

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT  
APPELLATE DIVISION

NELLIE FRANCIS

)

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VS.

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W.C.C. 03-05864

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PROVIDENCE SCHOOL DEPARTMENT )

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the petitioner/employee's appeal from the denial of her motion to proceed *in forma pauperis* in which she is alleging that she is unable to pay the cost of the trial transcript. The trial judge concluded that the employee had failed to prove that she was indigent. After reviewing the trial judge's decision and the memoranda of the parties, we deny the employee's appeal and affirm the ruling of the trial judge.

The employee filed an original petition in which she alleged that she developed stress as a result of sexual harassment at work by a superior which resulted in incapacity beginning March 6, 2003. The matter was denied at the pretrial conference and the employee claimed a trial. After a full hearing on the merits of the employee's allegations, the Associate Judge Dianne M. Connor rendered a decision denying the employee's petition. The employee filed a claim of appeal, paying the Twenty-five and 00/100 (\$25.00) Dollars filing fee. At this point, the employee's attorney withdrew from the case and the employee has proceeded *pro se* with her appeals and motions.

Ms. Francis filed a motion to proceed *in forma pauperis*, alleging that she was financially unable to afford the Six Hundred and 00/100 (\$600.00) Dollars required to obtain a copy of the trial transcript. She indicated that she has not worked since June 2003. Judge Connor conducted a hearing regarding the employee's ability to pay. The employee submitted a statement of her assets and liabilities and testified as to her monthly income and expenses. After considering this evidence, the trial judge rendered a decision denying the motion. She specifically stated that she found the employee's testimony to be evasive and unworthy of belief. The employee then filed an appeal from the decision and order denying her motion to proceed *in forma pauperis*.

Ms. Francis then filed another motion to proceed *in forma pauperis* for the purpose of obtaining the transcript of the hearing on her previous motion before Judge Connor. Judge Connor recused herself from hearing this second motion, in light of her credibility determination on the first motion. Chief Judge George E. Healy heard the second motion to proceed *in forma pauperis* and denied that motion as well.

The factual determinations made by a trial judge are accorded great deference on review. Rhode Island General Laws § 28-35-28(b) states that "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." In particular, when such findings are based upon credibility determinations made by the trial judge, the appellate panel must first find that the trial judge was clearly wrong, or misconceived or overlooked material evidence in arriving at that determination, before the appellate panel may independently review the evidence.

The employee has filed a document containing three (3) numbered reasons of appeal and a lengthy written argument. Generally, the employee contends that Judge Connor misconstrued or disregarded the employee's testimony and the written documentation which establishes that

her monthly expenses exceed her monthly income. After review of the record and considering the arguments of the parties, we deny the employee's appeal.

The authority of the courts to waive costs and fees for litigants is entirely discretionary. Silvestro v. Almonte, 484 A.2d 900, 902 (R.I. 1984); Jones v. Aciz, 109 R.I. 612, 626, 289 A.2d 44, 52 (1972). In particular, compelling circumstances must exist in order for a judge to waive the costs of an appeal in a civil action. Kelly v. Kallan, 442 A.2d 890, 892 (R.I. 1982). The appellee bears the burden of proving that he or she is "absolutely unable" to pay the fees or costs necessary to prosecute the appeal. Silvestro v. Almonte, 484 A.2d at 903. The United States Supreme Court has adopted a very limited view of the right of a civil litigant to be excused from the payment of the costs and fees associated with prosecuting an appeal. For example, in Ortwein v. Schwab, 410 U.S. 656, 93 S.Ct. 1172, 35 L.Ed. 2d 572 (1973), the Court concluded that a petitioner seeking judicial review of a welfare division decision denying benefits was not denied his due process or equal protection rights by the refusal of the state court to waive the filing fee. Id.

In her decision on the employee's motion to proceed *in forma pauperis*, Judge Connor reviewed the employee's testimony and the statement of assets and liabilities which she filed. Ms. Francis owns a home valued at over \$200,000.00 and has an outstanding mortgage liability of about \$85,000.00. She receives Social Security Disability Insurance benefits, as well as food stamps and heating assistance. For a two (2) year period ending in March 2005, her mortgage was paid through a private disability insurance policy. The employee testified that six (6) of her children live with her, but four (4) of them are between the ages of twenty (20) and twenty-five (25) years old. Ms. Francis stated that she is currently tutoring a number of children in various subjects, including computers, and has registered this activity as a business. However, she

asserted that she is not receiving any income from her work. She did state that she has several computers at her home which she uses for tutoring. The employee also testified that she is in the process of trying to return to work with the Providence School Department. She also drives a 2000 Toyota Avalon, for which she still makes some monthly payments.

The trial judge found that “the employee was evasive and less than forthright with regard to her monthly income, her assets and her liabilities.” (Tr. Dec. p. 4) Judge Connor pointed out that the employee had failed to list her home on the statement of assets and liabilities and failed to note the private disability insurance benefits. She further indicated that she did not believe the employee had registered a business and was tutoring children without receiving any income from that activity.

The Rhode Island Supreme Court has cited the importance of the trial judge’s position in assessing credibility. In Davol, Inc. v. Aguiar, 463 A.2d 170 (R.I. 1983), the court discussed the value of such first-hand observation of witnesses:

“We believe that the trial commissioner is in the best position to observe the appearance of a witness, his demeanor, and the manner in which he answers questions. These impressions are invaluable in assessing the credibility of witnesses and ultimately in determining what evidence to accept and what evidence to reject. (Citation omitted). The weight given to such evidence necessarily depends on a determination of the credibility of the witnesses presenting it.” Id. at 174.

In the present matter, we find that Judge Connor did not misconstrue or overlook or disregard any of the evidence presented by the employee. Consequently, we must defer to the trial judge’s credibility assessment and her ultimate decision that the employee had failed to establish that she was “absolutely unable” to pay the cost of the trial transcript. Because the employee has failed to establish her inability to pay the appeal costs, we need not address the

issues of whether there is any probability of success on the merits and whether the appeal was taken in good faith.

Based upon the foregoing, the employee's appeal regarding the denial of her motion to proceed *in forma pauperis* is hereby denied, and the decision and order of the trial judge is affirmed.

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

Bertness and Sowa, JJ. concur.

ENTER:

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Olsson, J.

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Bertness, J.

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Sowa, 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 regarding the denial of her motion to proceed *in forma pauperis* 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 an Order of this Court entered on February 24, 2005 be, and they hereby are, affirmed.

2. The reasons of appeal regarding the employee's claim of appeal from the decree of the trial judge entered on October 25, 2004, denying the employee's original petition, shall be filed no later than September 16, 2005.

Entered as the final decree of this Court this       day of

BY ORDER:

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John A. Sabatini, Administrator

ENTER:

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Olsson, J.

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Bertness, J.

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Sowa, J.

I hereby certify that copies were mailed to Nellie Francis, Pro Se, Paul Gionfriddo, Esq.,  
and Richard Woolley, Esq., on

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