SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2506-22

BJOURN AVERY,

Petitioner-Appellant,

v.

NEXT MILE, LLC/DSP,

Respondent-Respondent.

Argued April 9, 2024 – Decided May 23, 2024

Before Judges Haas and Puglisi.

On appeal from the Division of Workers' Compensation, Department of Labor and Workforce Development, Claim Petition No. 2020-31237.

Pablo N. Blanco argued the cause for appellant (The Blanco Firm, LLC, attorneys; Pablo N. Blanco, on the brief).

Brian Peter Berkoff argued the cause for respondent (Capehart & Scatchard, PA, attorneys; Ashley Theresa Mollenthiel and Brian Peter Berkoff, on the brief).

PER CURIAM

Petitioner Bjourn Avery appeals from the April 11, 2023 order of the Division of Workers' Compensation dismissing his petition for benefits based on lack of compensability. We affirm.

On consent of the parties, petitioner's case was bifurcated and tried first on the issues of whether the accident had taken place during the course of employment and had arisen out of the course of employment. The following was adduced during the hearing before Senior Judge of Workers' Compensation Robert D. Thuring.

Petitioner was employed as a delivery driver by respondent Next Mile, LLC, a subcontractor for Amazon. He was required to report to work in a parking lot, where he would receive delivery assignments from a dispatcher, who typically wore "Amazon clothing." On August 27, 2020, petitioner arrived at work approximately one hour before his shift was scheduled to begin. Upon arriving, he sat on the rear bumper of a delivery truck in the parking lot, waiting for the dispatcher.

Between fifteen and thirty minutes later, petitioner looked up and saw an individual wearing a mask and an Amazon vest standing in front of him. Petitioner did not recognize the individual. From about two arms' lengths away, the individual pointed a gun at petitioner and shot him, then fled the scene. The

individual did not take anything from petitioner and did not harm any of the other employees in the parking lot.

After petitioner was discharged from the hospital, he went to Massachusetts because he was "scared for his life." When he returned to New Jersey for two days in December 2020, petitioner was followed by two unknown individuals wearing ski masks while he was grocery shopping. He believed these individuals were trying to kill him and as a result, fled to Florida "because he feared for his life."

A week or two prior to the shooting, petitioner argued over the phone with a former co-worker, CJ Blocker, about money petitioner owed him for purchasing credit cards. Following the argument, petitioner and Blocker exchanged text messages. At the time of the shooting, petitioner still owed Blocker $80 to $100 for the credit cards. Petitioner and Blocker did not have any issues with one another while both were employed by respondent.

Judge Thuring found petitioner's credibility to be "suspect at best" because of "several inconsistencies" in his version of events and his "overall body language . . . observed during his testimony." After hearing from petitioner, Judge Thuring found it unnecessary for respondent to present its case. Based on petitioner's testimony, the judge found that although the accident had taken place

during the course of petitioner's employment, it did not arise out of his employment:

> Petitioner testified that he had no issues with [Blocker] while they were both working for [r]espondent and the purchase of the credit card from [Blocker] had nothing to do with the [p]etitioner's employment with [r]espondent. Furthermore, the shooting appears to have been a targeted act and was just as likely to have occurred outside the workplace. I find that it is more likely than not that the shooting was related to the credit card purchase from [Blocker]. Even if the shooting was unrelated to [Blocker], the record is still void of any evidence connecting the incident to the [p]etitioner's employment with the [r]espondent.

Therefore, the judge dismissed petitioner's claim with prejudice for lack of compensability. This appeal followed.

We begin our analysis with the applicable standard of review. With respect to workers' compensation cases, "[c]ourts generally give 'substantial deference' to administrative determinations." Lindquist v. City of Jersey City Fire Dep't,175 N.J. 244, 262 (2003) (quoting Earl v. Johnson & Johnson, 158 N.J. 155, 161 (1999)). "[T]he scope of appellate review is limited to '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.'" Id. at 262 (quoting Close v. Kordulak Bros., 44 N.J. 589, 599 (1965) (internal quotation marks omitted)).

Deference must be given to 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.'" Ibid. (quoting Perez v. Monmouth Cable Vision, 278 N.J. Super. 275, 282 (App. Div. 1994) (internal quotations omitted)).

With regard to petitioner's claim, N.J.S.A. 34:15-1 provides in relevant part:

> When personal injury is caused to an employee by accident arising out of and in the course of his employment, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause, he shall receive compensation therefor[e] from his employer, provided the employee was himself not willfully negligent at the time of receiving such injury.

Our Supreme Court in Ramos v. M & F Fashions, Inc., held "[t]he premises rule distinguishes between an accident that occurred on the employer's premises and one that did not." 154 N.J. 583, 591 (1998); see N.J.S.A. 34:15-36.

> The words "out of" relate to the origin or cause of the accident; the words "in the course of," to time, place and circumstances under which the accident takes place. The former words relate to the character of the

> accident, while the latter words relate to the circumstances under which the accident takes place.
>
> [Coleman v. Cycle Transformer Corp., 105 N.J. 285, 289 (1986).]

"The requirement that a compensable accident arise out of the employment looks to a causal connection between the employment and the injury." Id. at 290 (quoting Howard v. Harwood's Rest. Co., 25 N.J. 72, 83 (1957)). We apply a "but for" or a "positional-risk" test to decide "whether it is more probably true than not that the injury would have occurred during the time and place of employment rather than elsewhere." Id. at 290-91 (quoting Howard, 25 N.J. at 84).

New Jersey recognizes three categories of risks that a court must consider. Id. at 291. First, risks that are "distinctly associated with . . . employment," such as "industrial injury" like machines at work causing an injury. Ibid. Second, "neutral risks" are "uncontrollable circumstances and 'do not originate in the employment environment' but rather 'happen to befall the employee during the course of his employment.'" Ibid. Lastly, risks that are "personal" to the employee, which "do not bear a sufficient causative relationship to the employment to permit courts to say that they arise out of that employment." Id. at 292. The first two risks are compensable, the third is not. Ibid.

Under the "but-for" test, workplace assaults are compensable if they are "not motivated by personal vengeance stemming from contact with the employee outside of the employment . . . [or] from a purely private relationship entered into by them during the course of their employment." Martin v. J. Lichtman & Sons, 42 N.J. 81, 84 (1964).

When an assault on an employee is purely the product of a personal relationship against him by the "assailant" . . . and the assailant is not a "fellow-employee, and there is no more connection between the assault and the employment than that it occurs while the employee is at work, recovery is not allowed." Pittel v. Rubin Bros. Bergen, Inc., 59 N.J. Super. 531, 536 (1960). If an attack is just as likely to have occurred outside the workplace, the incident is not compensable. Marky v. Dee Rose Furniture Co., 241 N.J. Super. 207, 212 (App. Div. 1990).

On appeal, petitioner claims the judge committed error by incorrectly placing the burden of proof on petitioner to demonstrate the workplace incident was not the result of personal risk. We disagree. Although an employer is liable to an employee for disabling injuries sustained "by accident arising out of and in the course of employment," N.J.S.A. 34:15-7, a petitioner for workers' compensation benefits has "the burden of proof to establish all elements of [the]

case," Bird v. Somerset Hills Country Club, 309 N.J. Super. 517, 521 (App. Div. 1998). Nothing about the nature of this case would cause the burden to shift to respondent.

The cases cited to by petitioner, Spindler v. Universal Chain Corp., 11 N.J. 34 (1952), Verge v. Cnty. of Morris, 272 N.J. Super. 118, 128 (App. Div. 1994), and Shaudys v. IMO Industries, Inc., 285 N.J. Super. 407 (App. Div. 1995) all contain the same fact pattern: in each of those cases, the petitioner claimed a knee injury arose out of and in the course of employment. Although the injury was sustained in the course of employment, the employer disputed whether it arose in the course of employment and instead alleged the injury was caused by an idiopathic event other than the workplace incident: disease, physical seizure, prior injury or some other preexisting condition.

In the context of those cases, the disputed issue was the medical or physical cause of the injury; and "[w]here it is claimed the accident was the result of the physical condition of the employee, 'the burden of proof is on the employer to show such cause.'" Spindler, 11 N.J. at 38 (quoting Atchison v. Colgate & Co., 3 N.J. Misc. 451 (Sup. Ct. 1925)). That holding is inapplicable to this case, where the physical cause of the injury is not in dispute. Contrary to petitioner's contention, there is no precedent for burden-shifting to determine

whether an assault was caused by personal risk, as was the issue here, and the judge did not err in deciding the case based on petitioner's testimony.

We recognize petitioner stated he did not know the identity of his assailant and Blocker's name was first raised by respondent on cross-examination. However, the identity of the assailant is not the determinative factor here because the judge found that even if the shooting were not related to petitioner's alleged debt to Blocker, the record was devoid of "any evidence whatsoever causally relating the shooting to . . . [p]etitioner's employment with [r]espondent." In addition to issues of credibility with petitioner's testimony, the judge's findings were supported by facts in the record: petitioner was singled out and shot in a parking lot where several other individuals were also present, the incident was not theft-related and no one else was approached or injured. Given those facts, the judge found the shooting "was just as likely to have occurred outside the workplace." Because nothing about the judge's decision was inconsistent with the evidence or offensive to the interest of justice, we discern no basis to disturb his well-reasoned conclusion.

Affirmed.