39-2-5222

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-794-02T3

THOMAS F. WASIK,

Petitioner-Appellant,

v.

BOROUGH OF BERGENFIELD,

Respondent-Respondent.

Argued November 5, 2003 – Decided DEC 01 2003

Before Judges Pressler and Coleman.

On appeal from the Division of Workers' Compensation, 2001-23999.

Bernard Chazen argued the cause for appellant (Chazen & Chazen, attorneys; Mr. Chazen, of counsel and on the brief).

John J. Feczko argued the cause for respondent.

PER CURIAM

This is a workers' compensation case in which petitioner Thomas F. Wasik seeks benefits for injuries he sustained as the result of an assault upon him by a co-worker. The Judge of Compensation dismissed the petition after trial on the ground that while the assault had taken place on the job, it did not arise out the employment within the intendment of N.J.S.A. 34:15. We reverse and remand for determination of benefits.

Petitioner is a sanitation worker employed by the Borough of Bergenfield. His usual assignment is the collection of garbage. Constantino Christopoulos is a co-worker. The two were ordinarily not assigned to the same truck. Christopoulos is an older man and a long-time employee of the Borough. Petitioner, a younger man, had been working for the Borough for only two years or so at the time of this episode. As established both by the weight of the evidence and the judge's findings, petitioner is a habitual joker, "kidder," larker and something of a clown. On the day in question, petitioner's truck had concluded its route and joined Christopoulos's truck to assist it in the completion of its route. The two crews worked together until Christopoulos punched petitioner in the mouth.

We accept, as supported by the evidence, the judge's finding that the assault took place and his finding as to the events that immediately preceded it. In sum, he found that petitioner had made some insulting comments and gestures to Christopoulos earlier in the day and that just prior to the assault and as its precipitating cause, petitioner, who was behind Christopoulos as they were working, had thrust his pelvis into Christopoulos's back. At that point, Christopoulos turned around and hit petitioner. The judge then concluded that this

confrontation had not arisen out of the employment but was caused by petitioner's personal "proclivities motivated from some part of his personality that I cannot fathom."

We take a different view. Although petitioner points out that the Borough did not raise a so-called horseplay defense, the conduct of petitioner was obvious horseplay or larking. In view of this record, we regard that explanation of his conduct, offensive as it may have been to Christopoulos, as inescapable. Horseplay is addressed by N.J.S.A. 34:15-7.1, which provides in full as follows:

> An accident to an employee causing his injury or death, suffered while engaged in his employment but resulting from horseplay or skylarking on the part of a fellow employee, not instigated or taken part in by the employee who suffers the accident, shall be construed to have arisen out of and in the course of the employment of such employee and shall be compensable under the act hereby supplemented accordingly.

Although the statute expressly provides that an employee suffering an injury as the result of horseplay on the job which he did not instigate is deemed to have sustained a compensable injury, the statute does not interdict compensability when it is the instigator of horseplay who is injured and seeks compensation. As explained by Justice Schettino in McKenzie v. Brixite Mfg. Co., 34 N.J. 1, 8 (1961), the statute was adopted in specific response to judicial decisions excluding the

innocent victim of horseplay or skylarking from compensation benefits and was not intended to exclude other classes of horseplay victims. See also Trotter v. Cty. of Monmouth, 144 N.J. Super. 430, 433-434 (App. Div.), certif. denied, 73 N.J. 42 (1976). The Court in McKenzie thus allowed compensation, as for an accident arising out of the employment, to an employee who had "playfully touched ... [a co-worker] between his buttocks" while the co-worker was working with a hot scraper. The co-worker responded by turning suddenly, raising his arms, striking the petitioner with the scraper, and injuring him. Id. at 3. The Court's reasoning was based in part on the employer's knowledge that these kinds of touchings were common among the employees. Id. at 6.

Later the same year, the Court allowed compensation to a horseplay instigator where the employer, unlike the employer in McKenzie, was not shown to have had prior knowledge of its employee's horseplay propensities. Thus, in Diaz v. Newark Indus. Spraying, Inc., 35 N.J. 588 (1961), the Supreme Court affirmed a decision of the workers' compensation court awarding compensation to an employee who was injured as the result of a co-employee's retaliation to horseplay. The petitioner there had been hosing down a factory floor and sprayed the co-worker twice. The co-worker told him that if he did it again, he would

douse him with water. In response to the third spraying, the co-worker picked up a pail which he believed contained water and threw it at the petitioner. The pail, however, contained paint thinner which ignited, resulting in the petitioner's injury. The Supreme Court, in concluding that the accident was compensable, had this to say:

> We hold that the facts presented here do not encompass the type of "skylarking" which bars recovery and hence the question of acquiescence by the employer is immaterial. Rather the case requires the application of a realistic view of reasonable human reactions to working conditions and associations with people encountered in the course of employment.
>
> The history of judicial interpretation of the statutory words "out of and in the course of" the employment indicates clearly that upon the facts of each case a determination is made of whether the subject accident was "work-connected" or whether the accident was "unrelated" to the employment. In Tocci v. Tessler & Weiss, Inc., 28 N.J. 582 (1959), we noted the emphasis of the liberal view taken by our courts involving the "out of and in the course of" provision beginning with the rule laid down in Bryant v. Fissell, 84 N.J.L. 72 (Sup. Ct. 1913), which stated that an accident arises out of the employment if it results from a risk "reasonably incidental" thereto.
> [Id. at 590]

Elaborating on the theme of a "realistic view of reasonable human reactions" in the workplace, the Supreme Court in Martin v. J. Lichtman & Sons, 42 N.J. 81, 83 (1964), allowed

compensation to a petitioner who was assaulted by a co-worker as the apparent result of the co-worker's idiosyncratic response to a personal question asked him by the petitioner. The court rejected, for compensation purposes, the distinction between "a quarrel whose subject matter is related to the work" and an "assault ... due only to personal animosity," concluding that the assault is compensable provided "the work of the participants brought them together and created the relations and conditions which resulted in the clash ..." (quoting 1 Larson, Workmen's Compensation Law, p. 130 (1952).

We recognize that horseplay compensability is, nevertheless, a fact sensitive determination. In Trotter v. Cty. of Monmouth, supra, 144 N.J. Super. at 434, we considered the factors appropriately informing that determination. Pointing out that this jurisdiction does not absolutely bar compensation to horseplay instigators, we adopted the view expressed by Larson, supra, § 23.20 (1972), namely that recovery depends upon:

> (1) the extent and seriousness of the deviation, (2) the completeness of the deviation (i.e., whether it was commingled with the performance of duty or involved an abandonment of duty), (3) the extent to which the practice of horseplay had become an accepted part of the employment, and (4) the extent to which the nature of the employment may be expected to include some such horseplay.

We are persuaded that application of these factors compels a compensability conclusion here. The "horsing around" by petitioner was neither extensive nor serious and was obviously commingled with the performance of the duty of garbage collection. Horseplay, or at least horseplay by petitioner, was, according to the evidence, not uncommon, and we are satisfied that as a matter of common experience, the "nature of the employment" of garbage truck crews "may be expected to include some horseplay."

We are not dealing here with major "deviations" such as employee-initiated extraneous recreational activities on the job. See, e.g., Sarzillo v. Turner Const. Co., 101 N.J. 114 (1985); Quinones v. P.C. Richard & Son, 310 N.J. Super. 63 (App. Div. 1998). Nor are we dealing with such employment-unrelated deviations as an armed security guard playing one-man "Russian Roulette" on the job. Money v. Coin Depot Corp., 299 N.J. Super. 434 (App. Div.), certif. denied, 151 N.J. 71 (1997). What happened here was both integral and incidental to the conditions of employment and is essentially no different from the cited horseplay cases in which compensation was allowed. In sum, this assault arose out of the employment and is therefore compensable.

The judgment dismissing the claim petition is reversed, and we remand for determination of benefits.