

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1141-13T3

MATTHEW KATZENSTEIN,

Petitioner-Appellant,

V.

DOLLAR GENERAL,

Respondent-Respondent.

Argued November 12, 2014 – Decided January 22, 2016

Before Judges Messano, Ostrer and Summers.

On appeal from State of New Jersey Department of Labor and Workforce Development, Division of Workers' Compensation, Claim Petition No. 2012-27830.

Roger W. Thomas argued for cause for appellant (Dolan and Dolan, attorneys; Mr. Thomas on the brief).

Cheryl A. Binosa argued for cause for respondent (Weber, Gallagher, Simpson, Stapleton, Fires & Newby, attorneys; M. Binosa on the brief).

The opinion of the court was delivered by

SUMNERS, JR., J.A.D.

This appeal requires us to consider whether an employee, who was terminated after suffering a compensable injury arising from his former employment and deemed unable to work, is

entitled to temporary disability benefits under the Workers' Compensation Act, N.J.S.A. 34:15-1 to -142 (the Act) during his subsequent unemployment. The Division of Workers' Compensation judge determined that the employee failed to meet the burden of proof under Cunningham v. Atlantic States Cast Iron Pipe Co., 386 N.J. Super. 423, 432 (App. Div. 2006), which requires a claimant to prove that he was not only available and willing to work, but that he would have been working if not for the disability. The crux of this matter is whether the employee presented sufficient evidence to satisfy the Cunningham requirement. For the reasons that follow, we affirm.

I

We discern the following facts and procedural history from the record. On August 22, 2012, petitioner Matthew Katzenstein injured his right knee while at work as a store manager for respondent Dollar General. Katzenstein's injury was deemed work related and he was authorized to be treated by Dr. David B. Basch.¹ On September 19, Katzenstein was placed on "light duty," restricting his work week to fifty hours.

However, on September 28, Dollar General terminated Katzenstein for violating company policy when he left several

¹ At the time of the injury, Katzenstein was receiving treatment with Dr. Basch for an earlier left knee injury which is not the subject of this appeal.

store employees in the store without supervision while he went to the bank to deposit the previous days' earnings. Katzenstein sought unemployment benefits from the Division of Unemployment Insurance (Division).² On October 17, while Katzenstein was neither employed nor receiving unemployment benefits, Dr. Basch deemed him unable to work due to his knee injury.

In a decision dated October 22, the Division determined that Katzenstein was not eligible for unemployment benefits on the ground that he was terminated was for simple misconduct. Katzenstein appealed to the Appeal Tribunal.

In the meantime, despite being terminated, Katzenstein continued to be treated by Dr. Basch, who continued him on light duty, if available, with no lifting over twenty-five pounds, and ordered an MRI. Katzenstein subsequently filed a motion for medical treatment and temporary disability benefits. Approximately a month later, Dr. Basch recommended that Katzenstein not work at all and receive arthroscopic knee surgery.

² We note that the Division's records indicate Katzenstein filed his claim for unemployment benefits on September 23, 2012, five days before his termination. Neither party provides an explanation for this discrepancy. Nonetheless, this does not factor into our decision.

On February 28, 2013, the judge of compensation entered an order which provided that the parties agreed without prejudice that Katzenstein shall receive temporary disability benefits for the period of November 14, 2012 to February 14, 2013 and Dollar General shall pay for an independent medical exam. Katzenstein subsequently filed a motion to enforce the order.

At the motion's return date on September 6, 2013, the parties agreed that since the order had been complied with, they consented to have the judge sua sponte amend the motion for payment of temporary benefits - past and continuing. Thereafter, Katzenstein submitted an affidavit to the court in support of his position that, under Cunningham, he was entitled to temporary benefits despite his termination. He asserted that he was denied unemployment benefits because he "was unable to engage in employment due to the injury to my right knee."

Following testimony and argument on September 26, 2013, the judge of compensation issued a bench opinion on October 2, 2013, finding that Katzenstein was not entitled to temporary benefits. The court placed significant emphasis on its finding that Katzenstein gave untruthful statements regarding why the Division denied him unemployment benefits. The judge noted:

The Notice of Termination is not considered for the truth of the statement regarding the reason for termination. However, it is admissible for its impact on the credibility

of petitioner. The Notice from the Division [] not only fails to support [Katzenstein's] reason advanced for the Division's rejection of his application (an inability to work), but it directly contradicts his version -- which he asserted twice under oath. What is also important to this case, in addition to the impact on [Katzenstein's] credibility, is that it demonstrates that [his] leaving the job at Dollar General was not caused by his injury. Even [Katzenstein] admits that he did not leave Dollar General due to an inability to work because of his injury. He specifically testified that his termination was related to an issue, albeit disputed, pertaining to his compliance with company policy. The reason [Katzenstein] left the employ of [Dollar General] on September 29, 2012 is immaterial to my consideration of this application. Contrary to [Dollar General's] position, [Katzenstein] would not be disqualified from [temporary disability benefits] solely on the basis of a "for cause" termination.

Though Katzenstein also gave testimonial evidence that he made an effort to find a job after he was terminated from Dollar General, the judge found that "the accuracy and veracity of his testimony . . . [was] dubious due to his lack of credibility." In support, the judge not only mentioned that Katzenstein misstated the reason he was denied unemployment compensation, but that "[d]uring his testimony he sometimes evaded questions, and often inserted information in his answers that was not responsive to the question asked. He had to be admonished to answer only the question asked, and to refrain from extraneous comments."

Upon finding Katzenstein "somewhat lacking in candor," the judge reasoned that the record was devoid of evidence that Katzenstein had any promise or prospect of employment that he had to forego due to his disability, and that under Cunningham, he was not entitled to temporary disability benefits for days when there was no actual loss of wages.³

II

Before us, Katzenstein contends that the Workers' Compensation court erred in its rigid application of Cunningham, and that the appropriate application dictates that he be entitled to temporary disability. Dollar General disagrees, and also contends that the order denying Katzenstein's temporary disability benefits was interlocutory because it did not conclude Katzenstein's workers' compensation claim, and should not be heard absent a motion for leave to appeal pursuant to Rule 2:2-4. We disagree. We rely upon our prior decisions in

³ Approximately a week before the judge of compensation issued his oral decision, the Board of Review mailed its decision on September 23, 2013, granting Katzenstein unemployment benefits by finding that his termination was not warranted because his conduct "was a reasonable course of action and therefore not an act of misconduct connected with" his employment. There is no indication that the parties or judge were aware of that decision at that time the judge rendered his ruling. Even so, as the judge of compensation indicated, the Division's decision denying Katzenstein's unemployment benefits had no bearing on his ruling.

Della Rosa v. Van-Rad Contracting Co., 267 N.J. Super 290, 293-94 (App. Div. 1993), and Hodgdon v. Project Packaging, Inc., 214 N.J. Super. 352, 360 (App. Div. 1986), that an award of temporary disability benefits is a final judgment and appealable as of right.

Having concluded that there is no procedural bar to deciding the merits of this appeal, we begin by noting that "[a]ppellate review of workers' compensation cases is 'limited to whether the findings made could have been reached on sufficient credible evidence present in the record . . . with due regard also to the agency's expertise[.]'" Hersh v. County of Morris, 217 N.J. 236, 242 (2014) (alteration in original) (quoting Sager v. O.A. Peterson Constr., Co., 182 N.J. 156, 164 (2004)). Deference is given to the factual findings of judge of compensation who has the opportunity to assess the witnesses' credibility from hearing and observing their testimony. Lindquist v. Jersey City Fire Dep't., 175 N.J. 244, 262 (2003) (citing Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)). Those findings should not be reversed unless they are "'manifestly unsupported by or inconsistent with competent relevant and reasonably credible evidence as to offend the interests of justice.'" Id. at 262-63 (quoting Perez v. Monmouth Cable Vision, 278 N.J. Super. 275, 282 (App. Div.

1994), certif. denied, 140 N.J. 277 (1995)). Yet, the judge's "interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995) (citations omitted); see also Auletta v. Bergen Ctr. for Child Dev., 338 N.J. Super. 464, 470 (App. Div.), certif. denied, 169 N.J. 611 (2001).

Applying the above factors to the case under review, we see no reason to disturb the judge of compensation's findings of fact or conclusions of law. We affirm substantially for the reasons expressed by the judge in his well-reasoned bench decision that Katzenstein was not entitled to temporary disability benefits. We add only the following comments.

As noted, the question of whether Katzenstein is entitled to temporary disability is based upon the application of our decision in Cunningham. In that case, similar to the situation here, the employee was injured on the job and returned to work, but was subsequently terminated. Cunningham, supra, 386 N.J. Super. at 424. Thereafter, as in this case, the employee sought temporary disability when the authorized doctor determined that he was unfit to work as a result of a compensable injury. Ibid. We concluded that the employee would only be entitled to temporary disability benefits if he could establish causation

between the disability and the subsequent unemployment. Id. at 432-34. Thus, on remand, we directed the workers' compensation court to determine whether the employee can satisfy a two prong test: one, he had a "promise or prospect of employment," and two, he had to "forgo the employment because of the disability." Ibid. We acknowledged that meeting this standard would be difficult, but reasoned that it was a fair solution to determine eligibility for temporary benefits where there is an actual loss of income due to disability. Id. at 437.

Here, the judge of compensation properly applied Cunningham. The judge assessed whether Katzenstein, after being terminated, had a promise or prospect of employment that he had to forego due to his disability. In determining that Katzenstein was not credible, the judge found he was neither offered employment after he was terminated nor declined employment due to his work-related disability. We cannot second-guess a judge when sufficient credible evidence in the record supports his or her credibility findings. Thus, the judge's conclusion that Katzenstein was not entitled to temporary disability benefits is fitting.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION