STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

CAROL M. ZAMOR	)	
	)	
VS.	)	W.C.C. 01-07172
	)	
VNA SUPPORT SERVICES	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the petitioner/employee's appeal from a decision of the trial judge granting the employer's motion to dismiss on the ground that the employee's original petition was not filed within two (2) years of the date of the alleged injury at work as required by R.I.G.L. § 28-35-57. In addition, the employee has appealed the trial judge's decision to deny her motion to compel the administrator of the Workers' Compensation Court to assign this case in accordance with Rule 2.1 of the Rules of Practice and her request for an evidentiary hearing regarding the method of assignment of cases to judges in the Workers' Compensation Court. After thorough review of the record and careful consideration of the parties' arguments, we affirm the trial judge's dismissal of the petition under R.I.G.L. § 28-35-57. As a result of our decision on that issue, we conclude that the issues raised by the employee regarding the denial of the motion to compel have been rendered moot and need not be addressed in the context of this case.

The employee, who was forty-three (43) years old at the time of the alleged injury, testified that on June 9, 1999, she was involved in a motor vehicle accident. She was employed

as a field staff nurse by the respondent, primarily doing pediatric home care. The morning of June 9, 1999, she was driving her own vehicle to a school bus stop so that she could board the bus and then assist a child who was boarding the bus at a subsequent stop. Another vehicle struck the employee's vehicle on the driver's side causing her to hit the right side of her head on the rear view mirror and be thrown back and forth, despite the fact that she was wearing her seatbelt.

Ms. Zamor was taken to the emergency room at Rhode Island Hospital where she complained of head and right shoulder pain, but no loss of consciousness. A CT scan of the brain was negative. The diagnosis was a head contusion and she was discharged after about four (4) hours. The following day, she saw her primary care physician, Dr. Craig Winderman, at Harvard Community Health Center. She informed the doctor that she was not feeling like herself and was somewhat drowsy. Dr. Winderman noted in his office note that she appeared to have a mild to moderate post concussive syndrome. He recommended that she go home and return the next day.

On June 11, 1999, the employee returned to the center and saw another doctor, Dr. Zetan Nie. He indicated that she had sustained a head contusion and appeared to be better oriented than the day before. The doctor extended her out of work note for another week and scheduled another appointment the following week. When the employee returned on June 17, 1999, she complained to Dr. Winderman of low back pain. He noted that she was "looking much better" and was "awake, alert, oriented and appropriate." Resp. Exh. 3, office note 6/17/99. He simply indicated that she had low back pain which was gradually resolving. He advised her to return in a week and a half. She did not keep the next appointment which was scheduled for July 1, 1999.

The employee testified that sometime between June 17, 1999 and July 1, 1999, she went

to New York to stay with her mother because she was having difficulty caring for herself. She stated that she could not bathe herself for several months because she could not lift her foot up. She asserted that she was unable to dress or feed herself. Ms. Zamor indicated that her mother and her sister handled her affairs because she was in so much pain and was sleeping a lot. She also was involved in a physical therapy program. She related that during this time she lost two (2) houses that she had owned in Rhode Island to foreclosure.

Records from the Department of Labor and Training reflect that the employee filed a written application for Temporary Disability Insurance benefits dated June 15, 1999 which she completed and signed. She stated that her daughter assisted her in completing the application. In the application, she marked that the injury and disability were not work-related. She received TDI benefits from June 12, 1999 to November 13, 1999. Although notes in the records regarding telephone calls indicate that the employee called or was spoken with by department personnel, Ms. Zamor asserted that her mother and sister handled these phone calls. The records also contain documents from several doctors for various time periods beginning in June 1999 which indicate that the employee is capable of signing checks and documents.

The employee testified that near the end of November 1999 she secured full-time employment in New York as a nursing supervisor with ABD Home Care. She explained that she coordinated schedules and training for 150 employees in this position. She continued to work there until the company closed in October 2002. She then began working for Allen Health Care in quality management.

The remaining medical evidence includes the affidavit and some reports of Dr. David Zelefsky and the deposition and two (2) handwritten notes of Dr. Carl Stephen Chrispin, both physicians practicing in New York. Dr. Zelefsky was apparently providing physical therapy

services to Ms. Zamor, although it is unclear from the records when she started treating with him. However, a report from Dr. Zelefsky dated October 20, 1999 is attached to Dr. Chrispin's deposition and indicates that the employee is independent in activities such as bathing, dressing, walking, standing and sitting. None of his other records address her mental state in any greater detail.

The employee relies primarily on the testimony and records of Dr. Chrispin to support her claim that she suffered from a mental incapacity for at least six (6) months following the motor vehicle accident. Dr. Chrispin, an internist, testified that he was board certified in physical medicine and rehabilitation and also practiced as a pediatrician. Frankly, his testimony is rather vague and confusing. He indicated that he did not really treat the employee and only saw her maybe once in his office for an examination. (Pet. Exh. 4, p. 13) In a handwritten note dated July 10, 1999, the doctor described the employee's complaints, including low back pain and muscle spasm, which interfered with her ability to get out of bed. He also stated that she was very depressed because she could not work and she was unable to sleep due to the pain. He believed that he referred her for physical therapy, but he was uncertain whether she went forward with such a program.

In a letter dated September 15, 2001 addressed "To Whom it May Concern," Dr. Chrispin wrote in his own hand that Ms. Zamor was out of work due to severe pain, muscle spasms, headache, dizziness and a weakened left hand grip. He indicated that because she was not working, she encountered financial difficulties and became depressed to the point that she could not take care of her own affairs. However, the doctor testified that he never discussed the details of her financial problems or any other difficulties she was having. Pet. Exh. 4, p. 39. He explained that he saw Ms. Zamor at work at ABD Health Care and would talk to her and she just

sounded depressed. He advised her to see a psychiatrist for her problems.

Dr. Chrispin acknowledged that he never made a diagnosis regarding her psychiatric condition because it was not his field of practice. He testified that he did not know when her depression may have started or how long the condition persisted. Id. at 40. The doctor did state that the employee became disabled due to her physical injuries initially and at some later point she became depressed due to the pain and her inability to work. He also noted that she may have been experiencing some post-menopausal symptoms which could have been accelerated due to the accident.

An original petition was filed on the employee's behalf on October 23, 2001. Pursuant to the pretrial order entered in this matter on March 29, 2002, the petition was denied on the basis that it was filed out of time. The employee claimed a trial. After the parties submitted their evidence, the employer filed a motion to dismiss pursuant to R.I.G.L. § 28-35-57. After thoroughly reviewing all of the evidence, the trial judge rejected the employee's argument that she suffered from a mental incapacity for a period of time which would toll the running of the two (2) year period for filing a claim. He, therefore, granted the motion to dismiss. The employee filed a claim of appeal from that decision.

The role of the Appellate Division in reviewing a decision of the trial judge is limited by the standard set forth in R.I.G.L. § 28-35-28(b) which states, in pertinent part, as follows:

> "The findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous."

In accordance with this restriction, the Appellate Division is not permitted to undertake a *de novo* review of the evidence without first making a specific finding that the trial judge was clearly wrong. We have carefully reviewed the record in this matter, and we find no error in the trial judge's findings of fact as contained in the order entered on June 25, 2003.

The employee has filed twelve (12) reasons of appeal. We will first address reasons six (6) through twelve (12) as our decision on these issues will obviate the need to address the remaining reasons of appeal.

In reasons six (6) through nine (9), the employee argues that the trial judge committed error when he excluded the employee's testimony as to a statement allegedly made by an agent of the employer advising her that she did not have a claim for workers' compensation benefits arising out of the motor vehicle accident. The employee further contends that she relied upon this alleged statement and, therefore, the employer should be equitably estopped from asserting that her petition should be dismissed because it was filed out of time. After reviewing the transcript of the employee's testimony regarding this alleged statement, we find that the trial judge properly excluded the statement.

Ms. Zamor's testimony regarding this statement was somewhat vague. Initially, she recounted that she had someone (whom she never identified) contact someone at VNA Support Services at sometime during the period she was out of work in 1999. *See* Tr. p. 142. After prompting from her attorney, the employee identified the person at VNA as John Rioles, a nurse in quality management. As part of an offer of proof, the employee stated that Mr. Rioles told her that the circumstances of her injury did not qualify as a workers' compensation claim. Tr. p. 147.

First, we would note that courts in general do not permit the admission of the opinion of a lay person regarding a question of law. Jameson v. Hawthorne, 635 R.I. 1167, 1171 (R.I. 1994). In Jameson, the Rhode Island Supreme Court found that the trial judge properly excluded a memorandum from the city of Newport's finance director to the city solicitor which contained his opinion that the city had some "liability exposure" for a claim involving injury to a child at

the Senior Center. The plaintiff in that case had argued that the memorandum should be admitted as a statement of a party opponent under Rule 801(d)(2) of the Rules of Evidence. However, that issue was never reached because the trial judge properly excluded the statement as a lay person stating a lay belief regarding a legal issue. Id. at 1172.

Based upon the same reasoning, we believe that the trial judge acted properly in the matter presently before the panel. According to Ms. Zamor, Mr. Rioles informed her that because she was not injured while on property of the employer or a client, she was not eligible for workers' compensation benefits. This statement certainly qualifies as a legal opinion offered by a lay person. As such, it was properly excluded by the trial judge.

Assuming, *arguendo*, that the statement was admissible, we find that the doctrine of equitable estoppel does not apply to this situation. Mr. Rioles' alleged statement simply conveyed that the employer would not accept the employee's claim for workers' compensation benefits. We find the decision of the Rhode Island Supreme Court in Trzoniec v. General Controls Co., 100 R.I. 448, 216 A.2d 886 (1966), to be instructive. In that case, the employee filed a petition for workers' compensation benefits almost four (4) years after the injury occurred, stating that he had relied upon the statement of an insurance adjuster that he could not receive workers' compensation benefits and wages for the same period (the employer had continued to pay his regular wages). The Court determined that such a statement amounted to simply a denial of liability by the insurer and did not mislead the employee into believing that he did not need to file a claim. Id. at 451-452, 216 A.2d at 888-889.

> "Were we to equate it with the kind of conduct which in law will estop an employer from claiming the benefit of the statute, we would be nullifying by judicial declaration a legislative directive which makes the filing of a petition within a prescribed time an express condition of the right to recover compensation." Id.

The alleged statement by Mr. Rioles falls within the same category as the statement involved in Trzoniec, a denial of liability. It was not designed to lull or mislead the employee into believing that she need not file a claim and is not a sufficient basis to apply the doctrine of equitable estoppel.

Based upon the foregoing discussion, we deny and dismiss reasons of appeal numbers six (6) through (9). We would note that additional problems exist regarding the equitable estoppel argument and admission of the statement of Mr. Rioles. For example, the employee's testimony is insufficient to establish whether Mr. Rioles' position involved the actual handling of workers' compensation matters and the scope of his agency as a representative of the employer in such matters. In addition, it is unclear whether the employee actually spoke to Mr. Rioles. Although we point out some of these other problems, we believe that the above discussion is sufficient to deny the reasons of appeal involving the statement of Mr. Rioles.

In the final three (3) reasons of appeal, the employee argues that the trial judge improperly rejected the testimony of Dr. Chrispin regarding her alleged mental incapacity and improperly assessed the evidence as a whole in the context of a motion to dismiss. After reviewing the trial judge's discussion of Dr. Chrispin's testimony and the doctor's deposition in its entirety, it is clear that the trial judge's determination that the doctor's testimony was not probative is well-supported. Dr. Chrispin repeatedly noted his inability to diagnose and treat any psychological disorder the employee may have suffered from. *See* Pet. Ex. 1, p. 13, 14, 25-26. The trial judge did not simply reject the doctor's testimony because he was not a psychiatrist. On the contrary, he discussed it at length in his decision. However, he concluded that it carried very little, if any, weight. We must agree.

In order to toll the two (2) year period within which to file a petition, the employee must

prove that she was suffering from a mental incapacity which rendered her unable to manage her day-to-day affairs for some period following the injury. Her attorney specifically stated that the testimony of Dr. Chrispin was the evidence supporting this claim of mental incapacity. Tr. p. 174. In response to the direct question as to the period of time that the doctor believed Ms. Zamor could not handle her own affairs, Dr. Chrispin responded that he could not say when that period was. Pet. Ex. 1, p. 40. He also indicated that he never discussed her financial situation or whether she was able to manage her money. Id. at 45.

Dr. Chrispin's testimony does not even come close to supporting the contention that the employee suffered from a psychological disorder of such magnitude as to render her unable to manage her affairs or protect her legal rights. In addition, the record in this matter establishes that, although the employee may have been suffering from certain physical conditions restricting her physical activities, she continued to manage her affairs herself or through others at her direction.

During the period Ms. Zamor alleges she was incapable of handling her affairs, she sought medical treatment for her injuries and applied for TDI benefits. She moved to New York and continued to have contact with the TDI division as to changes in the form of payment and obtaining physicians' statements to document her disability. Even accepting her testimony that her mother and sister handled her affairs, it is apparent that Ms. Zamor provided direction and input for their actions. She appears to have attended medical appointments in New York, including physical therapy. Most significantly, she applied for and was hired as an assistant supervisor of 150 home care medical personnel within less than six (6) months of her injury. All of these facts belie her assertion that she was suffering from a mental incapacity which rendered her unable to pursue her legal rights in a timely manner. Based upon the record before us, we

find that the trial judge's conclusion that the employee was not suffering from a mental incapacity following her injury of June 9, 1999 which would toll the running of the two (2) year time limit for filing a petition, is not clearly erroneous and is well-supported by the evidence.

In light of the conclusion that the employee's petition was filed out of time, we find no reason to address the remaining reasons of appeal which involve the trial judge's denial of the employee's motion to compel the court's administrator to assign cases in accordance with Rule 2.1 of the Rules of Practice of the Workers' Compensation Court. Any issues raised by the employee's reasons of appeal have been rendered moot by the dismissal of her petition. The employee, as stipulated by her attorney, presented her entire case to the court. There are no allegations that she was not afforded a full and fair hearing before an impartial justice. In addition, the rule in question was amended on February 23, 2004 to change responsibility for assigning cases to the court in general rather than the administrator. Consequently, the remainder of the employee's reasons of appeal are dismissed.

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 be entered on

Sowa and Connor, JJ. concur.

ENTER:

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Olsson, J.

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Sowa, J.

_____
Connor, J.

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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 an order of this Court entered on June 25, 2003, be and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

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Olsson, J.

_____
Sowa, J.

_____
Connor, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq., Robert S. Thurston, Esq., and Jeffrey M. Liptrot, Esq., on

_____