2006, petitioner underwent cervical fusion surgery, fusing C4 to C5, and C5 to C6. Following the surgery, she was out for approximately five months, returning to work in July 2006.

In November 2006, petitioner was diagnosed with myelomalacia.[1] She had another MRI, which revealed an impression of moderate spinal stenosis at C3-C4 with a small central soft disc herniation and abnormal signal and cord deformity.

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[1] Myelomalacia is defined as "the softening of the spinal cord." Saunders, Miller-Keane Encyclopedia and Dictionary of Medicine, Nursing, and Allied Health (7th ed. 2003).

Petitioner continued working for Sisley and Neiman Marcus for approximately six months, until January 2007.

In May 2007, petitioner began working for Bloomingdale's/Macy's, Inc. (Bloomingdale's). She held the title of Sales Associate in the cosmetics department, and testified that her duties were essentially the same as when she worked for Sisley and Neiman Marcus. She stopped working for Bloomingdale's in November 2007. In December 2007, she had a second fusion surgery, this time fusing the C3 and C4 vertebrae. She has not worked since November 2007. In 2008, the Social Security Administration determined petitioner to be totally and permanently disabled and awarded her disability benefits.

In June 2008, petitioner filed Claim Petition 2008-16183 against Sisley, and Claim Petition 2008-16184 against Neiman Marcus. In June 2010, she also applied for benefits from the Second Injury Fund (SIF). In September 2011, petitioner filed Claim Petition 2011-25146 against Bloomingdale's.

A hearing was held over ten days in 2013 and 2014. Petitioner testified that she did not have problems with her neck, or cervical spine, before her March 2005 injury. However, in 1993 she had filed a prior workers' compensation claim against Macy's, alleging that she was injured in the stockroom and suffered cervical and lumbar radiculopathy. Petitioner also

testified that she had lumbar spondylosis, dating back to when she was nineteen or twenty years old.

On November 19, 2014, Judge Walcott-Henderson dismissed with prejudice petitioner's claims for workers' compensation and Second Injury Fund benefits. The compensation judge noted it was "undisputed that this Petitioner suffers from a significant disability related to lumbar spondylolisthesis, cervical myelopathy and cervical junctional degeneration status post anterior corpectomy with fusion." However, the judge found that petitioner failed to meet "her burden of establishing that her disability was due in a material degree to conditions at work that were characteristic of, or peculiar to her occupation."

Additionally, because petitioner's injuries were not experienced "under conditions entitling [her] to compensation" from her employer(s), the judge found the Second Injury Fund is not liable. N.J.S.A. 34:15-95. Petitioner appeals.

II.

We must hew to our standard of review. "The factual findings of the compensation court are entitled to substantial deference." Ramos v. M & F Fashions, 154 N.J. 583, 594 (1998). Our standard of review

> 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 and . . . with due regard also to the agency's expertise where such expertise is a pertinent factor."
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> [Sager v. O.A. Peterson Constr., Co., 182 N.J. 156, 163-64 (2004) (quoting Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)).]

Compensation judges have "expertise with respect to weighing the testimony of competing medical experts and appraising the validity of [a plaintiff]'s compensation claim." Ramos, supra, 154 N.J. at 598.

III.

After careful review, we affirm substantially for the reasons given by Judge Walcott-Henderson in her November 19, 2014 written opinion. We add the following.

Petitioner argues that the compensation judge erred in concluding that petitioner's disability was not due in a material degree to causes and conditions of her employment. Under the Workers' Compensation Act, N.J.S.A. 34:15-1 to -142, an employer shall pay compensation to an employee for personal injuries caused "by accident" or "by any compensable occupational disease arising out of and in the course of [her] employment." N.J.S.A. 34:15-7, -30.

"[C]ompensable 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. 34:15-31(a). "'Material degree' is defined as 'an appreciable degree or a degree substantially greater than de minimis.'" Singletary v. Wawa, 406 N.J. Super. 558, 565 (App. Div. 2009) (quoting Peterson v. Hermann Forwarding Co., 267 N.J. Super. 493, 504 (App. Div. 1993), (quoting N.J.S.A. 34:15-7.2), certif. denied, 135 N.J. 304 (1994)).

"It is sufficient in New Jersey to prove that the exposure to a risk or danger in the workplace was in fact a contributing cause of the injury." Lindquist v. City of Jersey City Fire Dep't, 175 N.J. 244, 259 (2003). "That means proof that the work related activities probably caused or contributed to the employee's disabling injury as a matter of medical fact." Ibid. "Direct causation is not required; proof establishing that the exposure caused the activation, acceleration or exacerbation of disabling symptoms is sufficient." Ibid.

Petitioner has the burden to establish causation. Bird v. Somerset Hills Country Club, 309 N.J. Super. 517, 521 (App. Div.), certif. denied, 154 N.J. 609 (1998). She tried to show causation through her expert, Dr. Alexander R. Vaccaro. However, the compensation judge found that the records and

testimony of Dr. Vaccaro "demonstrate the progressive nature of Petitioner's disability, but are not indicative of a causal relationship." Indeed, the judge found Dr. Vaccaro's "attempts to relate the Petitioner's disability to her work activity with the Respondents proved problematic."

Instead, the compensation judge found Dr. Charles R. Effron, Sisley's expert, "to be more credible and compelling on this issue." Dr. Effron "flatly rejected [Dr. Vaccaro's] allegation that working as a cosmetic sales associate entailed the type of lifting and bending that caused or materially contributed to [petitioner's] disability." Dr. Effron opined that petitioner's "work responsibilities essentially involved the same types of activities that she would undertake in the course of any ordinary day or week and could not have placed any additional stress upon her body." The judge agreed that petitioner's "work activities including make-up application, facials, packing and unpacking, stocking and even lifting boxes containing small cosmetic products" did not materially contribute to her disability under N.J.S.A. 34:15-31(a).

The compensation judge discredited petitioner's testimony that she engaged in overhead lifting and other strenuous activities against doctor's orders. The judge credited Dr. Effron's testimony that her "cervical and lumbar disability

deteriorated because of the natural aging processes, not her employment." Deterioration of a part of the body whose function "is diminished due to the natural aging process thereof is not compensable." N.J.S.A. 34:15-31(b).

The compensation judge also found there was "overwhelming evidence" showing that petitioner's "cervical disability is related to the 2005 traumatic accident and resulting fusion surgery after which she developed junctional degeneration." Even petitioner's expert admitted on cross-examination that junctional degeneration would be a foreseeable result of the 2006 spinal surgery alone, even if petitioner had not returned to work.

Petitioner never filed a claim based on her March 2005 accident or the resulting February 2006 surgery. Instead, she filed claims in June 2008 against the companies who employed her after her return from the surgery in July 2006, alleging that working for them caused her to suffer an occupational disease. Thus, as the compensation judge stated: "The issue in this case, is whether the Petitioner's occupational disease claims against the Respondents and the SIF can survive if her cervical disability is found to be related to her March 18, 2005 accident while in the stockroom at Neiman Marcus, for which no claim was ever filed." The judge properly found it could not survive.

On appeal, petitioner argues that Sisley and Neiman Marcus should be liable for her March 2005 accident and all injuries and occupational diseases she suffered by February 2006. She complains the compensation judge did not address those ailments. However, petitioner did not include those ailments in her June 2008 claims, apparently because they were barred by the two-year statute of limitations. See N.J.S.A. 34:15-41, -51 (requiring a claim be filed "within two years after the date on which the accident occurred"); N.J.S.A. 34:15-34 (requiring that an occupational disease claim be filed "within 2 years after the date on which the claimant first knew the nature of the disability and its relation to the employment"). On appeal, petitioner alleges for the first time that she did not file a workers' compensation claim because she was afraid that would result in losing her job.

We need not decide whether a claim for injuries arising out of petitioner's 2005 accident or 2006 surgery was barred by the statute of limitations, because she did not make such a claim before the compensation judge. "It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the

trial court or concern matters of great public interest.'" State v. Robinson, 200 N.J. 1, 20 (2009) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)). Thus, we decline to consider petitioner's arguments that injuries from her 2005 accident and 2006 surgery should be considered.

Finally, petitioner alleges that the compensation judge abused her discretion by considering lay testimony from other cosmetics workers, and by not striking certain submissions and testimony by defense experts. However, workers' compensation hearings "shall not be bound by the rules of evidence." N.J.S.A. 34:15-56. "Viewed in that context, the real issue presented is not whether evidence was admitted in violation of the Rules of Evidence, but whether there is substantial credible evidence in the record to support the judgment when the proofs are considered as a whole." Reinhart v. E.I. Dupont de Nemours, 147 N.J. 156, 163-64 (1996).

Judge Walcott-Henderson's conclusion could reasonably have been reached on sufficient credible evidence present in the record. Sager, supra, 182 N.J. at 163. We must give due regard to the judge's opportunity to judge credibility, ibid., and expertise in weighing the testimony of competing medical experts, Ramos, supra, 154 N.J. at 598. We cannot say her findings are so "manifestly unsupported by or inconsistent with

competent relevant and reasonably credible evidence as to offend the interests of justice." Lindquist, supra, 175 N.J. at 262.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION