

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

RHODE ISLAND HOSPITAL

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VS.

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W.C.C. 00-01317

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CLOTILDE SOUSA

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DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the appeal of the petitioner/employer from a decision and decree of the trial court which granted its petition in part. After review of the record and consideration of the arguments of counsel, we deny the employer's appeal and affirm the findings and orders of the trial judge.

The employee had been receiving weekly benefits for total incapacity pursuant to a Memorandum of Agreement dated June 25, 1999. That document indicated that the employee sustained a compression fracture at T12-L1 on February 6, 1999 resulting in total incapacity from that date and continuing. In March 2000, the employer filed an Employer's Petition to Review containing four (4) allegations: (1) that the employee's incapacity for work has ended; (2) that, in the alternative, the employee is capable of light work; (3) that the employee's weekly benefits should be forfeited due to

misrepresentation of her activities to several doctors; and (4) that her weekly benefits should be forfeited for failure to properly complete a report of earnings. At the pretrial conference, the trial judge found that the employee was capable of light duty work and reduced her weekly benefits from total incapacity to partial incapacity as of May 17, 2000. He also found that she had not failed to report earnings or return an earnings report. The employer filed a claim for trial in a timely manner.

The employee related that she was employed as a cook's assistant at the time of her injury which involved cutting up meats and vegetables, making sandwiches, and making salads in large quantities. As part of her duties, she would have to lift up to about fifty (50) pounds while loading and unloading cases of canned goods, vegetables, and condiments which she retrieved from a storeroom using a flat truck.

The employee testified that after her injury, she started a business with her sister called Ocean State Manor. The facility housed twelve (12) mentally disabled residents who were provided meals and assisted living services. Ms. Sousa indicated that the only people involved in the operation of the facility were herself, her sister, her sister's husband, and her son. One of the licensing requirements for the facility was that someone had to stay in the facility overnight with the residents. She stated that she would alternate staying overnight a week at a time with her brother-in-law and when she was unable to be there, her son would take this responsibility.

Ms. Sousa explained that when she was at the facility she answered the telephone, served the evening meal, put the dishes in the dishwasher, and gave out medication. Her sister would generally have the meal prepared beforehand. The employee continued to perform these duties until April 2000. In August of that year, she sold her interest in the business to her sister. She indicated that they began to have problems because Ms. Sousa could not do as much of the more physical work that was needed as her sister did. She anticipates that in five (5) years she will realize a profit of \$25,000.00 from the sale of the business when her sister pays her in full.

The employee acknowledged that she signed and returned a report of earnings form on which she indicated that she had no earnings. She stated that she did not really understand the form and that she did not believe that what she was doing for Ocean State Manor was earning wages. She explained that she was not paid on a regular basis and only received a check for Five Hundred and 00/100 (\$500.00) Dollars and a check for One Thousand and 00/100 (\$1,000.00) Dollars from the business. Her sister received the same amount. Ms. Sousa stated that she used this money to pay off some of the debt she incurred when they bought the business.

Cidalia Domingues, the employee's sister, testified by deposition on two (2) occasions. She explained that she worked at the facility from 7:00 a.m. to 3:00 p.m. and would prepare breakfast and lunch and start supper. She also did all of the housework to keep the facility clean. The employee worked from 3:00

p.m. to 11:00 p.m. and would serve the evening meal, clear the table, pass out medications and sometimes sweep the floor. Ms. Domingues indicated that the employee's son would assist her frequently. Every other week, the employee would sleep over at the facility.

Ms. Domingues testified that the only money received by the employee from the business was two (2) checks to repay some of the money she contributed to buy the facility and three (3) checks to reimburse her for groceries and other supplies. The two (2) repayment checks were issued on February 28, 2000 and April 14, 2000. Ms. Domingues stated that she received checks in the same amount as the employee on those occasions.

At some point after April 2000, Ms. Domingues hired two (2) people to work at Ocean State Manor – one (1) for 32 to 40 hours a week and the other for 24 hours a week. These individuals were paid Six and 00/100 (\$6.00) Dollars per hour.

Other records which were introduced indicate that the employee was the president and secretary of the corporation, Ocean State Manor, and owned fifty (50%) percent of the company. Documents from the sale of the business reflect that the employee received a little over Nineteen Thousand and 00/100 (\$19,000.00) Dollars at the closing and agreed to a five (5) year term for the payment of the remainder of the sale price in the amount of Forty-three Thousand and 00/100 (\$43,000.00) Dollars.

The medical evidence consists of the depositions and reports of Dr. Phillip R. Lucas, Dr. A. Louis Mariorenzi, and Dr. Stanley J. Stutz, as well as records from the Dr. John E. Donley Rehabilitation Center.

Dr. Lucas, an orthopedic surgeon, treated the employee in the emergency room the day she was injured and then saw her in his office for follow-up visits. He referred her to the Donley Center in May 1999 for therapy and work hardening. During the office visits, which were every four (4) to eight (8) weeks, the employee continued to complain of back pain, particularly with walking and standing any length of time. She also had some complaints of numbness in her legs. An MRI on November 19, 1999 revealed the healed compression fracture, but no other abnormality or compression of the spinal cord.

Dr. Lucas saw the employee on February 7, 2000 after she was discharged from the Donley Center. The Donley Center discharge indicated that she was capable of lifting up to fifty (50) pounds and pushing up to 100 pounds. Although she was still experiencing back pain, the doctor agreed that she should try to return to work while limiting the amount of lifting, pushing, and pulling she did.

The employee did not return to see Dr. Lucas again until September 14, 2000. At that time, she had continued complaints of back pain. The doctor testified that the employee was capable of working, but not in a position that would require repetitive lifting of weights up to fifty (50) pounds or repetitive

twisting and bending. It was his understanding that her restrictions would preclude her from returning to her former position as a cook's helper.

Dr. Lucas indicated that he was unaware that the employee had started a business with her sister in November 1999 and what she was doing for the business. However, it was his opinion that the tasks performed by the employee at Ocean State Manor were within her physical restrictions and were nothing more than what he would expect her to do at home.

Dr. Mariorenzi, an orthopedic surgeon, evaluated the employee on January 28, 2000 at the request of the employer. The physical findings on examination were normal, despite her subjective complaints of back pain. The doctor noted that the fracture had healed and the subjective complaints were not localized to the area of her pathology and were inconsistent. He concluded that she had made a satisfactory recovery and was capable of returning to her regular employment as a cook's assistant. There is no indication in the doctor's report that the employee informed him of her activities at Ocean State Manor. His deposition testimony was consistent with his report.

Dr. Stutz conducted an impartial medical examination of the employee on April 24, 2000 at the request of the court. He noted paraspinal tenderness, limitation in forward flexion, and spasm in the parathoracic and paralumbar areas. He indicated that she could perform light duty work with no heavy lifting, and no repetitive bending or twisting, especially from floor level. He stated that her sitting tolerance should be limited to thirty (30) minutes and she could lift

twenty-five (25) pounds or more occasionally from table level. He testified that it was not unusual for the employee to continue to experience spasm and back pain over a year after sustaining the compression fracture. He further noted that most people who have compression fractures experience continued pain due to the change in the structure of the bone.

Dr. Stutz was unaware of the employee's involvement with Ocean State Manor and what she had been doing at that facility. It was his understanding simply that she had not returned to work in any capacity since the injury. He was also unaware of the results of any final evaluation at the Donley Center.

The employee was admitted to the Donley Center on May 24, 1999 at the request of Dr. Lucas. According to forms completed by the employer, the most strenuous part of the employee's job was occasionally lifting cases of food weighing up to fifty (50) pounds and standing on her feet for eight (8) hours a day. "Occasional" lifting was defined as between 0 and 2.5 hours a day. The forms also indicate that the job requires frequent bending and stooping.

The employee participated in a work hardening program at the Donley Center. This involved one (1) hour sessions during which she performed tasks simulating her work activities. At the conclusion of the program at the end of October 1999, the therapist reported that the employee was capable of functioning at a medium level despite her continued subjective complaints of back pain and her assertion that she could not stand for the eight (8) hours of her regular work day. The discharge summary indicated that the employee had

met all of the rehabilitation goals and was functioning at a level consistent with her regular job. In response to an inquiry by the Donley Center, Dr. Lucas disagreed with the conclusion that the employee was capable of performing all of the duties of her regular job.

After conclusion of the proceeding, the trial judge rendered a bench decision in which he found that the employee was partially disabled, rather than totally disabled, based upon the opinions of Dr. Stutz. He further found that the employee had not committed any fraud because she had not received any checks or profits until after she had returned the report of earnings form to the insurer and the fact that she may have been working did not affect the opinion of Dr. Mariorenzi as to her disability.

The employer claimed an appeal and has filed three (3) reasons of appeal which we will address in order. In its first reason, the employer argues that the trial judge was clearly wrong in relying upon the opinion of Dr. Stutz regarding the degree of disability because he had an inaccurate and incomplete history. In support of this contention, the employer cites the facts that Dr. Stutz was not aware of the final report of the Donley Center stating that the employee should be able to perform the duties of her regular job despite her subjective complaints and he was unaware of the activities she performed at Ocean State Manor. We find no merit in this argument.

Dr. Stutz testified that he was aware that the employee had attended the Donley Center but acknowledged that he never saw their final report, which

was issued six (6) months before his examination. When the doctor examined the employee on April 24, 2000, she had already stopped her activities at Ocean State Manor. Those activities included some light housework, some cooking, and passing out medications. The employee did advise Dr. Stutz that she did some of these activities during the course of her normal day, but she denied that she had returned to "work" in any capacity.

During his examination, Dr. Stutz noted spasm, an objective finding. He testified that it was not unusual for someone to experience pain and discomfort over a year after suffering a compression fracture of the spine, despite the fact that x-rays indicated the fracture was healed. When he was asked whether he would find the information from the Donley Center and the information about the employee's activities at Ocean State Manor important in formulating his opinion as to the employee's disability, Dr. Stutz responded:

"I might depending on what the information is." (Pet. Exh. 4, p. 12)

The employer never provided the information to the doctor so that he could determine if, in fact, it would alter his opinion regarding the employee's ability to return to her regular job. However, the activities performed by the employee at Ocean State Manor were similar to those she described to Dr. Stutz as tasks she performed at home. In addition, those activities were certainly not similar to the duties of her regular job as a cook's helper, nor were they beyond the restrictions Dr. Stutz imposed on her activities based upon his examination and findings.

The Donley Center personnel stated that the employee should be capable of returning to her regular job for eight (8) hours a day, forty (40) hours a week, despite her assertion that she could not stand for that length of time because of pain in her back. However, the employee attended work hardening sessions at the Donley Center for only one (1) hour a day. In the form completed by the employer regarding the employee's job duties, it was noted that the most difficult aspect of the job was standing for eight (8) hours a day. There is no definitive statement from the Donley Center that the employee absolutely can withstand eight (8) hours on her feet without any ill effects.

After considering the information that Dr. Stutz was lacking, we find that his lack of knowledge of that information does not affect the competence or value of his opinion regarding the employee's disability. Consequently, the trial judge was not clearly wrong to rely upon that opinion and conclude that the employee remained partially disabled.

In the third reason of appeal, the employer contends that the trial judge was clearly wrong when he failed to find that the employee had misrepresented her employment status and daily activities to the three (3) physicians involved in this case and that such misrepresentation warrants a forfeiture of benefits under R.I.G.L. § 28-33-17.3. We believe that the alleged "misrepresentations" were the result of misinterpretation or misunderstanding rather than some knowingly deceitful plan on the part of the employee.

The employer cites the fact that the employee failed to inform any of the doctors that she had been “working” for Ocean State Manor on a full-time basis. However, for an individual unaccustomed to the legal effect of terminology in the workers’ compensation system, her activities at Ocean State Manor may not have been considered “work.” Ms. Sousa became involved in the facility with her sister as an investment. She and her sister both contributed their time to operate the facility. As Ms. Domingues testified, when the facility first opened, they only housed maybe three (3) residents. At the time when Ms. Sousa stopped assisting at the facility, there were maybe eight (8) residents. The residents were relatively self-sufficient and worked outside of the home. The facility provided meals, laundry service, a clean environment, and medication as prescribed.

The employee served supper, which had basically already been prepared by her sister, cleaned the table, put the dishes in the dishwasher, sometimes swept the floor, gave the residents medication, and served a snack at night. She was never paid any type of regular wage for these activities. Under the circumstances, one can understand why a person may not consider these activities to be “working” in the sense of performing a job for an employer for compensation.

Although the employee did not inform Dr. Mariorenzi that she was “working,” she did tell him that she did light housework, some vacuuming, cooking, light shopping and some driving for short periods. The activities she

related are essentially the same as those she was doing at Ocean State Manor. She was not doing anything that would be considered similar to her regular job duties.

Dr. Stutz noted in his report under the section describing her regular job duties that the employee “has not been back to work in any capacity since the incident.” Ms. Sousa obviously never returned to Rhode Island Hospital in any capacity. If she even understood that the doctor was inquiring if she had been back to work anywhere, it is understandable that she did not consider her activities at Ocean State Manor to be “work.” In addition, at the time she saw Dr. Stutz, she had ceased her activities at the facility.

Dr. Lucas only saw the employee on one (1) occasion, in February 2000, while she was involved with Ocean State Manor. He could not recall any discussion with the employee about her activities there. However, when he was informed about the nature of her activities at the facility, Dr. Lucas responded that it was not anything more than he would have expected she was doing around her own home. He also stated that during their office visits he generally asked about the employee’s activities, but not specifically about working.

The employer alleges that the employee intentionally misrepresented her physical capabilities and states that her activities at Ocean State Manor were comparable to her regular job duties in terms of physical requirements. As noted above, the activities are not at all comparable. Our review of the record does not reveal the sinister motive the employer attributes to the employee.

Under the circumstances of this case, particularly the unique situation with Ocean State Manor where it was certainly not a typical employee/employer relationship, we find that the trial judge was not clearly wrong when he declined to find that the employee made any knowingly false or fraudulent material misrepresentations in order to continue to receive her benefits.

In its second reason of appeal, the employer asserts that the trial judge was clearly wrong when he declined to find that the employee had failed to properly complete the report of earnings form. Specifically, the employer contends that the employee was obligated under the law to report the value of the services she provided at Ocean State Manor and to report the profit she realized upon the sale of her share of the business to her sister. However, the statute requiring the reporting of earnings, wages and salary does not mandate the reporting of these so-called “non-paid work activities.” Consequently, we find no grounds for a finding of fraud or misrepresentation and imposing a forfeiture of weekly benefits.

The employer sent a report of earnings form to the employee on February 11, 2000. The form is a standardized form issued by the Department of Labor and Training. The form requested information regarding any earnings received by the employee from February 7, 1999 to February 11, 2000. Ms. Sousa checked a box indicating that she did not receive any earnings during that period. She also checked off a box indicating that she did not perform any

“non-paid work activities” during the period. She signed the form on February 15, 2000 and returned it to the insurer.

It is clear from the testimony in this matter that the employee did not receive any money from Ocean State Manor until February 28, 2000. At that time, she received a check for a little over One Thousand and 00/100 (\$1,000.00) Dollars. Ms. Domingues, the employee’s sister, described this disbursement as the return of some of the money they had both invested to get the business started. Obviously, the money received by the employee from Ocean State Manor, even if it was considered to be earnings, was received after she had completed the report of earnings form and returned it to the insurer.

The employer concedes this point, but argues that the employee should have reported that she was performing some activities at Ocean State Manor and estimated the value of those services. In addition, the employer contends that Ms. Sousa was obligated to report the checks she subsequently received and any profit from the sale of the business, regardless of whether the employer had sent her another report of earnings form to complete. We disagree.

Section 28-33-17.2(b) of the Rhode Island General Laws states in pertinent part as follows:

“Any employee entitled to receive weekly workers’ compensation benefits shall have an affirmative duty to report those earnings, including wages or salary remuneration paid for personal services, commissions, and bonuses, including the cash value of all remuneration payable in any medium other than cash, earned from self-employment or from any employer other than the employer in whose employ he or she

was injured, so that compensation benefits may be properly computed.”

The statute requires the reporting of the receipt of any type of compensation, whether in the form of money, goods or services, from self-employment or from another employer. The Department of Labor and Training is charged with prescribing the form on which employees must report their earnings and which must notify them of the penalties for failure to report.

The report of earnings form promulgated by the Department attempts to impose additional burdens on the employee which are not mandated in the statute. In the explanation to employees of what must be reported, the form states as follows:

“You must report any work in any business, even if the business lost money or if profits or income were reinvested or paid to others. If you performed any duties in any business for which you were not paid, you must show a rate of pay of what it would have cost the employer to hire someone to perform the work you did, even if your work was for yourself, a relative, or friend.”

There is nothing in the Workers' Compensation Act which even mentions this concept of “non-paid work activities,” and it is inappropriate that this language is contained in a form which is intended for a specific purpose spelled out in the statute. It is unclear how this information would even be utilized, certainly not as a credit against the payment of weekly benefits. Perhaps such information would be useful to attempt to establish an earning capacity. However, providing this type of information is not required by R.I.G.L. § 28-33-17.2(b), which addresses the actual receipt of some type of remuneration,

whether it be in money or goods or services. Employees who hide the receipt of such remuneration for services rendered are subject to the penalties provided by the statute. There is no penalty provided for failure to give information about these so-called "non-paid work activities."

The testimony establishes that the two (2) checks received by the employee from Ocean State Manor were not for services rendered to the business, but rather in the nature of return of capital. The money was intended to repay loans obtained by the employee to get the business started. This type of disbursement cannot be categorized as "earnings" received by Ms. Sousa and therefore, she was under no obligation to report it to the insurer.

The profit realized by Ms. Sousa from the sale of her share of the business to her sister is also not "earnings." It was not compensation for services rendered, but rather profit from an investment. It is comparable to buying stock and cashing out after its value has increased. Any profit realized is not deemed to be wages, salary or compensation. Again, we find that the employee was not obligated to report the results of the sale of the business to the employer or insurer.

Based upon the foregoing, we deny and dismiss the employer's appeal and affirm the decision and decree of the trial judge. The employer shall pay a counsel fee in the sum of One Thousand Two Hundred and 00/100 (\$1,200.00) Dollars to Francis P. Castrovillari, Esq., for his successful defense of the employer's appeal.

In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, a copy of which is enclosed, shall enter on

Healy, C.J. and Bertness, J. concur.

ENTER:

Healy, C.J.

Olsson, J.

Bertness, J.

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CLOTILDE SOUSA)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the petitioner/employer and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

1. The findings of fact and the orders contained in a decree of this Court entered on March 7, 2001 be, and they hereby are, affirmed.

2. The employer shall pay a counsel fee in the sum of One Thousand Two Hundred and 00/100 (\$1,200.00) Dollars to Francis P. Castrovillari, Esq., for his successful defense of the employer's appeal.

Entered as the final decree of this Court this day of

BY ORDER:

ENTER:

Healy, C.J.

Olsson, J.

Bertness, J.

I hereby certify that copies were mailed to James T. Hornstein, Esq., and Francis P. Castrovillari, Esq., on
