DOWSON v. BOROUGH OF LODI

200 N.J. Super. 116 (1985)

490 A.2d 374

RICHARD DOWSON, PETITIONER-APPELLANT, v. BOROUGH OF LODI, RESPONDENT-RESPONDENT.

Superior Court of New Jersey, Appellate Division.

Decided April 1, 1985.

Raymond R. Pilch, for appellant.

Haskins, Hack, Piro & O'Day, for respondent (Joseph V. Wallace, of counsel and on the brief).

Before Judges MICHELS and BAIME.

PER CURIAM.

Petitioner-employee Richard Dowson appeals from a judgment of the Division of Workers' Compensation in favor of respondent-employer Borough of Lodi dismissing his claim for compensation benefits on the ground that he failed to sustain the burden of proving that the accident and resulting injuries he sustained while playing as a volunteer participant on the volunteer fire department's softball team arose out of and in the course of his employment with respondent. The judge of compensation found that because the volunteer fire company did not compel participation on the softball team, playing on the team was not a regular incident of petitioner's duty as a volunteer fireman and his injuries therefore were non-compensable

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under the 1979 amendment to *N.J.S.A.* 34:15-7 which became effective on January 10, 1980.[1]

We have studied carefully the entire record in light of the arguments presented and are satisfied that the findings and conclusions of the judge of compensation "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 to his expertise." *Bradley v. Henry Townsend Moving & Storage Company,* 78 N.J. 532, 534 (1979). *See also Close v. Kordulak Bros.,* 44 N.J. 589, 598-599 (1965); *DeAngelo v. Alsan Masons Inc.,* 122 N.J.Super. 88, 89-90 (App.Div. 1973), aff'd o.b. 62 N.J. 581 (1973). We find no sound basis or justification for disturbing these findings and conclusions. *See R.* 2:11-3(e)(1)(D) and (E).

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Moreover, the decision reached by the judge was controlled by and consistent with the principles enunciated by this court in *Cotton v. Worthington Corp.,* 192 N.J.Super. 467 (App.Div. 1984), certif. den., 96 N.J. 301 (1984). *Cuna v. Bd. of Fire Com'rs, Avenel,* 42 N.J. 292 (1964), upon which petitioner relied and which, construing *N.J.S.A.* 34:15-43, held compensable an injury sustained by a volunteer fireman while playing on his company's softball team, does not mandate a contrary conclusion.[2] The Supreme Court there held that participation on an unauthorized softball team constituted "public fire duty" for purposes of the statute. However, subsequent amendments to *N.J.S.A.* 34:15-43 and *N.J.S.A.* 34:15-7 substantially limited *Cuna's* applicability to nonwork-related injuries. Immediately following the Supreme Court's opinion in *Cuna* our Legislature adopted an amendment to *N.J.S.A.* 34:15-43 (*L.* 1964, *c.* 257, § 1, eff. Jan. 1, 1965) which eliminated the phrase "of said volunteer firemen or marshals, *either with or without their fire apparatus*" (emphasis supplied) after "or parade" in the statute's second paragraph. The Supreme Court in *Cuna* relied heavily upon the underlined portion of this deleted language to give *N.J.S.A.* 34:15-43 its liberal construction. The Legislature clearly intended its 1964 amendment to narrow the scope of the nonwork-related activities compensable under the statute.

In addition, the Legislature amended *N.J.S.A.* 34:15-7 in 1979 to restrict the availability of workers' compensation benefits for injuries sustained in recreational or social activities. The amendment subjected volunteer firemen to the same additional requirements prerequisite to recovery for injuries sustained in recreational and social activities as those to which other workers are subjected: that the activity be a regular incident of the fireman's duties and that the activities produce a benefit to the employer beyond improvement in employee health and morale.

The 1979 amendment to *N.J.S.A.* 34:15-7 also laid to rest "the mutual benefit doctrine" relied on in part by the Supreme Court to justify its holding in *Cuna.* Indeed, the benefits to the volunteer fire department cited by the Supreme Court in *Cuna* pursuant to the "mutual benefit doctrine" were of precisely the kind presently designated by *N.J.S.A.* 34:15-7 as inapposite for purposes of liability, that is, those related to employee health and welfare.

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Finally, the 1979 amendment to the workers' compensation statute, taken as a whole, confirmed our Legislature's intention to limit recoveries under the statute to work and duty-related injuries. *See* SENATE LABOR, INDUSTRIAL AND PROFESSIONS COMMITTEE, *Joint Statement To Senate Committee Substitute for Senate No. 802 and Assembly Committee Substitute for Assembly No. 840* (November 13, 1979).

The amendments to *N.J.S.A.* 34:15-7 and *N.J.S.A.* 34:15-43 significantly narrowed the scope of compensability for non-work related injuries incurred by volunteer fireman. Of course, *N.J.S.A.* 34:15-43 still includes "participation in any authorized public drill, showing, exhibition, fund-raising activity, or parade" as falling within a volunteer fireman's public duty. However here, at the time of petitioner's injuries, the softball team was not involved in a fund-raising activity nor did the game constitute a "public drill" or "parade" within the plain meaning of those terms.

Accordingly, the judgment under review is affirmed substantially for the reasons expressed by Judge Feeley in his oral opinion of March 28, 1984.

Affirmed.

FootNotes

1. 34:15-7 (L. 1979, c. 283, § 1), in pertinent part, provides:

2. The Supreme Court decided on May 4, 1964. At that time the relevant portions of 34:15-43 stated: