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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3927-14T2

ANTONIO DIAZ,

Petitioner-Respondent,

v.

NATIONAL RETAIL
TRANSPORTATION, INC.,¹

Respondent-Appellant.

Submitted September 27, 2016 – Decided November 9, 2016

Before Judges Fasciale and Gilson.

On appeal from New Jersey Department of Labor
and Workforce Development, Division of
Workers' Compensation, Claim Petition No.
2014-20563.

Foster & Mazzie, L.L.C., attorneys for
appellant (Carl Mazzie, of counsel and on the
brief).

Law Office of Paul Grosso, attorneys for
respondent (Clark M. Sarkisian, on the brief).

PER CURIAM

¹ National Retail Transportation, Inc. is incorrectly named as "National Transportation Retailers" in the captions of the briefs and transcripts.

Petitioner Antonio Diaz was injured, while at work, when he attempted to move a heavy lift that fell over on him. His employer, National Retail Transportation (National) asserted the statutory defense of intoxication. N.J.S.A. 34:15-7. National appeals from an April 16, 2015 order dismissing its defense of intoxication and awarding petitioner workers' compensation benefits. We affirm because there was substantial credible evidence supporting the compensation judge's finding that intoxication was not the sole cause of the work-related accident.

Petitioner worked for National for fourteen years as a mechanic. On January 28, 2014, petitioner was injured when he attempted to move a heavy metal lift that fell over on him. The lift, which is also referred to as a jack, weighed several hundred pounds and had the capacity to lift seven tons. The lift stood vertical and had two tires that could be used to tilt and move the lift.

Petitioner filed a claim for workers' compensation, seeking medical and temporary disability benefits. He contended that the lift fell because it had a flat tire. National, however, denied benefits and asserted the defense of intoxication, arguing that petitioner's intoxication was the proximate cause of the accident. The compensation court conducted a three-day hearing, taking testimony from petitioner, petitioner's wife, and two defense

experts: Dr. Gary Lage, a toxicologist; and Walter Wysowaty, a forensic civil engineer.

Petitioner testified that the lift fell over when the lift "tilted to one side at the same moment" that he was pulling the lift and that the lift then "fell over" on him. Petitioner also testified that after the lift fell on him, he noted that one of the tires on the lift was flat. He then introduced three photographs of the lift that showed that one of the lift's tires was deflated. Indeed, National conceded that a tire on the lift was deflated.

Petitioner admitted that before going to work on January 28, 2014, he drank at least two eight-ounce glasses consisting of half whiskey and half ice and water. Dr. Lage, respondent's toxicologist, testified that, based on the blood sample drawn from petitioner after the accident, petitioner had a blood alcohol level of at least .173 percent. Dr. Lage then opined that petitioner was intoxicated and impaired at the time of the accident.

Walter Wysowaty, respondent's forensic engineering expert, testified "a flat tire didn't contribute in any way to this accident." On cross-examination, however, Wysowaty acknowledged that a flat tire on the lift could have caused the lift to tilt to one side or the other. Thus, if someone was pulling the lift

backwards, the lift could tilt to one side. Moreover, Wysowaty also testified that if someone pulled the lift backwards and it had a flat tire, the lift could fall backwards "cockeyed."

[Petitioner's Counsel]. Okay. If someone is pulling the [lift] backwards and it has a flat tire, is it possible for the [lift] to fall backwards?

[Wysowaty]. Yes.

. . . .

[Petitioner's Counsel]. If someone is pulling a [lift] backwards and it has a flat tire, would it initially tilt to one side or the other rather than go backwards?

[Wysowaty]. It would tilt a very small amount. Only the one inch that the equipment is off the ground.

. . . .

THE COURT: You got a flat tire. It is not operating as designed. How does that not throw off the stability of that machine when you tilt it back?

[Wysowaty]: Because it's tilting to a side, not -- it's tilting perpendicular to the force that you are using to tilt it back. If, for example --

THE COURT: Instead of coming back like this, it's coming back cockeyed.

[Wysowaty]: It's coming back slightly cockeyed, yes.

At the end of the hearing, petitioner moved to dismiss National's defense of intoxication. The compensation judge

directed the parties to brief the issue, heard oral argument, and granted petitioner's motion. The compensation judge explained the reasons for his decision on the record on April 16, 2015. Initially, the compensation judge accepted National's contention that petitioner was intoxicated at the time of the accident. The compensation judge, however, found that National had not proven that petitioner's intoxication was the sole proximate cause of the accident. In that regard, the judge rejected the testimony and opinion of National's forensic engineering expert as "not credible." Instead, the compensation judge found petitioner's testimony concerning how the accident happened to be credible. Specifically, the compensation judge found petitioner's "description of the accident itself was very credible." Thus, the compensation judge entered an order on April 16, 2015, striking National's defense of intoxication and granting petitioner's medical and temporary disability benefits.

On appeal, National argues that the greater weight of the evidence established that petitioner's injury was produced solely by his intoxication. We disagree because there was substantial credible evidence that the flat tire may have also caused the lift to fall and, therefore, intoxication was not established to be the sole cause of the accident.

The Workers' Compensation Act, N.J.S.A. 34:15-1 to -128, requires employers to compensate employees for accidental injuries "arising out of and in the course of [their] employment" N.J.S.A. 34:15-1. Because the Act is a remedial statute, our Supreme Court has interpreted the Act broadly to achieve the goal of "affording coverage to as many workers as possible." Brower v. ICT Group, 164 N.J. 367, 373 (2000) (citation omitted). "Generally, the injured employee is entitled to recover workers' compensation benefits regardless of fault." Tlumac v. High Bridge Stone, 187 N.J. 567, 572 (2006).

The Act, however, prohibits recovery of benefits in limited circumstances. Thus, the Act provides that when intoxication "is the natural and proximate cause of injury or death[,]" benefits will not be provided. N.J.S.A. 34:15-7. Courts have interpreted the defense of intoxication to mean that the employee's intoxication must "be the sole cause" of the accident. Tlumac, supra, 187 N.J. at 572 (quoting White v. Atl. City Press, 64 N.J. 128, 137 n.1 (1973)). In reaffirming this rule in 2006, our Supreme Court explained:

[W]e conclude that the Legislature intended workers' compensation benefits to be denied only if intoxication was the sole cause of an employee's work-related injuries. Consequently, unless the employer shows by a preponderance of the evidence that the employee's work-related injuries were caused solely by intoxication, the employee is

entitled to recover workers' compensation benefits.

That interpretation is in keeping with the remedial purpose of the Workers' Compensation Act – to make benefits readily and broadly available to injured workers through a non-complicated process.

[Tlumac, supra, 187 N.J. at 573 (citations omitted).]²

Our role in reviewing a workers' compensation decision is limited to examining "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)). We give such fact finding "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 will only disturb the compensation judge's decision if it is "manifestly unsupported by or inconsistent with competent[,] relevant and reasonably credible evidence as to

² We note that there are pending bills both in the Assembly and the Senate that would respond to Tlumac, and amend the Act so that intoxication need not be the sole cause of the accident. To date, however, those bills have not advanced beyond being introduced. See Gen. Assemb. 1172, 217th Leg., Reg. Sess. (N.J. 2016); see also S. 1550, 217th Leg., Reg. Sess. (N.J. 2016).

offend the interests of justice." Lindquist, supra, 175 N.J. at 262 (quoting Perez v. Monmouth Cable Vision, 278 N.J. Super. 275, 282 (App. Div. 1994), certif. denied, 140 N.J. 277 (1995)).

Here, there was sufficient evidence for the compensation judge to find that the flat tire may have also contributed to the accident. The compensation judge expressly found petitioner's description of the accident credible. Petitioner testified that as he went to move the lift, it tilted, and fell over on him. Petitioner also introduced evidence that the lift had a flat tire at the time of the accident. While respondent's expert testified that the flat tire could not have caused the accident, the compensation judge rejected that testimony and found it incredible. Without testimony eliminating the flat tire as a cause of the accident, National did not carry its burden to prove by a preponderance of the evidence that petitioner's intoxication was the sole cause of the accident.³

National argues that the compensation judge used the wrong burden of proof. In that regard, National contends that although

³ The compensation judge initially described his decision as a summary judgment decision on petitioner's motion to dismiss the intoxication defense. The decision, however, was made after a hearing during which testimony was taken and exhibits were introduced. Critically, the compensation judge made fact findings and credibility findings. Thus, the proceedings were not in the nature of a summary judgment proceeding. Instead, they were in the nature of a contested workers' compensation hearing where both sides had the full opportunity to present evidence.

the compensation judge referred to the preponderance of evidence burden, the judge effectively used a beyond a reasonable doubt burden. Having reviewed the transcript of the judge's decision, we find no support for that argument and, therefore, reject it.

National also argues that the compensation judge erred by not accepting the opinion of the toxicologist. The compensation judge, however, accepted that testimony and found that petitioner was intoxicated at the time of the accident. The compensation judge also correctly noted that the toxicologist did not offer an opinion excluding other causes of the accident beyond the intoxication of the petitioner. Accordingly, we find no error in how the compensation judge evaluated the testimony of the toxicologist.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION