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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3320-20**

DUANE SYKES,

Petitioner-Appellant,

v.

**GEORGE HARMS
CONSTRUCTION
COMPANY INC.,**

Respondent-Respondent.

Argued December 14, 2022 – Decided September 28, 2023

Before Judges Accurso and Natali.

On appeal from the Division of Workers'
Compensation, Department of Labor and Workforce
Development, Claim Petition No. 2019-15211.

Michael R. Hobbie argued the cause for appellant
(Hobbie, Corrigan & DeCarlo, PC, attorneys; Michael
R. Hobbie and Erin E. Mullen, of counsel and on the
briefs).

Rajiv D. Parikh argued the cause for respondent
(Genova Burns LLC, and Hoagland, Longo, Moran,
Dunst & Doukas, LLP, attorneys; Rajiv D. Parikh,

Kathleen Barnett Einhorn, of counsel and on the briefs; Michele G. Haas and Jalessa L. Almonacy, of counsel; Maria R. Frucci and Harrison C. Clewell, on the brief).

The opinion of the court was delivered by
ACCURSO, P.J.A.D.

Petitioner, Duane Sykes, appeals from the New Jersey Division of Workers' Compensation's July 14, 2021 order, following a testimonial hearing, denying him medical and temporary benefits for injuries allegedly suffered in the course of his employment for respondent, George Harms Construction Company Inc. Petitioner contends the court made factual findings unsupported by the record, misapplied controlling caselaw, reached a conclusion contrary to the legislative intent of The Workers' Compensation Act, N.J.S.A. 34:15-1 to -147, and failed to protect him from respondent's bad faith. We disagree and affirm, largely for the reasons expressed in Judge Robertson's comprehensive opinion delivered from the bench on June 30, 2021.

The testimony established that petitioner Sykes was forty-eight years old, and a twenty-eight-year employee of George Harms, when he lost consciousness at work on April 30, 2019. Sykes was operating a 56,000-pound excavator on a bridge construction project in Manahawkin. The excavator and a dump truck were on the shoulder of Route 72, parallel to the

active travel lanes and separated from them by a line of Jersey barriers. Sykes was removing precut asphalt from the shoulder and depositing it in a dump truck. He testified he would bang on a precut piece with the bucket of the excavator to break it off and then go under the piece to pull it up. Once the asphalt was in the bucket, he'd swivel the cab around without moving the tracks of the excavator and dump the asphalt in the truck.

Sykes testified he'd been at his task for about two hours, when a piece of asphalt he was clawing up "broke loose," causing the excavator to "pop[] backwards" and "the front part" to "lift[] up," causing his body to move backwards within the cab. He testified the next thing he remembered was speaking with a doctor several hours later. Sykes believes he hit his head on something in the cab and lost consciousness. He has a history of seizures, the last having occurred about a month before the accident.

Sykes brought his motion seeking an MRI of his cervical and lumbar spine and right shoulder as recommended by the two doctors who'd performed his need for treatment exams. He testified he'd never had back or shoulder pain before the accident. After the accident he suffered headaches and experienced "a lot of pain" in his shoulder back and neck. Sykes testified he

was "[s]till in pain" at the time of the hearing, more than a year-and-a-half after the accident. He has not worked since.

Sykes was teamed with a dump truck driver on the day of the accident. The driver testified he was responsible for watching the excavator through his side mirror for hand signals from the operator that the truck needed to be moved forward or back to assist the operator in loading the asphalt. According to the driver, he watched as Sykes scooped a bucketload of asphalt, swung the arm of the excavator over the dump truck and paused. Then he heard the tracks of the excavator and watched it start to pivot sideways and move toward the travel lanes. The excavator pushed a Jersey barrier about two to three feet into the travel lane abutting the shoulder, pulling the barriers connected on either side with it, and dropped a two-foot by three-foot piece of asphalt onto the roadway before coming to a stop.

The driver testified he immediately radioed another worker to check on Sykes and hopped over the barrier to waive off traffic. According to the driver, the excavator had operated smoothly until the incident. He hadn't seen it "shake, . . . rise up, or bounce," while Sykes was pulling up the asphalt and loading it into the truck. The driver testified the only time he saw the tracks come off the ground was when they climbed three or four inches up the Jersey

barrier when the excavator turned toward the roadway and pushed the barrier into the travel lane.

The worker sent to check on Sykes found him "passed out." He testified Sykes was "sitting upright" in the upholstered operator's chair as he normally would, except that his head was hanging down toward his chest. According to the worker, Sykes' forearms were on the armrests and his hands on the joysticks. He was not visibly injured. The worker engaged the safety lever deactivating the controls and climbed up into the cab to turn off the machine. As he reached across Sykes to get to the key, Sykes awoke briefly and made as if to take a swing at him before passing out again. The other workers who testified described Sykes similarly.

The foreman testified that when he reached Sykes, he was unresponsive, but eventually said he was alright and complied with the foreman's request to hand over the keys. According to the foreman, shortly after Sykes gave him the keys, Sykes started to try to operate the excavator and "figure out where his keys went." The foreman testified Sykes "was not acting normal, for sure," but climbed out of the excavator without assistance and did not complain of any pain as he walked about, bending over to pick up asphalt pieces until told to sit down and relax. The foreman also testified that after Sykes got out of

the excavator, the foreman got in and used the excavator to pull the piece of asphalt, estimated to weigh about 1,200 pounds, out of the road and slide the Jersey barriers back into place.

The CEO of George Harms testified about the excavator. Describing the interior of the cab, he testified the operator's chair included a headrest, and that there was at least a foot of space between the headrest and the rear cab window and approximately eighteen inches between the chair and the windows on either side. The CEO explained the tracks of the excavator are each controlled by foot pedals, and that during the incident Sykes' foot must have activated one of the pedals, causing the excavator to pivot into the Jersey barrier.

After hearing the testimony and reviewing the documents entered into evidence, including the doctors' reports, Judge Robertson denied petitioner's motion in a detailed oral opinion. The judge began by acknowledging the liberal construction afforded the Workers' Compensation Act to accomplish its remedial purpose to "alleviate consequences of personal injuries caused by employers." He also explained, however, that "[t]he petitioner . . . carries the burden of proof in determining whether an injury has occurred arising out of and in the course of employment" and the "liberal construction does not . . .

reduce the petitioner's burden . . . nor . . . create factual presumptions in favor of the petitioner."

Reviewing the uncontroverted facts, the judge explained Sykes claimed the excavator "jolt[ed]" when he attempted to lift a piece of asphalt, causing him to "have a feeling of falling backwards" after which he had "no memory." Sykes "surmise[d] . . . his head . . . contacted something in the excavator."

Judge Robertson found, however, that "based on the configuration of the excavator" there was "no opportunity for the petitioner's head . . . to have contacted the back of the cab. . . . because the padded headrest spaced away from the window was in the way."

He explained petitioner "lost his consciousness" and "[b]y all accounts of witnesses" was in a normal position in the seat of the excavator after making contact with the Jersey barrier. The judge found "there was no evidence [petitioner] had moved out of that spot or somehow found a way to contact some part inside the cab."

Judge Robertson thus concluded "neither the tamping of the bucket to break the asphalt nor the contact of the excavator with the Jersey barrier would have created the type of motion needed to create the injury that the petitioner claims that he suffered." The judge rejected Sykes' conjecture that "the jolting

of the excavator and pulling up that piece of material" caused him to strike his head, rendering him unconscious. Relying on the driver's unrefuted testimony that after Sykes had the asphalt in the bucket, he maneuvered the arm of the excavator over the dump truck and paused, the judge found Sykes was apparently conscious "all the way around until the arm of the excavator was over the truck."

Judge Robertson also rejected Sykes' claim that regardless of whether it was a seizure that caused his loss of consciousness, or he struck his head in the excavator, his loss of consciousness occurred in the course of his employment, and thus his back and shoulder injuries are compensable. The judge explained "there is no presumption that once a petitioner goes unconscious, that whatever else he claims happened to him must have happened during the course of the accident." See George v. Great E. Food Prod., Inc., 44 N.J. 44, 48 (1965) (explaining an employee suffering "some idiopathic incident," such as "a convulsion at work," who "simply dies at his desk or machine or falls to the floor and suffers no injury from the impact" is not entitled to compensation).

The judge found none of the cases Sykes relied on, George; Reynolds v. Passaic Valley Sewerage Comm'rs, 130 N.J.L. 437 (Sup. Ct. 1943), aff'd, 131 N.J.L. 327 (1944); Spindler v. Universal Chain Corp., 11 N.J. 34 (1952);

Freedman v. Spicer Mfg. Corp., 97 N.J.L. 325 (1922); and Hall v. Doremus, 114 N.J.L. 47 (Sup. Ct. 1934), supported his claim. Judge Robertson explained "[i]n all of those cases . . . there was no doubt what happened to the petitioner after the loss of consciousness," Reynolds' face got pressed against a burning coal stove, Spindler severely injured her hip when she tripped and fell on a concrete floor, and George, Freedman and Hall all fractured their skulls in a fall, Freedman and Hall after fainting, and George after becoming dizzy. Here, in contrast, the judge found there was no "adequate proof, competent proof, as to what happened" to Sykes' shoulder and back after he lost consciousness.

Judge Robertson concluded there was simply no evidence, direct or circumstantial, that Sykes "suffered the impact that he thinks he did to cause the injury to the shoulder and the back." And, he found, the competent evidence in the record, including witness testimony, the documentary evidence, as well as the circumstantial evidence, specifically the positioning of the excavator and Sykes' position in the cab after it made contact with the Jersey barrier, refuted it.

In concluding Sykes had not carried his burden, Judge Robertson stated the case turned on the credibility of the various accounts of the physical events

that occurred on the day Sykes lost consciousness in the excavator. The judge "accept[ed] as credible the testimony of the employees of Harms Construction" finding "they told the story to the best of their recollection and truthfully," and found Sykes "not to be credible in relaying his version of events," as his testimony was not based on what he saw or heard but only on "theory or conjecture." Finally, the judge found the doctors' reports, which stated Sykes' injuries were causally related to the accident, could not establish causation, as both doctors made clear their conclusions as to causation were premised entirely on the information Sykes provided to them.

"Our review of decisions from the workers' compensation court is decidedly deferential," Ripp v. Cnty. of Hudson, 472 N.J. Super. 600, 606 (App. Div. 2022), based on the "compensation court's expertise and the valuable opportunity it has had in hearing live testimony." Hager v. M&K Constr., 246 N.J. 1, 18 (2021). Thus, "our review of workers' compensation decisions is 'limited to whether the findings made could have been reached on sufficient credible evidence present in the record.'" Ibid. (quoting Hersh v. Cnty. of Morris, 217 N.J. 236, 242 (2014)).

Applying those standards here, Sykes has provided us no reason to disturb the judge's careful findings and thorough explanation of his reasons for

rejecting the arguments Sykes has reprised on this appeal. There is substantial credible evidence in the record to support the judge's factual findings, and his understanding of the law is no different from ours. Further, our review of the record convinces us the only new argument, that the compensation judge "failed to protect" him from the bad faith conduct of the respondent, is utterly without merit. See R. 2:11-3(e)(1)(E).

We affirm the compensation court's July 14, 2021 order, essentially for the reasons expressed in Judge Robertson's thorough and thoughtful opinion from the bench on June 30, 2021.

Affirmed.

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


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