MICHAEL TUMOLO v. COUNTY OF OCEAN ROAD DEPARTMENT

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-2162-11T1

A-2392-11T1

MICHAEL TUMOLO, Petitioner-Respondent,

v.

COUNTY OF OCEAN ROAD DEPARTMENT,

Respondent-Appellant.

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MICHAEL TUMOLO, Petitioner-Appellant,

v.

BOROUGH OF SEASIDE PARK, Respondent-Respondent.

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January 11, 2013

Argued November 7, 2012 - Decided

Before Judges Messano and Lihotz.

On appeal from the Department of Labor and Workforce Development, Division of Workers' Compensation, Nos. 2011-12961 and 2011-13395.

James A. Maggs argued the cause for appellant/respondent Michael Tumolo (Maggs & McDermott, LLC, attorneys; Mr. Maggs and Tennant D. Magee, Sr., on the briefs).

Andrea E. Wyatt argued the cause for appellant County of Ocean Road Department (Gilmore & Monahan, P.A., attorneys; Ms. Wyatt, on the briefs).

Robert D. Budesa argued the cause for respondent Borough of Seaside Park (Berry, Sahradnik, Kotzas & Benson, attorneys; Mr. Budesa, on the brief).

PER CURIAM

These two cases, consolidated on appeal, challenge separate provisions of a December 5, 2011 order entered following a hearing to review claims for workers' compensation benefits. The workers' compensation judge (WCJ) awarded petitioner-employee Michael Tumolo medical and temporary benefits paid by respondent-employer the Ocean County Road Department (Department), but denied Tumolo's petition for benefits payable by the Borough of Seaside Park (Seaside), where he served as Fire Chief.

The Department appealed the order, Docket No. A-2162-11, challenging the WCJ's finding that Tumolo was on a "special-mission" and not commuting to work at the time he sustained injury in the April 5, 2011 automobile accident. The Department maintains it has no obligation to provide workers' compensation benefits, as the facts show Tumolo was commuting to work when injured in the accident.

In the related case, Docket No. A-2392-11, Tumolo challenges the dismissal of his petition for benefits sought from Seaside, arguing the WCJ erred in concluding he was not eligible for benefits. Tumolo states at the time of the accident, he was driving a vehicle owned and insured by Seaside, wore his firefighter's pager, and "on call," making him available to Seaside to respond to a fire emergency.

Following our review, we reverse that portion of the December 5, 2011 order awarding Tumolo benefits for his injuries to be paid by the Department. We affirm the provisions of the December 5, 2011 order dismissing Tumolo's petition for benefits from Seaside.

I.

Tumolo is a heavy equipment operator employed by the Department, which operates approximately six garages throughout Ocean County (the County) to perform road repairs and renovation projects undertaken by the County. Several Department garages store equipment and vehicles used by Department employees. Each Department employee must report to his or her assigned supervisor at a designated garage every morning at 7 a.m. to receive an assignment to a County project assigned to the Department, on an as-needed basis. Employees must take Department vehicles to each job site and return them to the Department's garages at the end of each day.

Tumolo began his employment with the Department as a laborer in June 2005. Over the next two years, he reported to his supervisor, Glen Harrington at the Miller Air Park garage. As part of a pipe crew, Tumolo reported every day and was sent to a project in the County performing storm water maintenance. He received a written memorandum, transferring him to the Toms River garage for approximately one year. The pipe crew

was disbanded and, by written memorandum he was instructed to report to supervisor Rich Emery at the Jackson garage, effective December 11, 2008, at 7 a.m.

Tumolo never received a written memo reassigning him to another location and specifically acknowledged he had not received similar written instructions to report to Ocean County College (OCC). Further, he acknowledged he "never worked for the college."

Tumolo testified in 2009, Emery directed him to operate heavy equipment like dump trucks, backhoes, and loaders, to clear roughly fifty acres to build an addition, parking lots and retention basins at OCC. Tumolo testified he was "told to go out [to OCC] every day, unless otherwise told to do so." Over a period of two years, Tumolo drove directly from his home in Seaside to OCC, except on days when it was snowing, raining too hard, if the Department was shorthanded, or when demands of other projects took priority. Emery was replaced by Deborah Sloan in early 2011.

Frank Runza, the general supervisor responsible for overseeing supervisors and special projects, including the OCC project, confirmed Tumolo was assigned to the Jackson garage and worked at OCC on an as-needed basis when the weather was not inclement. Runza and Steve Childers, superintendent of the Department, stated the Department policy required all workers to drive to their assigned garage, park their vehicle, and drive a Department vehicle to the assigned work site. Runza asserted in 2009, Tumolo reported to the Jackson garage the "majority" of the year. The OCC project began in September 2009, halted in December 2009, and then began again in March or April 2010. Runza explained the scope of the project required he use as many available workers from the Department. He also admitted Tumolo could have coordinated with Emery as his immediate supervisor, to drive directly to the OCC work site; however, he understood this arrangement did not begin until 2011, when he asked Tumolo to arrive at the OCC site to start up the equipment prior to the crew's arrival. Sloan confirmed Tumolo began driving directly to OCC in 2011.

In January 2011, Tumolo also became Seaside's Fire Chief. In that position, when a fire emergency occurred he would receive a message on his Motorola pager and respond to the location to immediately marshal necessary fire resources to resolve the emergency. As Chief, Seaside provided Tumolo a 1996 Chevy Tahoe truck designated as the "chief's truck[.]" Tumolo would drive the chief's truck when he was in the area and able to respond to a fire emergency. If Tumolo was paged while working for the Department, he requested and was given permission to leave by his supervisor. Tumolo was charged vacation time when he left his job site to respond to a fire emergency.

The evening before the accident, Runza instructed Tumolo there was a problem and he was to report to his supervisor at the Jackson garage until the problem was resolved. The "problem" was identified in an April 1, 2011 email sent by Sloan to Runza at 2:09 p.m. Sloan wrote:

It has come to my attention that Mike Tumolo is taking his own/assistant fire vehicle to the college instead of going to the TR garage . . . and riding in a county vehicle and also

leaving when everyone does but doesn't go to the garage. I know you take you [sic] special treatment to people who are firemen or Masons but it's [sic] not fair for everyone else. Also, since Dean & Tommy were in Jackson today[,] I expected Mike [Tumolo] to be there. I'm sure if he was [sic] at the college he would have had . . . a boat or chest waders.

Sloan was recalled as a witness to explain the email's contents because the document was not provided until after she had completed her initial testimony. She explained it had rained heavily on April 1 and two other Jackson employees, who had been assigned to the OCC project, returned to the garage in the afternoon when the work was halted because it was too wet and muddy, but Tumolo did not return. Sloan emailed Runza when she discovered this discrepancy. Runza did not receive the email until April 4, 2011, at which time he told Tumolo to report to his supervisor at the Jackson garage the following day and called Sloan confirming he relayed the instructions.

Sloan was also asked about her comments suggesting Tumolo received preferential treatment. She stated Runza "takes care of guys that are firemen and, as they say it, have a ring, which is the Masonic ring." Sloan was never able to address the issues with Tumolo because of the accident.

On April 5, 2011, Tumolo was driving to the Jackson garage operating the chief's truck. At approximately 6:30 a.m., while traveling north on Whitesville Road, Tumolo's truck was struck head-on by an on-coming vehicle, which had crossed the center line. Tumolo was extracted from the wreck, hospitalized for significant injuries, and later underwent surgery to repair his shattered femur. He returned to work on December 5, 2011.

In his limited statement of reasons, the WCJ credited Tumolo's testimony and found Sloan "ha[d] not been forthright" and had been "spurious" in reporting "a problem" with Tumolo's work performance. In discussing Sloan's credibility, the WCJ further determined her comments exhibited biases, as "[f]or one to castigate volunteer firemen or Masons, as did Miss Sloan, the court finds that to be in rather poor taste." The WCJ concluded Tumolo "was on an errand outside the scope of his regular duty[,]" found to be a heavy equipment operator who "regularly worked at the county college." Citing only Mannes v. Healey, 306 N.J. Super. 351, 358 (App. Div. 1997) -- which is not a workers' compensation case, but a vicarious liability action analyzing liability of an employer for an employee's negligent act based upon agency and, therefore, distinguishable from this matter -- the WCJ determined Tumolo "was required to be away from the [OCC] work site, which was his usual work site" and "[t]he direct performance of his duties appeared to be happening at the [OCC] work site." The WCJ concluded Tumolo was engaged in conduct that fell outside the going and coming rule, entitling him to medical and temporary benefits paid by the Department.

Regarding the claim for benefits paid by Seaside, the WCJ rejected Tumolo's assertion that he was carrying his firemen's pager and was prepared to respond to any fire emergency. The WCJ found Tumolo had not established he was involved "in any activity that could be construed as a public fire duty" as there was no "connection between the operation of the motor vehicle on Whitesville Road on the date in question" and his position with Seaside, as the WCJ found Tumolo was solely responding to "a special request" at the Jackson garage and was then expected to return to the OCC worksite. Accordingly, the operation of the chief's truck could not be construed "as being within the purview of his volunteer firemen's status[.]" The case against Seaside was dismissed with prejudice. These appeals followed.

II.

A.

Our review of a determination made during a workers' compensation hearing is limited. We do not "engage in an independent assessment of the evidence as if it were the court of first instance." State v. Locurto, 157 N.J. 463, 471 (1999). Rather, we determine only

"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 and, in the case of agency review, with due regard also to the agency's expertise where such expertise is a pertinent factor."

[Sager v. O.A. Peterson Constr., Co., 182 N.J. 156, 164 (2004) (quoting Close v. Kordulak Bros., 44 N.J. 589, 599 (1965) (citation and internal quotation marks omitted)).]

Accordingly, in reviewing an agency decision, if we find sufficient credible evidence in the record to support the conclusions, we must uphold the findings. In re Taylor, 158 N.J. 644, 657 (1999) (citing Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 588 (1988). On the other hand, erroneous findings which are unsupported by the evidence must be reversed. Ibid.

Also, due regard is given to a WCJ's expertise, when applicable. Sager, supra, 182 N.J. at 164 (citations omitted). This court is not bound by the WCJ's interpretation of a statute or any determination of a legal issue. Div. of Consumer Affairs v. Gen. Elec. Co., 244 N.J. Super. 349, 353 (App. Div. 1990).

B.

"[T]he workers' compensation system has been carefully constructed by our Legislature in a manner that serves to protect the rights of injured employees to receive prompt

treatment and compensation." Stancil v. ACE USA, 211 N.J. 276, 277 (2012). The Workers' Compensation Act, N.J.S.A. 34:15-1 to -142 (the Act), provides a consensual system of compensation paid by employers to employees injured by accidents "arising out of and in the course of . . . employment[.]" N.J.S.A. 34:15-1. See also Cruz v. Cent. Jersey Landscaping, Inc., 195 N.J. 33, 42 (2008) (discussing Act's purposes). More specifically, the Act, as amended in 1979, states:

When employer and employee shall by agreement . . . accept the provisions of this article[,] compensation for personal injuries to . . . such employee by accident arising out of and in the course of employment shall be made by the employer without regard to the negligence of the employer, according to the schedule contained in [the] sections . . . of this Title[.]

[N.J.S.A. 34:15-7.]

Initially the Act did not contain a definition of employment. Plodzien v. Twp. of Edison Police Dep't, 228 N.J. Super. 129, 131 (App. Div.), certif. denied, 113 N.J. 655 (1988). This was remedied by the 1979 amendment, which included "employment" as a term of art specifically defined in N.J.S.A. 34:15-36. The statute states, in part:

Employment shall be deemed to commence when an employee arrives at the employer's place of employment to report for work and shall terminate 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.

[N.J.S.A. 34:15-36.]

By adopting this new definition of employment, the Legislature distinguished between compensable and non-compensable accidents. The 1979 amendment recognized employment encompassed periods while at the employer's place of business and circumstances when injuries were sustained when the employer specifically required the employee to be off-premises to perform an assigned duty, but "'sharply curtailed'" compensation for off-premises accidents. Zelasko v. Refrigerated Food Exp., 128 N.J. 329, 335 (1992) (quoting Alfred J. Napier, Impact of the Reform Act of 1980, 96 N.J. Lawyer 17, 18 (Summer 1981)).

The rationale supporting what is commonly known as the "going and coming" rule, "which ordinarily precluded benefits for injuries sustained during routine travel to and from an employee's regular place of work[,]" Jumpp v. City of Ventnor, 177 N.J. 470, 478 (2003) (internal quotation marks and citations omitted), is employment is

suspended from the time the employee leaves the workplace until he or she returns. See also, Livingstone v. Abraham & Straus, Inc., 111 N.J. 89, 96 (1988) (concluding injuries sustained by an employee prior to arrival at the employer's premises, or after the employee had departed from the premises at the conclusion of a scheduled work period, were not compensable under the Act).

Two exceptions to the going and coming rule have been identified by the courts:

A "special-mission" exception allows compensation at any time for employees

1. required to be away from the conventional place of employment;

2. if actually engaged in the direct performance of employment duties.

A "travel-time" exception allows portal-to-portal coverage for employees

1. paid for travel time to and from a distant job site, or

2. using an employer-authorized vehicle for travel time to and from a distant job site.

[Zelasko, supra, 128 N.J. at 336.]

Importantly, when "interpreting . . . statutory exception[s, courts] must keep in mind the overriding purpose of N.J.S.A. 34:15-36: 'to impose upon off-site accidents a more restrictive standard of compensability.'" Carberry v. State, Div. of State Police, 279 N.J. Super. 114, 120 (App. Div.) (quoting Ehrgott v. Jones, 208 N.J. Super. 393, 397 (App. Div. 1986)), certif. denied, 141 N.J. 94 (1995).

Tumolo's arguments are directed solely to the applicability of the "special-mission" exception, as found by the WCJ, obviating a need to detail the travel time exception. We will expand our discussion of the "special-mission" below, when reviewing the Department's arguments on appeal.

Another specific exception to the going and coming rule found in the statute was crafted by the Legislature and relates to public safety personnel. Plodzien, supra, 228 N.J. Super. at 134. The statute provides, "[t]ravel by a policeman, fireman, or a member of a first aid or rescue squad, in responding to and returning from an emergency, shall be deemed to be in the course of employment." N.J.S.A. 34:15-36.

III.

A.

In its appeal (A-2162-11), the Department argues the WCJ erred in concluding Tumolo's injuries arose within the course of his employment, as defined by N.J.S.A. 39:15-36. The Department maintains, at the time of the accident, Tumolo was not on a special-mission at the direction of the Department, but was merely commuting to his place of employment. We agree.

Various court decisions have considered the parameters of the "special-mission" exception. In Livingstone, supra, 111 N.J. at 97, the Court defined the exception as follows: "when an employee departed from his routine travel to and from work 'in order to do something for and at the direction of the employer,' he was in the course of his employment during the side trip." Ibid. (quoting O'Brien v. First Camden Nat. Bank & Trust Co., 37 N.J. 158, 163 (1962)).

As noted by the Court in Zelasko, the prior decisional authority from this court addressing the "special-mission" exception, found to be "exemplified" by the facts in Ehrgott, supra, 208 N.J. Super. at 393, and Nemchick v. Thatcher Glass Manufacturing Co., 203 N.J. Super. 137 (App. Div. 1985), included circumstances where "employment required the employee to be away from the conventional place of business, and because the travel was an indispensable part of the performance of the job duty, it was required as part of that mission." Zelasko, supra, 128 N.J. at 336-37.

In Nemchick, supra, this court noted the "special-mission" exception deems an employee to be acting within the course of employment when he or she

having identifiable time and space limits on his [or her] employment, makes an off-premises journey . . . [if] the trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself.

[203 N.J. Super. at 141 (quoting 1 Arthur Larson, Workmen's Compensation Law 16.10 at 4-123 (1984)).]

Finally, in Jumpp, supra, the Court examined a city worker's request for workers' compensation benefits for an injury suffered during the workday when he stopped at the post office to pick up his mail, in the course of traveling between designated work stations. Id. at 473. The Court surveyed the development of the law before and after the 1979 amendment to N.J.S.A. 34:15-36. Id. at 476-482. Following this analysis, the court held:

[W]hen an employee is assigned to work at locations away from "the employer's place of employment," eligibility for workers' compensation benefits generally should be based on a finding that the employee is performing his or her prescribed job duties at the time of the injury. Case law subsequent to the 1979 amendments has recognized the legislative intent to focus on the performance of the work, thereby limiting the reach of the workers' compensation statute.

. . . .

Employees who are where they are supposed to be, doing what they are supposed to be doing, are within the course of employment whether on- or off-premises, except when they are commuting.

[Id. at 482-83 (emphasis added).]

Our survey of authorities is not intended to be an exhaustive list of all cases examining the special-mission exception. Moreover, the cases cited do not clear an unmistakable path when resolving the question. Rather, we have chosen to discuss these cases because they present established concepts that we believe reveal the methodology guiding an analysis of whether an injury occurred when employment required the "employee to be away from the conventional place of business, and because the travel was an indispensable part of the performance of the job duty[,]" and thus, was not commuting. Zelasko, supra, 128 N.J. at 337.

In our review of this matter, we accept the WCJ's determination that Tumolo was "a most credible witness." Nevertheless, the entirety of the record discloses additional uncontroverted facts, seemingly overlooked by the WCJ, which, when considered, undercut the legal conclusion that Tumolo was on a special-mission.

Tumolo asserted that for much of the two years preceding the accident, he traveled directly from his home to OCC, rather than the Jackson garage where he was assigned. Prior to this arrangement, from 2005 through 2009, he followed the Department's established policy of reporting to his assigned supervisor at an assigned garage in accordance with his written instructions. Further, Tumolo admitted in this period, he did not always go to OCC, particularly during severe rain storms, during the winter snow season, when Jackson was shorthanded, when he was reassigned to address another emergency, or when he was otherwise directed by his supervisor to perform a different task, and had worked at "all different locations." He explained he "was told to go out [to OCC] everyday, unless otherwise told to do [something else]."

Department policy matched each employee with a supervisor and a Department garage. The garage supervisor was authorized to assign employees assigned to the garage to a Department project for the County. Although Runza was the OCC project supervisor in 2011, Tumolo's assigned Department supervisor at the Jackson garage was Emery and later Sloan.

The breadth of the OCC project required approximately 200 Department employees to complete the work. Childers testified all Department supervisors were requested to allow any employees not needed elsewhere to be assigned to work on the OCC project. Emery generally assigned Tumolo to the OCC project and Sloan continued that assignment after she became his supervisor.

Also clear from all witnesses is an employee's supervisor could "make other arrangements" with an employee, which changed the Department policy of reporting to the garage. Runza and Sloan concurred that in 2011 Tumolo was permitted to drive directly from his home to OCC to start the equipment prior to the work crew's arrival.

This redirection of assignment was the exception to the established Department policy, not the other way around, as found by the WCJ. Permitting Tumolo to drive directly to the OCC project site to start the equipment deviated from Department policy but was at the employer's direction and was designed to assist the employer. The testimony of all witnesses including Tumolo showed reporting to the Jackson garage was Tumolo's "conventional" place of employment in accordance with standard Department procedure.

On April 4, 2011, when Runza told Tumolo to report to Sloan at Jackson the following day, Runza was directing him to follow the standard procedure; he was not imposing a special-mission. Runza's testimony stated Tumolo would be working back at Jackson, unless he was directed by Sloan to return to OCC. Further, Sloan's April 1, 2011 email identified her observation Tumolo was not adhering to the Department policy mandating a Department employee must report from home to the garage and then drive to a project-site in a Department vehicle. Further, she believed he had failed to return to Jackson when heavy rain halted the OCC project prior to the end of the April 1, 2011 workday.

The WCJ's conclusion that Tumolo was not commuting because his regular place of employment was OCC is error. The fact that Tumolo had worked extensively on the OCC project over a two-year period or that he held an expectation of returning to OCC after meeting with Sloan does not change Tumolo's conventional place of employment. The Department did not own or operate OCC; Tumolo admitted he never worked for OCC; and OCC was a Department job site not a Department facility.

Tumolo was not on a special-mission when he traveled to Jackson. He was driving in order to commence work at his usual 7 a.m. start time at the garage designated as his "place of employment[.]" N.J.S.A. 34:15-36. He may have thereafter been directed to return to the Department's OCC project, but this possibility or even probability does not alter the fact he was commuting when the accident occurred. He was not "required by the employer to be away from the employer's place of employment" nor was he "engaged in the direct performance of duties assigned or directed by the employer[.]" N.J.S.A. 34:15-36. See also Nemchick, supra, 203 N.J. Super. at 141 (holding petitioner was on a special-mission when injured returning from a distant worksite, where he was directed to report after he completed his workday at his regular worksite).

Tumolo's morning drive to the Jackson garage, like the morning drives of all other Department employees assigned to work under Sloan's supervision at Jackson, did not present a special-mission. The present case clearly falls outside the bright line definition of employment because Tumolo had not arrived "at the employer's place of employment to report for work[.]" N.J.S.A. 34:15-36.

We also reject as unfounded the WCJ's characterization of the content of Sloan's email. Sloan identified her concern Tumolo was receiving favored treatment by Runza because the two shared connections as fire chiefs and Masons. Perhaps she could have more artfully expressed her concerns rather that utilizing sarcasm. However, her

words challenge Runza's perceived nepotism; they do not disparage either identified group.

Following our review of the arguments presented on appeal, in light of the record and applicable law, we reverse the provision of the December 5, 2011 order entered by the WCJ, requiring the Department to pay medical and temporary benefits to Tumolo.

B.

The second appeal (A-2392-11), filed by Tumolo, challenges the dismissal of his petition for medical and temporary benefits against Seaside. Tumolo argues he was within the line of duty at the time of the accident pursuant to N.J.S.A. 34:15-43, making his injuries compensable. We disagree.

N.J.S.A. 34:15-43 provides workers' compensation benefits to "each and every member of a volunteer fire company doing public fire duty . . . who may be injured in line of duty[.]" As used in this section, "doing public fire duty" and "who may be injured in line of duty" include

participation in any authorized construction, installation, alteration, maintenance or repair work upon the premises, apparatus or other equipment owned or used by the fire company . . ., participation in any State, county, municipal or regional search and rescue task force or team, participation in any authorized public drill, showing, exhibition, fund raising activity or parade, and to include also the rendering of assistance in case of fire and, when authorized, in connection with other events affecting the public health or safety, in any political subdivision or territory of another state of the United States or on property ceded to the federal government while such assistance is being rendered and while going to and returning from the place in which it is rendered. [Ibid.]

Review makes clear Tumolo's conduct -- driving to his place of full-time employment, even though operating the chief's truck, armed with his pager and ready to respond to a fire emergency if called -- does not fit within the statutory provisions of either "doing public fire duty" or "injured in the line of duty." Despite an "indulgent application of the law[,]" Muller v. Island Heights Volunteer Fire Co., 93 N.J. Super. 311, 314 (App. Div. 1967), Tumolo was not performing, in any cognizable way, duties related to his position as Fire Chief of Seaside.

We also reject Tumolo's contention Seaside received a substantial benefit because he drove to his Department employment using the chief's truck, as it enabled his quick response to a fire emergency, if necessary. See R. 2:11-3(e)(1)(E) (providing for affirmance without a written opinion on issues found to lack merit). As noted by the WCJ, there was no connection between his performance as a firefighter and driving the chief's truck when he suffered injuries in the accident. We have no basis to alter this determination of the WCJ.

Reversed in part and affirmed in part