SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3524-20

GREGORY VAN SCIVER,

Petitioner-Respondent,

v.

JERSEY MECHANICAL CONTRACTORS, INC.,

Respondent-Appellant.

Argued September 28, 2022 – Decided November 15, 2022

Before Judges Messano, Gilson, and Gummer.

On appeal from the Division of Workers' Compensation, Department of Labor and Workforce Development, Claim Petition No. 2020-26678.

Susan Stryker argued the cause for appellant (Bressler, Amery & Ross, attorneys; Susan Stryker, of counsel and on the briefs).

Adam M. Kotlar argued the cause for respondent (Kotlar, Hernandez & Cohen LLC, attorneys; Adam M. Kotlar, on the brief).

PER CURIAM

Petitioner Gregory Van Sciver was severely injured when a tank filled with acetylene gas exploded in his car. Following a trial, a workers' compensation judge found that the accident arose out of and in the course of petitioner's employment and his injuries were compensable under the Workers' Compensation Act (the WC Act), N.J.S.A. 34:15-1 to -147.

Petitioner's employer, Jersey Mechanical Contractors, Inc. (the Employer or Jersey Mechanical), appeals from the order awarding petitioner workers' compensation benefits. Because there is substantial credible evidence supporting the compensation judge's finding that petitioner was on a special mission for his Employer when the accident occurred, we affirm.

I.

We summarize the material facts from the record, including the parties' stipulated facts and the facts found by the compensation judge after he had heard the testimony and considered the evidence presented at the trial.

Jersey Mechanical is a family-owned business with its main facility in Farmingdale, New Jersey. It provides mechanical contracting services at various jobsite locations primarily in New Jersey.

Robert J. Butler started the business in 1986 and his son, Robert C. Butler (Butler), now oversees the business's daily operations. Butler's sister, Krista

Dietrich, serves as the controller and office manager, and Butler's nephew, Greg Dietrich (Dietrich), is a project manager and estimator. Dietrich is also considered the number two person in charge of the operations of Jersey Mechanical.

Petitioner began working for Jersey Mechanical in October 2019. He is a member of a union, and the union had a collective bargaining agreement (the Union Agreement) with Jersey Mechanical. In September 2020, petitioner was a second-year apprentice pipe fitter and truck driver. He did not have a formal job description; instead, he was assigned various tasks.

Petitioner's normal working hours were from 7:00 a.m. to 3:30 p.m. Typically, petitioner would meet with Butler at Jersey Mechanical's main facility at the beginning of a workday and Butler would provide petitioner with a list of tasks to be completed that day. Those tasks usually included using a Jersey Mechanical truck to make deliveries to the company's jobsites. Petitioner often delivered tanks of acetylene gas (B-Tanks), which were used to solder pipes.

On September 29, 2020, Butler directed petitioner to perform several tasks, which included exchanging two empty B-Tanks for full ones at a store

that serviced B-Tanks; delivering one full B-Tank to a jobsite in Livingston; and delivering paychecks to Jersey Mechanical employees at five jobsites.

One of the jobsites where petitioner delivered paychecks that day was in Bordentown. When petitioner arrived at that jobsite, he met with David Catavan, who was the jobsite's foreman. Catavan asked if petitioner was delivering a full B-Tank. Petitioner informed Catavan that he had not been instructed to deliver a B-Tank to the Bordentown jobsite, and Catavan responded that he would communicate with Butler about receiving a B-Tank. At trial, Catavan explained that he was expecting petitioner to deliver a B-Tank on September 29, 2020, because he had sent a request to Butler the day before.

At the end of the workday on September 29, 2020, petitioner returned to Jersey Mechanical's facility in Farmingdale and dropped off the company's work truck. Acting on his own initiative, petitioner then loaded a full B-Tank into the hatchback of his personal vehicle with the intent of delivering it to the Bordentown jobsite. Petitioner lived in Mt. Laurel, and his drive to and from work took him by Bordentown. The compensation judge found that petitioner's sole purpose in putting the B-Tank in his car was to deliver the tank to the Bordentown jobsite. The compensation judge also found that petitioner did not

deliver the B-Tank to the Bordentown job site on his way home that day because it was too late, and no one would have been at the jobsite.

The next morning, on September 30, 2020, petitioner left home in his personal vehicle to drive to work. Although the B-Tank was still in petitioner's car, he forgot about the tank and drove by Bordentown without making the delivery. After passing Bordentown, petitioner received a text from Dietrich requesting that petitioner pick him up and take him to work. Dietrich lived near to Jersey Mechanical's main facility in Farmingdale, but he was unable to drive because he had injured his Achilles tendon.

After petitioner told Dietrich he would pick him up, he heard a "hissing sound" in his vehicle. Petitioner then recalled that the B-Tank was in the hatchback of his vehicle. Accordingly, he stopped on the side of the road, opened all the windows, got out of his car, and went to the rear of his vehicle. As petitioner opened the hatch of his vehicle, the B-Tank exploded. That explosion caused serious and severe injuries to petitioner. Following the explosion, he was rushed to a trauma hospital where he underwent multiple surgeries and extensive medical treatment. Petitioner was in a coma for eight days, he suffered traumatic brain injuries, and he lost the use of one of his eyes.

In October 2020, petitioner filed a workers' compensation claim. Petitioner also filed a motion for medical and temporary benefits. Jersey Mechanical objected to the claim and asserted that petitioner's injuries did not arise out of and in the course of his employment. In early 2021, a compensation judge conducted a trial on petitioner's claim. The parties submitted a list of stipulated facts, and three witnesses testified: petitioner, Butler, and Catavan.

At trial, it was undisputed that no one at Jersey Mechanical asked or directed petitioner to deliver the B-Tank to the Bordentown jobsite in his personal vehicle. Testimony and evidence also established that petitioner had been told not to use his personal vehicle for company business, and the Union Agreement prohibited the use of personal vehicles for company business. Petitioner also had received training on handling B-Tanks and had been told that B-Tanks should not be stored in confined spaces.

After hearing the testimony and considering the evidence presented, the compensation judge made findings of facts and conclusions of law. The judge found that (1) petitioner put the B-Tank in his personal vehicle with the intent to deliver the tank to the Bordentown jobsite; (2) petitioner's motive was to complete the delivery of the B-Tank for his Employer; (3) the B-Tank "was a workplace instrumentality of" the Employer; (4) petitioner's work

responsibilities often required him to be away from Jersey Mechanical's main facility in Farmingdale; (5) before the accident, Dietrich had asked petitioner to pick him up and take him to work and petitioner was in route to make that pickup when the accident occurred; and (6) petitioner had an "objectively reasonable basis in fact for believing that . . . he was in essence 'compelled' to say yes to picking up" Dietrich because Dietrich held a high-level position at Jersey Mechanical.

Based on those factual findings, the compensation judge concluded that petitioner had been engaged in work-related duties when the accident occurred, and he was entitled to workers' compensation benefits. In addition, the compensation judge found that petitioner was entitled to workers' compensation benefits under the special-mission exception to the going-and-coming rule. In that regard, the compensation judge recognized two grounds for finding a special mission. First, the compensation judge determined that petitioner had "embarked upon a special mission of delivering the B-Tank to Bordentown and that mission had not ended" before the accident. Second, the compensation judge found that petitioner was engaged in a special mission for Jersey Mechanical when he was driving to pick up Dietrich.

II.

On appeal, Jersey Mechanical argues that the legal determinations made by the compensation judge are not supported by the facts. In that regard, Jersey Mechanical argues (1) petitioner's injuries did not arise out of and in the course of his employment; (2) petitioner was not injured while engaged in a special mission for Jersey Mechanical; and (3) petitioner's injuries were not compensable under the WC Act. We hold that substantial credible evidence supports the compensation judge's finding that petitioner was on a special mission for Jersey Mechanical when he was in route to pick up Dietrich. Accordingly, we discern no reversible error in the compensation judge's legal determination that petitioner was entitled to workers' compensation benefits. Given that determination, we need not and do not address whether petitioner was on a special mission to deliver the B-Tank.

A. Our Standard of Review.

Our standard of review of a workers' compensation determination made after an evidentiary hearing is limited. Lapsley v. Township of Sparta, 249 N.J. 427, 434 (2022). Accordingly, we examine "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)). "A judge of compensation's factual findings are entitled to substantial deference." Bellino v. Verizon Wireless, 435 N.J. Super. 85, 94 (App. Div. 2014) (citing Ramos v. M & F Fashions, Inc., 154 N.J. 583, 594 (1998)). "We may not substitute our own fact finding for that of the [j]udge of [c]ompensation . . . ." Ibid. (alterations in original) (quoting Lombardo v. Revlon, Inc., 328 N.J. Super. 484, 488 (App. Div. 2000)). In contrast, we review legal determinations de novo. Hersh v. County of Morris, 217 N.J. 236, 243 (2014). Ultimately, if an "appellate court finds sufficient credible evidence in the record to support the agency's conclusions, that court must uphold those findings, even if the court believes that it would have reached a different result." Sager v. O.A. Peterson Constr., Co., 182 N.J. 156, 164 (2004).

B. The WC Act.

The WC Act "is humane social legislation designed to place the cost of work-connected injury on the employer who may readily provide for it as an operating expense." Livingstone v. Abraham & Straus, Inc., 111 N.J. 89, 94-95 (1988) (quoting Hornyak v. Great Atl. & Pac. Tea Co., 63 N.J. 99, 101 (1973)).

The "provisions of the [WC] Act have always been construed and applied in light of this broad remedial objective." Id. at 95; see also Sager, 182 N.J. at 169 (noting that the WC Act should be "liberally construed 'in order that its beneficent purposes may be accomplished'" (quoting Torres v. Trenton Times Newspaper, 64 N.J. 458, 461 (1974))).

Under the WC Act, employers are required to compensate employees for accidental injuries "arising out of and in the course of employment." Jumpp v. City of Ventnor, 177 N.J. 470, 476 (2003) (quoting N.J.S.A. 34:15-7). The WC Act describes employment as

> commenc[ing] when an employee arrives at the employer's place of employment to report for work and . . . terminat[ing] when the employee leaves the employer's place of employment, excluding areas not under the control of the employer; provided, however, when the employee is required by the employer to be away from the employer's place of employment, the employee shall be deemed to be in the course of employment when the employee is engaged in the direct performance of duties assigned or directed by the employer; but the employment of employee paid travel time by an employer for time spent traveling to and from a job site or of any employee who utilizes an employer authorized vehicle shall commence and terminate with the time spent traveling to and from a job site or the authorized operation of a vehicle on business authorized by the employer.
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> [N.J.S.A. 34:15-36.]

An employee's injury arises out of his or her employment if it is "more probable that the injury would not have occurred under the normal circumstances of everyday life outside of the employment . . . ." Coleman v. Cycle Transformer Corp., 105 N.J. 285, 291 (1986). Generally, an injury resulting from risks that are distinctly associated with the employment or from "uncontrollable circumstances" that "happen to befall the employee during the course of his [or her] employment" are compensable. Ibid. (quoting Howard v. Harwood's Restaurant Co., 25 N.J. 72, 84 (1957)). Injuries stemming from an employee's "'personal proclivities or contacts,'" however, are not compensable. Id. at 292 (quoting Howard, 25 N.J. at 85).

An employee's injury occurs "in the course of employment when 'it occurs (a) within the period of the employment[,] and (b) at a place where the employee may reasonably be, and (c) while [the employee] is reasonably fulfilling the duties of the employment, or doing something incidental thereto.'" Stroka v. United Airlines, 364 N.J. Super. 333, 341 (App. Div. 2003) (quoting Crotty v. Driver Harris Co., 49 N.J. Super. 60, 69 (App. Div. 1958)).

Generally, an employee's injury does not occur in the course of employment if it occurs away from the employer's premises or in an area not controlled by the employer. Kristiansen v. Morgan, 153 N.J. 298, 316-17 (1998).

This prohibition, known as the premises rule, replaced the longstanding going-and-coming rule, which precluded employees from recovering for injuries sustained during travel to or from an employee's regular place of work. See Hersh, 217 N.J. at 243-44. There are, however, exceptions to the going-and-coming rule that have been codified in N.J.S.A. 34:15-36. See Livingstone, 111 N.J. at 101 n.4.

One exception is the special-mission exception. Ibid. The special-mission exception to the going-and-coming rule allows compensation for employees that are "required to be away from the conventional place of employment" and are "actually engaged in the direct performance of employment duties." Zelasko v. Refrigerated Food Exp., 128 N.J. 329, 336 (1992); see also Wilkins v. Prudential Ins. & Fin. Servs., 338 N.J. Super. 587, 590-91 (App. Div. 2001); Ehrgott v. Jones, 208 N.J. Super. 393, 398-99 (App. Div. 1986). Accordingly, employees who work away from the employer's premises may be compensated for injuries "occurring in the direct performance of their duties." Jumpp, 177 N.J. at 483; see N.J.S.A. 34:15-36.

Employees may also be entitled to compensation if their employer compels them to participate in an activity, and they are injured during that participation. See Lozano v. Frank DeLuca Constr., 178 N.J. 513, 531-32

(2004). Accordingly, our Supreme Court has explained "that when an employer directs or requires an employee to undertake an activity, 'that compulsion, standing alone, brings an activity that is otherwise unrelated to work within the scope of employment.'" Sager, 182 N.J. at 163 (quoting Lozano, 178 N.J. at 532).

C. Petitioner's Special Mission.

The compensation judge found that petitioner was on a special mission to pick up Dietrich when the accident occurred. Specifically, the judge found that Dietrich requested a ride to work. Dietrich was a senior employee at Jersey Mechanical, the nephew of Butler, and the grandson of the company's founder. Petitioner reasonably believed that the request for a ride was essentially a compulsive directive from a senior employee of his Employer. The judge also found that the explosion occurred while petitioner was in route to pick up Dietrich.

All those facts are supported by substantial credible evidence presented at the workers' compensation trial. Moreover, those facts establish that at the time of the accident that caused petitioner's injuries, he was on a special mission for Jersey Mechanical. See Zelasko, 128 N.J. at 336-37; Wilkins, 338 N.J. Super.

at 590-91; see also Sager, 182 N.J. at 163 (recognizing that compulsion brings an activity within the scope of employment).

Jersey Mechanical argues that there was testimony suggesting that petitioner could have refused to pick up Dietrich and that petitioner's subjective beliefs are insufficient to support the compensation judge's finding that petitioner had an objectively reasonable basis to believe he was compelled to pick up Dietrich. The testimony Jersey Mechanical relies on, however, concerned petitioner's ability to say "no" to other foremen. In that regard, at trial petitioner acknowledged he could say "no" to another foreman's request for something not already on his list of tasks provided by Butler, but that there was usually "no reason to say 'no.'" Petitioner's acknowledgement that he could decline directives from other foremen does not mean that he was at liberty to refuse a directive from Dietrich. More to the point, the compensation judge considered all the testimony and found that petitioner had a reasonable basis to believe that he was compelled to pick up Dietrich. Substantial credible evidence supported that finding, including testimony from Butler who had agreed with petitioner's understanding that he should pick up Dietrich. In that regard, the compulsion need not come from an employee's direct supervisor. Instead,

"indirect pressure on an employee can be as powerful as an explicit order." Lozano, 178 N.J. at 534.

The principal reason that Jersey Mechanical objects to the compensation award is its contention that petitioner was not asked to deliver the B-Tank outside of working hours or in his personal vehicle. Jersey Mechanical contends that petitioner deviated from his job duties by putting the B-Tank in his personal vehicle in violation of his Employer's policies, the Union Agreement, and safety training he had received. Those arguments go to the question of whether petitioner was on a special mission to deliver the B-Tank. As we have already pointed out, we are not affirming the compensation order on that ground.

Nevertheless, the B-Tank's presence in petitioner's personal vehicle is a relevant consideration in examining the special mission to pick up Dietrich. The explosion would not have happened without the B-Tank being in petitioner's personal vehicle. The compensation judge found, however, that petitioner's sole motive in placing the B-Tank in his vehicle was to facilitate a delivery for his Employer. The compensation judge also found that the B-Tank was an instrumentality of the Employer. Consequently, that no one directed petitioner to place the B-Tank in his personal vehicle does not take the accident outside of the special mission to pick up Dietrich. See Ehrgott, 208 N.J. Super. at 398-99

(noting that N.J.S.A. 34:15-36 prescribes just two conditions for the application of the special-mission exception); see also White v. Atl. City Press, 64 N.J. 128, 138 (1973) (noting that a hazardous risk is not beyond the scope of employment "merely because it is heightened by" an employee's "foolhardy," "negligent," or "foolish" actions); Green v. De Furia, 19 N.J. 290, 299-300 (1955) (finding that employee should not be denied compensation despite disobeying his employer's order not to leave the worksite because he did so "in order to fulfill the duties of his employment").

At oral argument before us, and for the first time, Jersey Mechanical contended that petitioner should be precluded from receiving compensation under the WC Act because he had engaged in reckless and unreasonable behavior by placing the B-Tank in his personal vehicle. In support of that position, Jersey Mechanical cited N.J.S.A. 34:15-7, which states that injuries stemming from an employee's willful failure to make use of reasonable and proper personal protective devices will not be covered under the WC Act. Jersey Mechanical also cited to Tomeo v. Thomas Whitesell Construction Co., 176 N.J. 366 (2003), and contended that Tomeo stands for the proposition that employees who recklessly engage in hazardous activity are not covered by the WC Act.

We reject these arguments for two reasons. First, the record does not clearly establish that these arguments were raised before the compensation judge, and we generally decline to consider arguments that are raised for the first time on appeal. See Zamen v. Felton, 219 N.J. 199, 226-27 (2014); Alloco v. Ocean Beach and Bay Club, 456 N.J. Super. 124, 145 (App. Div. 2018).

Second, even if we were to consider these arguments, the facts found by the compensation judge rebut Jersey Mechanical's contentions. Tomeo does not stand for the proposition for which Jersey Mechanical cited it. The issue in Tomeo was whether the alleged conduct of the employer was an intentional wrong that brought an accident outside of the workers' compensation bar and allowed an employee to directly sue the employer. 176 N.J. at 367. In short, Tomeo did not focus on the employee's conduct and was not analyzing whether an employee's reckless or unreasonable conduct precluded compensation.

In addition, the compensation judge effectively rejected any claims that petitioner's action in placing the B-Tank in his personal vehicle was a willful failure to follow safety directions. The compensation judge expressly found that the "limited circumstances" under which petitioner could be precluded from recovering under N.J.S.A. 34:15-7 were not supported by the facts presented at the trial.

D. In summary.

We affirm the compensation order because the finding of a special mission to pick up Dietrich was supported by substantial credible evidence and is consistent with the governing law. Jersey Mechanical's arguments for reversal either address other points or essentially dispute the factual findings made by the compensation judge. We discern no basis to reverse the compensation award based on the arguments raised by Jersey Mechanical.

Affirmed.