

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

BRUCE PALUMBO

)

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VS.

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W.C.C. 2009-06265

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TOWN OF BRISTOL

)

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's appeal from a decision and decree of the trial judge denying his original petition in which he alleged he sustained an injury to his right foot after an altercation with a co-worker on September 30, 2009. After a thorough review of the record and consideration of the arguments of the parties, we deny the employee's appeal and affirm the decision and decree of the trial judge in this matter.

The evidence offered before the court during the trial consisted of the testimony of the employee and a number of his co-workers, photographs of the area where the altercation took place, and the affidavits and medical reports of Dr. Howard Perrone and Dr. Jeffrey Rock. The testimony of the employee and his co-workers contains numerous inconsistencies and contradictions concerning the events preceding the altercation, as well as the altercation itself.

The employee testified that he worked as a heavy equipment operator for the Town of Bristol. His job duties at the time of the alleged injury involved driving a garbage truck and picking up bags and other containers of yard waste placed at curbside by homeowners. Each day, two (2) heavy equipment operators and one (1) laborer were assigned to each truck. The

two (2) heavy equipment operators would split their day between driving the truck and working on the back of the truck with the laborer picking up the yard waste and tossing it in the truck.

On the date of the altercation and alleged injury, Mr. Palumbo was working with Thomas Andrade, a laborer, and David Ramos, another heavy equipment operator. The employee and Mr. Andrade, according to the employee's testimony, "have had disagreements" in the past and he described their working relationship as "probably not the best." Tr. at 80. He also admitted to criticizing Mr. Andrade to other employees. Mr. Palumbo drove the truck for about three (3) hours that morning before switching to a position on the back of the truck, alongside Mr. Andrade, for the remainder of the route. Once he was working on the back of the truck, he and Mr. Andrade began having issues that would lead eventually to the altercation at the compost facility. He felt that Mr. Andrade "was not pulling his weight" and was "slacking off." Tr. at 58. After a period of time he "called him on it" but Mr. Andrade did not respond. Id.

The employee testified that at approximately 1:15 p.m., after the conclusion of the route, he and Mr. Andrade joined Mr. Ramos in the cab of the truck to drive back to the town's compost facility. At some point after concluding their route and beginning their return trip to the compost facility, the employee asked Mr. Ramos, who was driving, to head back as he was not feeling very well. After the employee made this request, Mr. Andrade asked Mr. Ramos if they could stop at his apartment on the way back to the compost facility to retrieve his Chapstick because his lips were chapped from exposure to the elements due to riding on the back of the truck. Mr. Palumbo again asked Mr. Ramos "to please take me in" and Mr. Ramos drove them back to the compost facility without stopping to retrieve Mr. Andrade's Chapstick. Tr. at 63.

After it became clear that Mr. Ramos was not stopping to retrieve Mr. Andrade's Chapstick, the employee and Mr. Andrade engaged in a heated argument involving the exchange

of profanities which the employee stated was initiated by Mr. Andrade. After arriving at the facility and exiting the cab of the truck, Mr. Palumbo began walking towards the office, in the opposite direction of Mr. Andrade, and told Mr. Andrade “now you can go home and get your Chapstick.” Tr. at 64. At this point, the employee testified that “all I heard him say was, ‘Oh, yeah’...and then the barrel came in to my vision.” Id. The employee testified that he saw Mr. Andrade throw the empty fifty-five (55) gallon plastic drum towards him from approximately twenty (20) feet away as the employee was standing in front of the door to the office. He stated that he put his right foot up to about waist height in defense as the barrel was going to strike him. The barrel struck him, causing him to tumble forward, landing on the barrel and then the ground.

The employee remained on the ground “for a little while” before getting up and walking into the office. Tr. at 68. After reporting the incident to his supervisor, he sought medical attention at Medical Associates of Rhode Island where he was diagnosed with a right foot sprain. He wore an air cast on his right foot for approximately five (5) weeks and returned to work on November 15, 2009.

Mr. Andrade testified that he had been employed for about four (4) and one (1) half years by the Town of Bristol as a laborer at the compost facility. He acknowledged that he and Mr. Palumbo did not have a very good working relationship. Shortly after the altercation he signed a letter, along with most of his co-workers, addressed to their supervisor expressing that the employee’s behavior created unnecessary stress for the entire department and created an uncomfortable working environment. He indicated that Mr. Palumbo made derogatory comments about him to co-workers or directly to him on a daily basis since Mr. Andrade began working at the facility.

With regard to the altercation on September 30, 2009, Mr. Andrade explained that after their lunch break he asked Mr. Ramos to stop at his home on the way back to the facility so that he could pick up some Chapstick. While working on the back of the truck in the afternoon, Mr. Andrade did not exchange any words with Mr. Palumbo despite his comments about how slowly he was working. After they finished the route and got into the cab together, Mr. Palumbo told Mr. Ramos to take him back to the facility because he felt ill. When Mr. Andrade reminded Mr. Ramos about stopping at his home to retrieve his Chapstick, Mr. Palumbo declared that he did not care that Mr. Andrade needed his Chapstick and they needed to get back to the facility because he felt ill. Mr. Andrade testified that this barrage of inappropriate language directed at him by the employee included Mr. Palumbo stating that he was “like a girl” and a “faggot.” Tr. at 24-5.

Upon returning to the compost facility, the co-workers exited the cab of the truck and went off in opposite directions while still exchanging words. Mr. Andrade then picked up an empty fifty-five (55) gallon blue plastic drum and threw it over the nose of his supervisor’s pickup truck towards a wall which was about ten (10) to twelve (12) feet away from the employee. Mr. Andrade asserted that as the barrel hit the wall and bounced off, the employee thrust himself into the barrel and then fell to the ground. He estimated that the employee was on the ground for about five (5) minutes, although no one approached to assist him. Eventually, Mr. Palumbo got up and went into the office.

Mr. Ramos testified that he was employed by the Town of Bristol for seven (7) years as a heavy equipment operator at the compost facility. Mr. Ramos was on the truck with Mr. Andrade and the employee on the date of the altercation and was driving the truck in the afternoon on their way back to the compost facility. He recalled a conversation earlier that day

when Mr. Palumbo asked him if something was wrong with Mr. Andrade as Mr. Palumbo thought he was taking too long to brush himself off at each stop and generally was performing his job slower than the employee would like. Mr. Ramos stated that he told the employee that Mr. Andrade had suffered a legitimate ankle injury about two (2) weeks earlier and that was likely why he was not able to perform his job as quickly as he otherwise would have been able.

Mr. Ramos stated that Mr. Andrade had asked him at lunch time if they could make a stop at Mr. Andrade's apartment after their route was over so he could retrieve his Chapstick as his lips were hurting from exposure to the weather. Mr. Ramos testified that before he reached Mr. Andrade's street, while on the way back to the facility, the employee instructed him to take him back to the compost facility as he didn't "give a f*** about his Chapstick" and "his lips can burn for all I care." Tr. at 100. Mr. Ramos stated that he believed that Mr. Andrade "actually has very thick skin" and felt that the employee aggravated Mr. Andrade while the three of them were in the truck on the way back to the compost facility. Tr. at 115.

Mr. Ramos testified that when he parked the truck in the compost facility lot, the employee and Mr. Andrade continued to argue. As they got out of the truck, they were "making personal digs at each other" immediately before the barrel was thrown. Tr. at 103. He stated that he did not see the barrel hit the employee or the wall but he heard a loud sound that "resemble[d] that of a plastic barrel hitting," and heard Mr. Andrade say after he heard the noise, "I can't believe you just did that." Tr. at 104. Mr. Ramos indicated that within a matter of seconds he walked around the tub grinder, which had been blocking his view of the area where the barrel hit, and he did not see the employee anywhere in the vicinity.

Richard Tavares, the supervisor, testified that he has worked for the town for twenty (20) years and was working at the compost facility on the date of the altercation. He stated that he

was working on a piece of machinery in the yard about twenty-five (25) feet away and could see the employee, but could not see Mr. Andrade. Mr. Tavares testified that he heard the employee and Mr. Andrade arguing as they came out of the truck and that suddenly he heard a “boom,” saw the barrel hit the building, and Mr. Palumbo fall down. Tr. at 118. He stated that he never saw the barrel contact the employee but he observed the employee moving “in to the barrel” rather than stepping away from the barrel. Tr. at 129.

Kevin Nerone, a fellow employee, testified that he has worked for the town for eight (8) years and on the day in question he was working on a piece of machinery with Mr. Tavares within fifteen (15) feet or so from the scene of the altercation. He stated that he heard the two (2) men engaged in an argument as they got out of the truck and this caused him to turn towards them. Mr. Nerone testified that he saw Mr. Andrade throw the barrel and observed it hit the wall. He noted that the employee was five (5) to ten (10) feet away from where the barrel hit the wall. He stated that when the barrel came off the wall, he saw the employee “take two steps quickly towards the barrel.” Tr. at 137. Mr. Nerone observed the employee fall down and asserted that he remained on the ground for ten (10) to fifteen (15) minutes before getting up unassisted and making his way into the office.

The trial judge noted that the facts in this case were vigorously contested and that there were numerous inconsistencies between Mr. Palumbo’s testimony and that of the other town employees. The trial judge stated that Mr. Palumbo’s testimony that the barrel was thrown directly at him and he used his foot to deflect the barrel was contradicted to some extent by each of the other witnesses. As a result, he found that the employee’s testimony lacked credibility. The trial judge indicated that Mr. Andrade’s version of the events that transpired in the truck was corroborated by Mr. Ramos, in particular that Mr. Palumbo was the protagonist in the argument

with Mr. Andrade on the way back to the facility. He also found Mr. Tavares and Mr. Nerone to be credible witnesses and accepted their version of events at the compost facility and noted that it was consistent with Mr. Andrade's testimony. After reviewing the testimony, the trial judge concluded that any injury sustained by the employee was not compensable because the subject matter of the fight was personal and did not concern the employer's business or the manner in which it was carried on. The employee filed a timely claim of appeal from the trial judge's decision.

The parameters of appellate review of a decision rendered by a trial judge are very limited and are set forth in R.I.G.L. § 28-35-28(b), which 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." The panel must initially make a finding that the trial judge was clearly wrong or misconceived or overlooked material evidence before undertaking its own *de novo* review of the evidence. Blecha v. Wells Fargo Guard-Co. Serv., 610 A.2d 98, 102 (R.I. 1992).

The scope of review is further limited when the factual determinations are based upon the trial judge's evaluation of the relative credibility of the witnesses. The Rhode Island Supreme Court stated that "[a] credibility determination is particularly within the province of the factfinder." Almeida v. Red Cap Constr., Inc., 638 A.2d 523, 524 (R.I. 1994). In reviewing the trial judge's decision, we must afford "a great deal of respect to the factual determinations and credibility assessments made by the judicial officer who has actually observed the human drama that is part and parcel of every trial and who has had an opportunity to appraise witness demeanor and to take into account other realities that cannot be grasped from a reading of a cold record." In the Matter of the Dissolution of Anderson, Zangari, & Bossian, 888 A.2d 973, 975 (R.I. 2006). With these standards guiding our evaluation process, we have thoroughly reviewed

the record in this matter and conclude that the trial court was not clearly wrong in its assessment of the evidence.

The employee has filed four (4) reasons of appeal. The employee's first, third and fourth reasons essentially contend that the trial judge erred in determining that the verbal confrontation and subsequent altercation at the compost facility between the employee and Mr. Andrade was the result of a personal issue rather than the culmination of mounting tensions regarding Mr. Andrade's work effort. We find no merit in this contention.

The Rhode Island Supreme Court has previously affirmed this court's holding "that injuries resulting from a fight between fellow employees upon the employer's premises are not compensable unless the subject matter of the fight concerns the employer's business or the manner in which it is carried on." Gaudette v. Glas-Kraft, Inc., 91 R.I. 304, 306, 163 A.2d 23, 24 (1960). In Gaudette, the employer approved the use of a sink by employees to wash their hands during working hours due to the nature of their work as pipe coverers. Id. at 305, 163 A.2d at 24. The sink was large enough for simultaneous use by two (2) employees. A third employee pushed Gaudette away from the sink while he and another co-worker were using the sink. Gaudette then grabbed the offender by the shirt and pushed him away from the sink. As he was talking to another co-worker, the offender struck Gaudette in the face, breaking his nose.

The Rhode Island Supreme Court framed the issue as a question of causation which required that the employee establish a causal connection between the injury and the employment or the conditions under which it must be performed. Id. at 306, 163 A.2d at 24. Assuming that the use of the sink was incidental to Gaudette's employment, "the question whether the assault was caused by the use of the sink or from some other cause is, in the first instance, a question of fact." Id. at 307, 163 A.2d at 25. The trial commissioner found as a fact that the assault was not

due to the use of the sink but to the private quarrel resulting from Gaudette grabbing and pushing the offending co-worker. After reviewing the record of the trial, the appellate panel concluded that “the dispute which precipitated the assault in no way concerned the work which the petitioner or his assailant was required to do for the respondent, nor did it concern the conditions under which the work was required to be performed.” Id. The Rhode Island Supreme Court affirmed the decision after determining that there was sufficient evidence to support the appellate panel’s “findings that the assault was not attributable in whole or in part to the nature, conditions, obligations or incidents of petitioner’s employment.” Id.

The facts in this case are analogous to those in Gaudette and it is apparent that the dispute here was precipitated by a private quarrel between the employee and Mr. Andrade. Although the employee and Mr. Andrade had an acrimonious relationship for several years, it had never progressed beyond verbal name-calling and arguing on any other occasion. It is apparent then that it was the employee’s decision not to allow Mr. Andrade to retrieve his Chapstick, essentially his denial of a personal favor or courtesy to a co-worker, which precipitated the altercation at the compost facility on September 30, 2009.

Mr. Ramos, who was driving the truck when the verbal confrontation began, stated that he believed Mr. Andrade “actually has very thick skin,” and there is no evidence of prior physical altercations between the employee and Mr. Andrade to contradict his testimony. Tr. at 115. There is nothing in the trial testimony to dispute that Mr. Andrade possesses an above-average ability to deflect criticism and disregard derogatory comments. Mr. Andrade stated that the employee had made these types of comments on a regular basis for a number of years and it is clear from his testimony that it had never enraged him to the point where he had lost his composure until the day of the altercation. His frustration on the day of the altercation,

therefore, is more likely due to the denial of a rather simple personal favor than it is to the employee's comments about the pace of his work, comments that he has certainly heard many times before.

The employee admitted at trial that there had been a difference of opinion between himself and Mr. Andrade as to whether to stop or not for Mr. Andrade's Chapstick, and that the verbal confrontation in the truck did not begin in earnest until the employee had "requested to go in." Tr. at 79. It is not difficult to imagine that Mr. Andrade, after asking for a simple favor and receiving permission from one (1) co-worker, would become aggravated when the other co-worker denied him the ability to perform that favor because he felt so ill that he could not withstand a five (5) minute errand on the way back to the compost facility after being able to perform his job duties normally for an entire shift. This denial of a favor would by its nature be personal under these circumstances as it would seem to Mr. Andrade that the employee did not agree to the stop because of their previous acrimonious history and the low esteem the employee held for Mr. Andrade, rather than because the employee had unexpectedly and rather suddenly become genuinely ill.

It is apparent that the employee's denial of Mr. Andrade's request for a simple favor, and not his generic complaints about the pace of Mr. Andrade's work, served as the catalyst for both the verbal confrontation in the truck as well as the subsequent altercation at the compost facility. The trial testimony, including the testimony of Mr. Palumbo himself, supports the factual determination of the trial judge that the subject matter of the fight was personal in nature and did not concern the employer's business or the manner in which it was carried on.

The employee's second reason of appeal contends the trial judge erred by determining that the employee was the antagonist in a verbal confrontation with Mr. Andrade thereby

disqualifying the employee from receiving benefits. This contention is misguided, however, as the trial judge did not disqualify the employee from receiving benefits based on a finding that the employee was the antagonist in the verbal confrontation with Mr. Andrade, but rather based upon his determination that the injury resulted from a private quarrel between the two (2) men and was not causally connected to the employment.

During the course of his evaluation of the testimony of the witnesses, the trial judge stated that he accepted the testimony of Mr. Ramos regarding what transpired in the cab of the truck as they were returning to the compost facility, including Mr. Ramos' statement that the employee was the antagonist. The employee denied that he initiated the argument in the truck and attempted to portray himself as an innocent victim. The trial judge further indicated that he found Mr. Tavares and Mr. Nerone to be credible witnesses and accepted their description of the barrel-throwing incident at the facility. Based upon these credibility assessments, the trial judge concluded that "the credibility of the employee was greatly damaged and the court will not accept his version of what occurred on the date in question." Dec. at 8.

There is nothing in the trial judge's decision to lend any credence to the notion that the employee was disqualified from receiving benefits solely because he was found to be the antagonist in the verbal confrontation with Mr. Andrade. After assessing the veracity of the witnesses, the trial judge concluded that the injury was not work-related because it resulted from a personal quarrel, not because he determined that the employee was the antagonist.

Based upon the foregoing discussion, we deny and dismiss the employee's claim of appeal and affirm the decision and decree of the trial judge. 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

Hardman and Ferrieri, J.J., concur.

ENTER:

Olsson, J.

Hardman, J.

Ferrieri, J.

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TOWN OF BRISTOL

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FINAL DECREE OF THE APPELLATE DIVISION

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

ORDERED, ADJUDGED, AND DECREED:

That the findings of fact and the orders contained in a decree of this Court entered on February 16, 2010 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

John A. Sabatini, Administrator

ENTER:

Olsson, J.

Hardman, J.

Ferrieri, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Charles J. Vucci, Esq., and Michael J. Feeney, Esq., on
