

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

ARMANDO G. ALVES

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VS.

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W.C.C. NO. 2000-05378

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CAPRICCIO'S, INC.

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DECISION OF THE APPELLATE DIVISION

BERTNESS, J. This is an appeal from a decision and decree rendered by the trial court denying and dismissing an Employee's Original Petition. The petition alleges that the petitioner/employee sustained injury to the right hand and head while working as a cook on June 11, 2000, seeking total or partial disability from June 13, 2000, and continuing.

The petitioner has filed nine (9) reasons of appeal. Six (6) of the reasons of appeal allege that the judge erred in failing to find that the employee sustained an injury arising out of and in the course of his employment. The employee also alleges that the trial judge overlooked testimony of Dimitrias Peretias and misconstrued testimony of Kyle Murphy. The final reason alleges that the trial court erred in stating that no evidence was presented to support the employee's theory that he intended to return to work. After a careful review of all of these reasons

and the record below, the court finds that the trial judge committed no error and, therefore, denies and dismisses this appeal.

Armando Alves testified that he was working as a line cook for Capriccio's Restaurant on June 11, 2000. One of his job duties involved locking the salad bar box and the ice cream parlor box at the end of the evening. On June 11, 2000, Mr. Alves was walking outside the restaurant to check and see if his ride had arrived. He walked out with a fellow employee, Dimitrias Peretias (nicknamed Jimmy). The employee described what happened next as follows:

“Well, we were walking outside ... All I heard were some like, I thought it was like bottles breaking, some gun shots and I looked .. I had seen a .. I didn't know if it was a cab, regular car. I looked and I had seen someone with a gun, black male, big guy shooting at the cab driver, whoever was in the car and the guy just kept driving. He walked toward my way and Jimmy had not noticed .. I guess he heard .. I was really looking though. I'm trying to get attention off the whole time and next thing I ran back inside.” (Tr. p. 22).

Mr. Alves did not see his ride outside and when asked whether he ran back inside Capriccio's after he saw the man with the gun, he stated:

“I was..I was running back in, I heard shots. He was like, 'Don't move'. He's shooting at me and I run inside and at that time I locked the door. I don't know if he's shooting at me or the cab driver. I see he was coming toward me.” (Tr. p. 23).

The employee heard shots, the assailant was coming toward him, he ran back to Capriccio's and tried to lock the door. (Tr. pp. 23-24).

Mr. Alves testified that there remained work for him to do following the incident and that he walked out with Jimmy to see if his ride was there. (Tr. pp. 24, 39-40). The assailant followed Mr. Alves into the restaurant. Mr. Alves fought with the assailant, was shot in the hand, and beaten about the head. (Tr. p. 25). He could not recall punching out on the date of the incident. (Tr. p. 36). He had not locked his box. (Tr. p. 37). He has had trouble with memory loss. (Tr. p. 37).

Mr. Alves testified and stated that he never had an opportunity to look for his ride and then that he could not recall looking for his ride. (Tr. pp. 40-41). He then contradicted himself by agreeing with counsel that the reason he turned back toward the restaurant was because he did not think his ride had arrived. (Tr. p. 42). He also agreed with his attorney that he was heading back toward the restaurant to return to work before he heard gun shots. (Tr. p. 43).

Kyle Murphy, the sous-chef at Capriccio's, testified that it was Mr. Alves' job duty to lock up his coolers and clean his station. He admitted that the salad bar box was not locked when he checked on it the evening of the incident. (Tr. p. 64).

Dimitrias Peretias testified that he was working as a broiler cook on the date of the accident. He admitted that after finishing his job duties he is required to punch out and leave the premises. (Tr. pp. 75-76). He walked out of the restaurant with Mr. Alves on June 11, 2000. Mr. Alves

asked Mr. Peretias if he could come outside to see his car. (Tr. pp. 76, 86). Mr. Alves did come out to see Mr. Peretias' car. The employee did not mention to Mr. Peretias that he was going out to check for his ride. (Tr. p. 84). While walking out of the restaurant, the witness stated that Mr. Alves spoke about the car, not about work. (Tr. p. 87). Outside at Mr. Peretias' car, they heard a noise which sounded like someone driving over a glass bottle. (Tr. pp. 78-79). Mr. Peretias stated that they saw an African American exit a taxi cab and walk toward them, at which point "Armando was walking back away from him to avoid controversy." (Tr. p. 79). The taxi cab then drove past and the African American then shot at the cab driver. (Tr. p. 80). The African American then followed the employee into the alleyway. (Tr. p. 81). Mr. Peretias drove away and called the police after entering Interstate 95.

Vincenzo lema, the owner of Capriccio's Restaurant, testified that employees punch out of work when they are done and are supposed to leave. (Tr. p. 93). He testified that if the employee had failed to punch out on Sunday, June 11, 2000, that management would not have punched him out. They would simply have written in a time. (Tr. p. 98).

Mr. Alves' timecard for the date of the incident revealed that he punched into work on that date at 1:43 p.m. and punched out at 10:09 p.m.

Medical records from Rhode Island Hospital and Dr. Gregory J. Austin were admitted into evidence and document the injuries Mr. Alves sustained on June 11, 2000.

Pursuant to R.I.G.L. § 28-35-28(b), a trial judge's findings on factual matters are final unless found to be clearly erroneous. The Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). The Appellate Division is entitled to conduct a *de novo* review only when a finding is made that the trial judge was clearly wrong. Id., citing R.I.G.L. § 28-35-28(b); Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986). Such review, however, is limited to the record made at the trial judge. Vaz, supra, citing Whittaker v. Health-Tex, Inc., 440 A.2d 122 (R.I. 1982).

It is well settled that in order for an employee's injury to be compensable, the employee must establish a "nexus" or "causal relationship" between the injury and employment. Beauchesne v. David London & Co., 118 R.I. 651, 375 A.2d 920 (1977). In order to determine whether a nexus exists between the injury sustained and the employment, the court examines the particular facts of each case and circumstances surrounding the injury in light of three criteria first enunciated in Di Libero v. Middlesex Constr. Co., 63 R.I. 509, 9 A.2d 848 (1939). These criteria include whether the injury arose within the period of the employee's employment; whether the injury occurred at a place where the employee might reasonably be expected to be present; and whether the employee

was reasonably fulfilling the tasks of his or her job at the time of the injury or was performing a task incidental to the conditions under which those tasks were to be performed. Toolin v. Aquidneck Island Medical Resource, 668 A.2d 639 (R.I. 1995).

The petitioner cites nine (9) reasons of appeal to this Tribunal. First, the employee alleges that the trial court:

“found that had it not been for the employee’s efforts, the assailant would have killed or injured other employees and patrons at the employer’s restaurant. Clearly, by this statement, the employee’s actions were a benefit to the employer. The court misconstrued the law when it failed to find that the employee sustained injuries during the course of his employment while doing an act or actions which were benefiting the employer.”

While the court described Mr. Alves’ actions as heroic and was convinced that had it not been for his efforts, the assailant would have killed or injured other employees or patrons at the employer’s restaurant, it is also clear that Mr. Alves’ actions had nothing to do with his employment. He was simply trying to escape a potentially dangerous situation. (Tr. pp. 22-23). As such, Mr. Alves’ actions could be considered voluntary or those of an officious intermeddler. Wegimont v. Argonne Worsted Co., 69 R.I. 360, 33 A.2d 215 (1943). Moreover, the only reason the assailant was in the restaurant was apparently because he followed Mr. Alves inside. Mr. Alves, himself, testified that he ran back inside the restaurant because the assailant was coming toward him with a gun and he did not know whether

the assailant was shooting at him or the cab driver. (Tr. pp. 22-23).

Certainly, the employee was not acting in his employer's interest by running back into the restaurant. He was acting in his own interest, trying to protect himself, which is quite understandable. Nevertheless, this does not rise to the level of furthering the employer's interest and, therefore, cannot be considered an action in the course of his employment.

The employee next argues that the trial judge erred in noting that the employee was returning to the restaurant to lock up his own box and "Jimmy's" box. The employee argues that there was no testimony concerning locking Jimmy's box and, further, that Mr. Murphy testified that the employee's two (2) boxes, the salad bar box and the ice cream parlor box were not locked that evening. The trial court stated:

“...the fact that the employee punched out and walked out of the building in street clothes with a coworker does not allow the Court to draw a conclusion that the employee intended to return to finish his job by locking his stations after he punched out. No evidence was presented to support this theory except for the employee's testimony that he intended to return to work and that he also never punched out, and Kyle Murphy's testimony that the employee's work station and Mr. Peretias' work station were not locked up that evening.” (Tr. dec. p. 13).

In fact, Mr. Murphy testified that Mr. Murphy's boxes and the salad bar box remained unlocked. (Tr. pp. 63-64). The trial court committed harmless error when it stated that Mr. Peretrias' box was not locked. The trial court correctly stated that the employee's work station was not locked up that

evening. It also noted that Mr. Murphy acknowledged that employees sometimes forget to lock their work stations. (Trial dec. p. 13, Tr. p. 68). There was no testimony concerning whether the employee had or had not locked the ice cream parlor box. For these reasons, the employee's appeal in this regard is denied and dismissed.

The employee's next reason of appeal argues that the trial judge erred when she stated that Jimmy saw a man with a gun walking toward him and the employee. The employee argues that neither he nor Jimmy testified that the assailant had a gun when he exited from the taxi cab. To the contrary, the employee testified as follows:

“...I looked and I had seen someone with a gun, black male, big guy shooting at the cab driver, whoever was in the car and the guy just kept driving. He walked toward my way...” (Tr. p. 22).

Clearly, the trial judge did not err. Therefore, this reason of appeal is denied and dismissed.

The employee's next reason of appeal seems to be multi-tiered. First, the employee argues that the trial court erred in stating that Mr. Peretias did not know what the employee was doing while the witness was punching out. This is not true. The trial court stated that Mr. Peretias

“...testified that when he punched out, the employee was still working, and they walked out together.” (Trial dec. p. 8).

Mr. Peretias testified that Mr. Alves was still working when he punched out. (Tr. p. 85). Nevertheless, he did not know what Mr. Alves was doing specifically. (Tr. p. 87). Mr. Peretias was asked as follows:

“Q. When you say he was cleaning up when punched out, what was he doing?”

“A. I don’t remember. I wasn’t familiar with his station so...because I was only there for a short period of time so I don’t know what his duties were to do. I just knew what I had to do, you know.” (Tr. p. 87).

The trial court acknowledged this statement when it said in its decision as follows:

“He testified that he does not know what the employee was doing while the witness was punching out.” (Trial dec. p. 8).

For these reasons, the trial judge did not misconstrue the testimony when stating that Mr. Peretias did not know what Mr. Alves was doing while he was punching out.

Second, the employee argues that because Mr. Peretias did not see the employee punch out, it creates doubt whether the employee actually punched his timecard.

The circumstantial evidence presented to the trial court was sufficient for it to believe that Mr. Alves did punch his timecard on the date in question. Although Mr. Peretias did not see Mr. Alves punch out, he also indicated that he was already walking up the stairs when Mr. Alves said he wanted to look at Mr. Peretias’ car and Mr. Peretias did not know whether

or not Mr. Alves was right behind him. (Tr. pp. 85-86). Mr. Alves could not recall whether or not he punched out and indicated that he was having memory problems due to the incident. (Tr. pp. 36, 50). Mr. Iema testified that it is Capriccio's policy to write in a time on a timecard where an employee fails to punch out. (Tr. p. 96). Mr. Alves' timecard was punched out at 10:09 p.m. on the date of the incident. Mr. Alves could not recall what time he left the restaurant with Mr. Peretias. (Tr. p. 48). Based on this information, there was sufficient evidence for the trial judge to find Mr. Alves punched his own timecard. For these reasons, the employee's fourth reason of appeal is denied and dismissed.

The employee's fifth reason of appeal is the same as his second reason of appeal and is, likewise, denied and dismissed.

The employee's next reason of appeal argues that the trial judge thought it crucial that the injury occurred after the employee punched out, and that our Supreme Court has held that the period of employment does not necessarily hold to the precise moment when an employee is scheduled to begin and cease work, but depends on the circumstances. The employee argues that he simply left the premises to check to see whether his ride was there and to advise the driver how much longer he would be working. Mr. Peretias testified that Mr. Alves asked to walk out with him because he wanted to take a look at his car and in fact the two were discussing cars when they walked out. (Tr. pp. 76, 86-87). Mr. Alves had

already changed into his street clothes and never mentioned to Mr. Peretias that he was going to check for his ride. (Tr. pp. 78, 84).

The employee relies on the case of Montanaro v. Guild Metal Prods., 108 R.I. 362, 275 A.2d 634 (1971) to support his argument that the employee could be considered within the period of employment even though he may have punched out. Montanaro was an employee who for a period of almost three (3) years prior to the date of her injury, arrived at work approximately one (1) hour before the start of the work day with her employer's knowledge and consent. It was during this hour that she was injured. The court stated that:

“[W]hile that fact might not of itself establish the prerequisite nexus between the injury and the employment, it becomes sufficient when considered in conjunction with the further circumstances that subsequent to her arrival she habitually deposited her lunch and personal effects at the bench where she worked and made other necessary preparations for the day's work. Her employer acquiescent in and certainly was benefited by that practice, and in addition on occasion requested her to commence actual work before the scheduled a.m. starting time.” Id. at 366, 275 A.2d at _____.

In the instant petition, Mr. Alves did not recall punching out on the date of the incident. (Tr. p. 36). He did not testify that it was his habit to punch out and then return to work. Mr. Murphy testified that employees are not paid after they punch out. They are supposed to leave work and not hang around. (Tr. pp. 69-70). Mr. Peretias testified that when you are

finished with your job duties, you are required to punch out and leave. (Tr. pp. 75-76). There is simply no indication, in the instant case, that the employer knew or consented to an employee remaining at work and continuing to work after punching out. To the contrary, the evidence indicates that Mr. Alves returned to his employer's premises to escape an assailant. (Tr. pp. 22-24). For these reasons, this case is easily distinguished from Montanaro and the trial court did not err in finding that the employee failed to meet this first criteria enunciated in Di Libero. For this reason, the employee's reason of appeal is denied and dismissed.

The employee next argues that the trial judge erred by finding that there was nothing in the evidence to indicate that the employer would expect the employee to have returned to Capriccio's. The employee cites Mr. Murphy's testimony that it was the employee's routine to go out and check on his ride. There is simply nothing in the record to indicate that it was the employee's routine to check for a ride after finishing work and punching out. Moreover, the overwhelming testimony of other witnesses was that once employees complete their work, they are supposed to punch out and leave the premises. For these reasons, the trial court did not misconstrue the evidence. Therefore, this reason of appeal is denied and dismissed.

The employee next argues that "the evidence strongly suggests that the employee returned to the restaurant to finish his job and lock up his

boxes.” To the contrary, the employee ran back into Capriccio’s to escape the assailant. (Tr. pp. 22-24). There was no indication that anyone other than the employee punched his own timecard, and the employee testified that he has memory problems since the date of the incident and could not recall whether or not he had punched his timecard. (Tr. p. 37). In fact, the employee testified that it was his habit to punch out after he had completed his job duties. (Tr. pp. 36-37). For these reasons, we find that the trial court committed no error in this regard and this reason of appeal is denied and dismissed.

The employee’s ninth reason of appeal is similar to several others. The employee again alleges that the trial judge misconstrued testimony regarding the employee’s boxes. We have already discussed that any error in this regard was harmless at best. The trial court fully acknowledged that the employee testified that he intended to return to work to lock his station after he punched out and that his work station was, in fact, discovered unlocked by Mr. Murphy. (Trial dec. p. 13). The trial judge clearly did not overlook any relevant evidence. For this reason, this reason of appeal is similarly denied and dismissed.

For all of the reasons stated, we find that the trial judge committed no error. It is, therefore, ordered that the petitioner/employee’s appeal be denied and dismissed.

In accordance with Sec. 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, copy of which is enclosed, shall be entered on

Rotondi and Healy, JJ. concur.

Rotondi, J.

Healy, J.

Bertness, J.

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PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
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W.C.C. No. 2000-05378

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CAPRICCIO'S, INC.

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FINAL DECREE OF THE APPELLATE DIVISION

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

ORDERED, ADJUDGED, AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on November 2, 2001 be, and they hereby are affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

ENTER:

Rotondi, J.

Healy, J.

Bertness, J.

I hereby certify that copies were mailed to Robert Ferrieri, Esq.,
Michael Tarro, Esq., and Ronald Izzo, Esq., on

jmf