STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

KATHALEEN MCHALE	)	
	)	
VS.	)	W.C.C. 03-08215
	)	
MARK ACCOUNTING SERVICES	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division pursuant to an order issued to the parties to appear and show cause why the appeal should not be summarily decided. After reviewing the record and considering the arguments of the parties, we find that cause has not been shown and we will proceed to render our decision in this matter without further argument.

The employee filed an original petition alleging she sustained injuries to her left arm, neck, and back as a result of a physical assault by a co-worker on October 23, 2003. She asserted that she was disabled from November 4, 2003 to March 6, 2004. The trial judge denied the petition at the pretrial conference and the employee claimed a trial in a timely manner.

After extensive and contradictory testimony from the employee, the employers, and co-workers regarding the circumstances surrounding the alleged assault and its aftermath, the trial judge found that the employee failed to prove that she was physically assaulted by a co-worker on October 23, 2003. Accordingly, the trial judge denied and dismissed the employee's petition. The employee then filed a claim of appeal.

Ms. McHale filed the petition herself, but thereafter, she was represented by counsel at the pretrial conference and through the course of the trial (she did change attorneys mid-way through the trial). She filed the present claim of appeal *pro se*. She did not provide a transcript of the trial in conjunction with her appeal. Consequently, whatever facts are presented in our decision have been gleaned from the written decision of the trial judge.

The employee had worked as a payroll manager for Mark Accounting Services since January 18, 2003. The company was owned by Daniel and Diane Vaccaro and only employed three (3) people in addition to Ms. McHale. The Vaccaros testified, as well as the employee and two (2) of her co-workers, Dawn Allen and Ann Marie Tatulli.

The employee's contention was that Ms. Allen physically assaulted her during a confrontation in her office on October 23, 2003. Ms. Tatulli testified that she witnessed most of this alleged confrontation and Ms. Allen did not touch Ms. McHale. At the time, the Vaccaros were out of the country and did not return to the office until November 4, 2003. There was testimony to the effect that the work environment was not exactly tranquil and raised voices, bickering, and foul language were often heard.

After the alleged incident occurred on October 23, 2003, Ms. McHale continued to work until she walked out on November 4, 2003 after an argument with Ms. Vaccaro. Although she spoke with Mr. Vaccaro on one (1) occasion while the Vaccaros were on vacation, the employee did not inform him of any confrontation with Ms. Allen. Ms. McHale did not report the alleged assault to the police and she did not seek any medical treatment until November 6, 2003, after she was terminated and after she was informed that Ms. Allen had filed a police report against her.

The trial judge was faced with contradictory testimony regarding events leading up to the incident on October 23, 2003, the exact details of the event itself, and the conduct of the parties thereafter. Based upon her observation of the witnesses as they testified and the documentation submitted to the court, the trial judge determined that the testimony of Ms. Allen and Ms. Tatulli was more credible and persuasive than that of the employee. She, therefore, concluded that the employee had not sustained the burden of proving that she was injured at work on October 23, 2003.

Pursuant to R.I.G.L. § 28-35-28(b), the Appellate Division must abide by the trial judge's findings on factual matters absent clear error. 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)). A review of the trial judge's decision in this matter reveals that it was based upon her determination that she found that testimony of the employers and co-workers to be more persuasive than that of the employee regarding the circumstances involving the alleged assault. The trial judge is uniquely qualified to determine what evidence to accept and what evidence to reject because she has the opportunity to personally observe the witness who appears before her, to evaluate his demeanor, his attitude, and the manner in which he testifies. Davol, Inc. v. Aguiar, 463 A.2d 170, 174 (R.I. 1983). Credibility assessments made at the trial level are given great deference on appeal and will not be overturned absent a finding of clear error. Laganiere v. Bonte Spinning Co., 103 R.I. 191, 195, 236 A.2d 256, 258 (1967). After reviewing the limited information which is available to us from this case, we find no error on the part of the trial judge, and we, accordingly, affirm her decision and decree.

In support of her appeal, the employee offered as reasons for appeal a battery of perceived errors in the trial judge's decision. The crux of the errors pleaded pertain to ostensible misstatements of the testimony given in court in the trial judge's decision as well as the employee's personal grievances with her attorneys, the Rhode Island Department of Labor and Training, and the Rhode Island Workers' Compensation Court. The employee repeatedly refers to testimony allegedly given during the trial and information which was not made part of the record before the trial judge to point out perceived errors on the part of the trial judge. However, the employee did not order a transcript of the trial proceedings for this appeal which would enable this panel to compare the trial judge's recitation of facts with the actual testimony. Furthermore, we are not permitted to consider any information other than that which was presented at the trial.

The crux of the employee's argument is that the trial judge chose to believe the wrong people and that she is the only person telling the truth. However, the trial judge cited specific facts which supported her assessment of the testimony of the witnesses in this matter. She noted the failure to promptly report the incident to her employer or to the police, particularly if Ms. McHale was as traumatized and injured as she claimed. The employee also failed to seek medical treatment until she was fired from her employment almost two (2) weeks after the alleged incident. During that two (2) week period, Ms. McHale continued to work with Ms. Allen, the alleged perpetrator of the assault, without complaint. Although the employee's treating physician did state that the employee's complaints of pain in her arm, back, and neck were caused by a physical assault by a co-worker, the trial judge pointed out that the doctor's opinion was based solely on the employee's subjective complaints and her version of what took place on October 23, 2003.

Based upon our review of this matter, we do not find that the trial judge was clearly wrong in her conclusions. The denial of the employee's claim based upon the finding that the testimony of Ms. Allen and Ms. Tatulli is more credible and persuasive is further bolstered by the additional facts cited by the trial judge. We find that her determination that the employee failed to prove by a fair preponderance of the evidence that she was injured at work on October 23, 2003 is well-supported. Consequently, the employee's appeal is denied and dismissed and the decision and decree 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 Hardman, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Bertness, J.

_____
Hardman, 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 a decree of this Court entered on April 5, 2005 be, and they hereby are, affirmed.

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Bertness, J.

_____
Hardman, J.

I hereby certify that copies were mailed to Kathaleen McHale, 12 Esmond St., Smithfield, R.I. 02917, and Leonard Cordeiro, Esq., on

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