NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4595-10T4

ALTAIR ALVES DA SILVA,

Appellant,

v.

BEST TRANSPORTATION,

Respondent.

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Argued February 1, 2012 - Decided July 10, 2012

Before Judges Cuff and St. John.

On appeal from New Jersey Department of Labor, Division of Workers' Compensation, Claim Petition No. 2010-10121.

John M. Pinho argued the cause for appellant (DaSilva & Pinho, L.L.C., attorneys; Mr. Pinho, of counsel and on the brief).

Robert J. Rejent argued the cause for respondent (Adelson, Testan, Brundo & Jimenez, attorneys; Mr. Rejent, on the brief).

PER CURIAM

Altair Alves Da Silva appeals from a March 29, 2011 order of the Division of Workers' Compensation (the Division),

dismissing his claim for medical and temporary benefits. We affirm.

I.

We derive the following facts from the evidence presented at trial. On April 23, 2010, Da Silva filed a claim petition with the Division, indicating an accident date of January 25, 2010, which was later amended to February 8, 2010. In its answer, Best Transportation (Best) contested that Da Silva's injury arose out of and in the course of employment.

A three-day hearing commenced on September 16 and concluded on December 14, 2010. The parties stipulated that Da Silva was employed by Best on February 8, 2010. The Judge of Compensation issued a written decision on March 23, 2010, dismissing Da Silva's claim petition for failure to sustain his burden of proof, memorialized in an order of March 29, 2011. Specifically, the Judge of Compensation found Da Silva "was not a credible witness" and "did not suffer a fall which lead[] to the injuries complained of."

Da Silva testified that he worked for Best as a truck driver and was injured when he "fell down from the top of the truck" while trying to make a delivery. He asserted that he was "confused with the date." Da Silva testified, "I cannot

remember, but I know it was —— I believe it was February, but I don't remember the exact date."

The alleged incident occurred during a delivery in Pennsylvania. Best provided a wrong delivery address and Da Silva arrived in a residential neighborhood with no radio signal. While maneuvering to turn the truck around, "the hose that connects the tractor to the trailer, [] disconnected." Da Silva testified,

> And since I was trying to connect the hose again -- the air hose, and when I was connecting it, I was on top of the chassises of the trailer. I lost -- I lost control of my leg that was on top of the fuel tank and I fell backwards. And as I fell, I went -- I fall straight on the street with my whole body backwards. And I lost a little bit of conscious and I was not understating much and I had a lot of pain.
>
> And at that point, I can not communicate. The phone was -- I could not get a signal where I was in the area.

Da Silva allegedly fell a distance "higher than [his] own height" onto the blacktop. He "could not get up forward" so he "pushed [him]self on [his] back to the steps of the truck and then [he] got up with a lot of difficulty" into the truck. He stated that he was in so much pain he was "90% impaired." When he obtained a radio signal, Da Silva called Best and spoke with a female dispatcher, who he could not identify by name but stated she was new to the company. Da Silva explained he was

lost and the address was incorrect. He told the dispatcher he "had had an accident; that [his] back was hurting a lot and that [he] did not know if [he] could make the delivery[,]" as he "had just fallen from the top of the truck." Da Silva contacted another driver headed to the same destination with the correct address and proceeded to make the delivery. On his way back to New Jersey, he stopped and purchased Ibuprofen but did not go to the emergency room, see a doctor, or call any family members about the incident.

The following day, Da Silva notified dispatcher Allen Renta about the incident, but Da Silva asserted he was ignored and told to continue working. On March 1, 2010, he informed Best that the pain was too intense and he could "not even stand up." He stated that at the time, the human resources manager "started to get worried" and said that the "government" would give him care. He never returned to work. During his employment following the accident, he asked for treatment and was not referred to any doctors.

On March 2, 2010, Da Silva was driven by ambulance to the emergency room, but received no treatment because he lacked insurance coverage. He then went to a chiropractor, Dr. Mark Rodrigues, who scheduled him to see an orthopedic specialist, Dr. Kenneth Kopacz. Dr. Kopacz ordered an MRI and instructed Da

Silva to go to the emergency room at St. Barnabas where, on March 8, 2010, Da Silva underwent surgery for a left side L5-S1 diskectomy.

Regarding his prior medical treatment, Da Silva testified he occasionally went to a chiropractor as preventative care. He stated that his neck would bother him "because of the shaking of the truck[,]" and when asked if a doctor had previously provided treatment for his back, he responded in the negative. He again was asked if the chiropractor had ever treated his back prior to the incident in question and he replied "directly to my back, no[,] it was always the neck." Da Silva later stated that he previously received treatment to his back and that he "complained of [his] back — the middle of [his] back and up." However, he did not remember complaining of his lower back, and he maintained he "never had problems with the lower back."

Dr. Rodrigues testified that Da Silva has been a patient since 2005 when he presented complaints with his low back region. X-rays were taken, which were normal except for a questionable encroachment of the neural canal at L5-S1. On February 5, 2010, Dr. Rodrigues saw Da Silva, and noted he looked "a lot worse than what he was back in '05." Dr. Rodrigues referred to his "Consultation Admittance Record," which he said is always filled out by staff, but never by the

patient. Based on his records, Dr. Rodrigues indicated that Da Silva said he was involved in an accident at work and slipped and fell when he was connecting a hose to a trailer. There was also a note that indicated it "happened a few days ago." X-rays were then taken, which were substantially similar to the x-rays from 2005.

Vendetta Ward testified that she was formerly employed by Best and worked as a dispatcher on the date Da Silva alleged he was injured. She testified that on February 8, 2010, Da Silva was a driver for Best and made a delivery in Pennsylvania. On that date, he called Best to notify that he was sent to the wrong address and was injured. Ward also testified she heard Da Silva tell another dispatcher, Renta, about the accident. She stated there was a company procedure for reporting accidents but it was not followed, as neither she nor Renta advised their supervisors that the accident occurred.

Ward recalled that Da Silva came to work with his wife two weeks to a month following the accident, to "let them know he was hurt really bad." She testified that Da Silva spoke to the owner of the company and the human resources manager. Another employee was also present to act as a translator, as Da Silva

speaks Portuguese.[1] This visit occurred approximately two weeks to a month after the incident.

Ward identified documents confirming Da Silva was sent on a delivery in Pennsylvania on February 8, 2010, and that the delivery order had an incorrect street address.

Following the March 29, 2011 order dismissing Da Silva's motion for medical and temporary benefits, on May 5, 2011, he filed an emergent motion with the Judge of Compensation to reopen the record to take additional testimony. At the May 10, 2011 hearing on the motion, the Judge of Compensation refused to enter an order and closed the record, noting that Da Silva's time for appeal would soon expire. On May 12, 2011, Da Silva filed a notice of appeal along with a notice of motion to remand to the Division for further testimony. We denied Da Silva's motion on July 6, 2011.

II.

In a written opinion, the Judge of Compensation made comprehensive findings of fact, credibility determinations, and conclusions of law. While the Judge of Compensation found both Ward and Dr. Rodrigues to be credible, she found Da Silva not to

[1] Da Silva's testimony was taken with the benefit of an interpreter.

be credible and found his injury incongruent with the timeline of events.

The Judge of Compensation noted that while Da Silva was unsure of the date of injury, he was adamant he had been injured on the trip to Pennsylvania. The Judge of Compensation found that the documentary evidence of the delivery to Pennsylvania showed, and "the Petitioner agreed that they showed[,] he was sent to the Pennsylvania delivery on February 8, 2010." Yet, the Judge of Compensation found "Dr. Rodrigues' records clearly show Petitioner's first treatment for his injuries was on February 5, 2010." She concluded that "while it could be possible that the Petitioner was mistaken about the date he went to Pennsylvania and was injured, it is clear that he was in fact there on February 8, 2010, three days after he first reported for treatment." The Judge of Compensation also did not find it likely Da Silva would have been able to drive back and continue working without seeking medical attention had he suffered the degree of injury claimed. "Da Silva's credibility was also undermined by his testimony that he had 'never' had any treatment for his back." His medical records indicated five visits and an x-ray in 2005 for back treatment.

A.

On appeal, Da Silva first argues that the case should be remanded for further testimony to establish he was injured in the course of employment. As a basis for this argument, he contends that he possesses newly discovered evidence concerning an FBI agent who would have testified as a fact witness had the Judge of Compensation granted his motion to reopen the record. In denying the request, the Judge of Compensation stated that Da Silva "would like the court to consider that [Da Silva] was cooperating with a federal agency in an investigation . . . and did not testify as to that cooperation during his hearing." The court, however, refused to rule on the motion, holding that

> based on the timing of [the motion], the court does not have enough time to subpoena any other witnesses in or allow for a briefing by the parties and were [it] to do that, the time that [Da Silva] could file his appeal would expire; and we do not want to deprive [Da Silva] of his appellate rights.

Following the hearing, the Judge of Compensation denied Da Silva's motion, and we subsequently denied his emergent application for a remand to obtain additional testimony.

"To obtain relief from a judgment based on newly discovered evidence, the party seeking relief must demonstrate '[1] that the evidence would probably have changed the result, [2] that it was unobtainable by the exercise of due diligence for use at the

trial, and [3] that the evidence was not merely cumulative.'" DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 264 (2009) (quoting Quick Chek Food Stores v. Twp. of Springfield, 83 N.J. 438, 445 (1980)). The party seeking relief must satisfy all three requirements. Ibid. Further, "newly discovered evidence does not include an attempt to remedy a belated realization of the inaccuracy of an adversary's proofs." Ibid. (citing Posta v. Chung-Loy, 306 N.J. Super. 182, 206 (App. Div. 1997), certif. denied, 154 N.J. 609 (1998)).

Da Silva has not asserted any proffer, speculative or otherwise, satisfying any of the criteria required for a remand based on newly discovered evidence. Da Silva's refusal to call certain witnesses or testify himself as to certain facts he knew at the time of trial does not amount to "newly discovered evidence" warranting remand.

B.

Da Silva further argues that he sustained a compensable injury during the course of his employment despite the discrepancy regarding the date of the incident indicated in the record. He asserts that the Judge of Compensation erred in not viewing the testimony as a whole, and that there is "insufficient credible evidence present in the record to support the court's findings."

We exercise a "limited" review of the decision, and a judge of compensation's "findings are binding when based . . . on 'sufficient credible evidence in the record.'" Cooper v. Barnickel Enters., Inc., 411 N.J. Super. 343, 348 n.4 (App. Div.) (quoting Sager v. O.A. Peterson Constr., Co., 182 N.J. 156, 164 (2004)), certif. denied, 201 N.J. 443 (2010). We also give "'due regard to the compensation judge's expertise and ability to evaluate witness credibility.'" Lindquist v. City of Jersey City Fire Dep't, 175 N.J. 244, 277 (2003) (quoting Magaw v. Middletown Bd. of Educ., 323 N.J. Super. 1, 15 (App. Div.) (internal citation omitted), certif. denied, 162 N.J. 485 (1999)). "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.'" Id. at 262 (quoting Perez v. Monmouth Cable Vision, 278 N.J. Super. 275, 282 (App. Div. 1994), certif. denied, 140 N.J. 277 (1995)). Although considered experts in their field, a judge of compensation's "findings . . . must be supported by articulated reasons grounded in the evidence." Lewicki v. N.J. Art Foundry, 88 N.J. 75, 89-90 (1981).

We especially defer to those factual findings dependent on the judge's credibility determinations. Ramos v. M & F Fashions, Inc., 154 N.J. 583, 594-95 (1998); see also State v. Locurto, 157 N.J. 463, 474 (1999) (credibility determinations are "often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record"). Where the record contains sufficient credible evidence, 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, supra, 182 N.J. at 164.

Under this deferential standard of review, we see no basis to disturb the Judge of Compensation's findings and conclusions. The Judge of Compensation's factual determination that the injury did not arise out of and in the course of Da Silva's employment with Best is fully supported by the record.

Affirmed.