A-4553-T3

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APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4553-90T3

FILED
APPELLATE DIVISION
MAY 6 1992
Clerk

JOHN MEUSE,

Petitioner-Respondent,

v.

EGG HARBOR TOWNSHIP
POLICE DEPARTMENT,

Respondent-Appellant.

Argued March 31, 1992 - Decided MAY 6 1992

Before Judges Antell and Thomas.

On appeal from a decision of the Division of Workers' Compensation.

Alfred H. Katzman argued the cause for appellant (Horn, Goldberg, Gorny, Daniels, Paarz, Plackter & Weiss, attorneys; Mr. Katzman on the brief).

D. William Subin argued the cause for respondent (Subin & Isman, attorneys; Philip G. George on the brief).

PER CURIAM

Employer, Egg Harbor Township Police Department, appeals from a workers' compensation award of temporary and medical benefits, contending that the employee, recipient of the award, failed to prove an injury arising out of and in the course of his employment. We agree this was not a compensable injury and reverse.

Employee, a police officer on desk duty at the time,

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sustained a knee injury while walking down a stairway at his place of employment. The employee described the event as follows:

> I was coming down the stairwell, hand on the railing, ... and as I approached the landing to turn onto the next flight of steps down, I'm not really sure if I planted my foot wrong or landed wrong on my leg, however, It [sic] buckled out.
>
> ....
>
> My left knee, sir, buckled to the outside. I was holding onto the railing so I never fell all the way down.

As a result, the employee suffered an osteochondritis dissecans of the left knee. This is an inflammation of the bone and cartilage resulting in the splitting of pieces of cartilage into the knee joint.

Employee's doctor was asked, "So it was his descending the flight of stairs that was the cause of the condition which you went on to diagnose and treat as far as you could; is that right?" The doctor answered: "It was the cause of the symptoms of the condition. And in my opinion, what occurred at that time was that the fragments of the osteochondritis dissecans became separated."

Employee did not fall entirely to the floor so there was no outward blow to the knee. At issue is whether his employment was a contributing cause of his injury, i.e., was the event reasonably incident to his employment.

The workers' compensation judge held it was saying:

(1) Petitioner suffered a compensable

accident.

(2) "arising out of" and "in the course of his employment" for the Respondent,

(3) on August 21, 1989,

(4) while descending stairs at his place of employment,

(5) in the normal performance of his duties for the Respondent.

(6) No evidence whatever by either party even suggests that the accident and injury could more probably have occurred under the normal circumstances of every day life outside of Petitioner's employment, the record being completely silent on Petitioner's home circumstances regarding stairs, or of his everyday activities regarding stairs.

The court went on to say:

> In the case before us of Officer Meuse, his regular employment duties required that he descend the stairs from the dispatcher's office to the sergeant's desk at his duty station, and that he thereafter enter and exit his [patrol] car repeatedly on duty, all during his paid duty time, all of which caused his latent and previously undiscovered osteochondritis dissecans of his knee to fracture and render him incapacitated for all regular duties.
>
> Here, the work was at very least a major contributing cause of the injury, and that risk of occurrence was "reasonably incidental" to employment. It is clearly more probably that the injury would not have occurred under normal circumstances of every day life outside of employment, especially since no testimony whatever was elicited of Petitioner's personal life, contrasted with his police duties during which the accident occurred.

These findings are defective in two respects. First, the activity of entering and exiting the patrol car is neither

described nor referred to anywhere as being causative of employee's injury. Secondly, it is employee's burden to establish he has a compensable injury. See Perez v. Pantasote, Inc., 95 N.J. 105, 118 (1984); Celeste v. Progressive Silk Finishing Co., 72 N.J. Super. 125, 142 (App. Div. 1962); Harbatuk v. S & S Furniture Systems Insulation, 211 N.J. Super. 614, 620 (App. Div. 1986).

We recognize that the intent of the Legislature is that the, "Workmen's Compensation Act is remedial social legislation and should be given liberal construction in order that its beneficent purposes may be accomplished." Torres v. Trenton Times Newspaper, 64 N.J. 458, 461 (1974).

We also recognize that the New Jersey Legislature has tightened our compensation laws in order to provide benefits for those who truly deserve them. Thus, we saw the extensive amendments to the workers' compensation statute that became effective January 10, 1980.

Our Workmen's Compensation Act N.J.S.A. 34:15-7 provides in part:

> "...compensation for personal injuries to ... employee[s] 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..."

Traditionally, the approach to analyzing the critical phrase "arising out of and in the course of employment" has been to separate the phrase into its two parts. Following this course, "arising out of" refers to the cause of the injury and "in the

course of employment" refers to the time, place and circumstance of the accident. See Rafferty v. Dairymen's League Co-op. Ass'n, Inc., 16 N.J. Misc. 363 (Dep't Labor 1938):

> The words "out of" relate to the origin or cause of the accident; the words "in the course of," to the 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. An accident comes within the latter words if it occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during the time to do that thing. The accident, in order to arise "out of" the employment, must be of such nature the risk of which might have been contemplated by a reasonable person when entering the employment, as incidental to it. A risk is incidental to the employment when it belongs to or is connected with what a workman has to do in fulfilling his contract of service.

Id. at 366.

In determining if a worker's injury qualifies for compensation benefits, the "in the course of" half of the critical phrase does not usually present a problem and does not here because it is undisputed the employee's injuries were sustained during working hours on the employer's premises.

The more difficult question is whether the injury "arose out of" the employment. In order to do that, "It must be established that the work was at least a contributing cause of the injury and that the risk of the occurrence was reasonably incident to the employment." Coleman v. Cycle Transformer Corp., 105 N.J. 285, 290 (1986). This means that it must be determined "whether it is

more probably true than not that the injury would have occurred during the time and place of employment rather than elsewhere." Howard v. Harwood's Restaurant Co., 25 N.J. 72, 83 (1957). In other words, if the injury could have happened anywhere in the pursuit of one's everyday activities, it is not work connected.

In determining if the injury is work connected, New Jersey recognizes three categories of risk. The first type of risk is one which is "distinctly associated" with the work place and is usually easily identifiable. Catching one's hand in a punch press is an example. The second type of risk is called "neutral". This is an injury occurring during work at the work place but which is not caused by an event arising out of the work itself. An example of this risk is demonstrated in Gargiulo v. Gargiulo, 13 N.J. 8 (1953) where an employee, while at work on his employer's premises, was struck by an arrow fired by a boy off the premises who was aiming at a tree near where the employee was working. Recovery was allowed on the theory that, but for being at work, he would not have been hit. The third type of risk is one which is "personal" to the employee. "Risks falling within this classification do not bear a sufficient causative relationship to the employment to permit courts to say that they arise out of that employment." Coleman v. Cycle Transformer Corp., supra, 105 N.J. at 292. In Coleman, the employee burned herself while attempting to light a cigarette at work. In denying her claim, the court discussed how this last, very difficult category, is applied. In doing so, it reviewed our cases

involving idiopathic falls, i.e. falls resulting from the employee's physical condition rather than a condition of the work place. A typical example of an idiopathic fall is one which results from an epileptic seizure.

What we determine from this discussion is that if an idiopathic fall results in an injury because of a condition or risk at work, then recovery will be allowed. Awards for such idiopathically related injuries were allowed in George v. Great Eastern Food Products, Inc. 44 N.J. 44 (1965), where petitioner fell because of a cardiovascular condition but fractured his skull on the concrete floor of the workplace, and in Reynolds v. Passaic Valley Sewerage Comm'rs, 130 N.J.L. 437 (Sup. Ct. 1943), aff'd, o.b., 131 N.J.L. 327 (E. & A. 1944), where an epileptic seizure caused a fall resulting in contact with a hot stove. In the present case, the employee sustained an idiopathic injury. No condition of the workplace caused the employee's knee to buckle in the first instance. Following the buckling, the employee did not fall so no secondary injury caused by impact with some instrumentality of the workplace occurred. It was merely coincidence that the knee buckled at work. It could have happened at any time at any place. Based upon the record before us there is not the, "slightest suggestion that it is more probable that the accident would not have occurred under the normal circumstances of everyday life outside of the employment, or that if it had occurred at, say, petitioner's home ... the resultant injury would somehow have been less severe." Coleman

v. Cycle Transformer Corp., supra, 105 N.J. at 295.

Accordingly, the decision of the Workers' Compensation Court is reversed.