STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

TONYA J. LILLIE	)	
	)	
VS.	)	W.C.C. No. 2011-04057
	)	
BLACKSTONE SUPPLY CO.	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's appeal from the denial of her original petition for workers' compensation benefits. In her petition, the employee alleged that she sustained an injury to her neck and right shoulder on May 10, 2011 while performing work-related duties, to wit, lifting a heavy sink. After thoroughly reviewing the record in this matter and considering the respective arguments of the parties, we deny the employee's appeal.

In August 2010, Tonya J. Lillie (the "employee") began working for hardware distributor Blackstone Supply Co. (the "employer" or "Blackstone"). Her job as an "order picker" at the employer's warehouse involved retrieving items that were listed on customer orders. The employee utilized a cart and ladder as necessary.

The testimony of the employee and the employer's witnesses diverge regarding certain conditions of employment. The employee asserts that order pickers rushed to meet various shipping times throughout the day and that she therefore individually lifted items such as sinks

that weighed in excess of fifty (50) pounds rather than ask for help. She acknowledged that there were always other employees present in the warehouse when she was working.

In contrast, the employer's witnesses, Blackstone Vice President Alfred Desrochers and Blackstone Warehouse Manager Adriano Freches, testified that the employer instructed its employees on its policy that employees were expected to seek co-worker assistance when attempting to lift sinks and other heavy items. According to the employers' witnesses, packs of sinks may weigh as little as five (5) or six (6) pounds or as much as seventy (70) or seventy-five (75) pounds. As the employers' witnesses testified, such packs, containing between one (1) and five (5) units, may be stacked up to six (6) feet high, and are more difficult for an individual to lift than the items' weight may suggest due to suction between the packs. Mr. Desrochers testified that, due to the difficulty of overcoming the effect of suction, two (2) employees are able to retrieve sinks faster, safer, and with less risk of damaging the product than a single employee. Both of the employers' witnesses stated that employees are expected to seek each other's help in lifting sinks, and that there are always co-workers available to provide assistance. Mr. Desrochers contended that order pickers are allowed a reasonable period of time to complete their tasks, explaining that he could not recall ever firing an order picker for slow production since beginning to work at Blackstone in 1974.

The employee testified that, on May 10, 2011, she felt a twinge in the area of her neck and right shoulder when she attempted to grab a pack of one (1) or more sinks as it slipped from her grasp. She indicated that she was standing on the floor when she lifted the sink(s). The employee stated that she was able to lift the sink(s) from the stack by herself by using a screwdriver to overcome the suction effect. She asserted that she began experiencing neck stiffness later that day, at which time she reported to her supervisor, Mr. Freches, that she

thought she hurt herself when moving sinks. The employee testified that she had never had any prior difficulties with her neck or right shoulder. She also denied telling anyone at work that she had a stiff neck prior to May 10, 2011.

According to the employee, Mr. Freches provided her with light duty work from May 10, 2011 to May 17, 2011, her last day of work. She stated that the pain worsened during that week and on May 17, 2011 she informed Mr. Freches she had to go to the hospital to get checked out. After being evaluated at Miriam Hospital that day, the employee returned to the employer and provided Mr. Freches with paperwork from the hospital. The employee did not return to work for the employer, but obtained employment as a server at Dave's Bar and Grill on or about October 11, 2011, earning significantly greater wages.

Mr. Freches' testimony contradicts that of the employee. He stated that he noticed the employee was leaning to the side on or about May 2, 2011. On inquiry, the employee allegedly told him that she had a stiff neck. Mr. Freches testified that he assigned the employee to light duty on or about May 10, 2011 when she informed him that she woke up with a stiff neck. According to Mr. Freches, he advised her to seek medical treatment two (2) or three (3) days prior to her seeking treatment on May 17, 2011. He asserted that the employee never reported to him that the stiffness in her neck was related to an incident at work, and that he assigned her light duty work because he "kind of felt bad [that] she was walking around with the neck to the side." Tr. at 54.

In support of her petition, the employee submitted the records of Miriam Hospital. The records consist of Emergency Department admissions of the employee on four (4) dates commencing on May 17, 2011. In relevant part, the records dated and corresponding to the employee's visit to the emergency room at Miriam Hospital on May 17, 2011 state that the

employee "presents with right shoulder injury while at work last Tuesday [May 10, 2011]." The document notes that the above information was obtained from the employee. In addition, the employee submitted the records of chiropractor Michael A. Gross. A letter from the doctor dated July 18, 2011 states that the employee initially visited his office on May 21, 2010 presenting with pain that the employee related to an incident on or about May 10, 2011.

In holding that the employee did not satisfy her burden of proof, the trial judge found that the employer's witnesses were more credible than the employee and he cited the direct contradictions between the testimony of the employee and the employer's witnesses. Mr. Desrochers asserted that any of ten (10) to twelve (12) persons could assist the employee in lifting a sink, while the employee testified that she was expected to lift the sink alone in order to satisfy time requirements. Decision at *9-10. Mr. Freches stated that the employee complained of a stiff neck and was "walking in a leaning manner" a week prior to the date of the alleged injury, while the employee asserted that she had no problems with her neck prior to the injury. Decision at *10. Mr. Freches asserted that the employee did not report a work-related injury to him; the employee argues otherwise. The trial judge specifically found Mr. Freches' testimony that the employee was exhibiting neck problems prior to May 10, 2011 and that she never reported a work injury to him to be credible. Consequently, he concluded that the employee had failed to prove that it was more probable than not that she had sustained an injury in the course of her employment.

The appellate standard of review is very limited and is clearly delineated in R.I. Gen. Laws § 28-35-28(b), which dictates 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 accordance with this standard, the Appellate Division must find that the trial judge was "clearly wrong because the

[trial judge] was obviously mistaken in his or her judgment of the credibility of the witnesses or overlooked or misconceived material evidence in arriving at the conclusion reached." Jan Co., Inc. v. Woodard, W.C.C. No. 2009-06777 (App. Div. 03/04/14) at *8 (quoting Mulcahey v. New England Newspapers, Inc., 488 A.2d 681, 683 (R.I. 1985)). The trial judge is best situated "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 * * *." Id. (quoting Davol, Inc. v. Aguiar, 463 A.2d 170, 174 (R.I. 1983)). We must also remain mindful that it is the petitioner who bears "the burden of adducing credible evidence of probative force to support his or her petition." Badessa v. Rhode Island Hospital, W.C.C. No. 2011-05751 (App. Div. 01/15/15) at *10 (quoting Delage v. Imperial Knife Co., 121 R.I. 146, 148, 396 A.2d 938, 939 (1979)). After a thorough review of the record, we find no error on the part of the trial judge and deny the employee's appeal.

The employee argues that this panel should conduct a *de novo* review of the record because all of the medical evidence is written. Employee's Br. at 2 (citing Verte v. Mearthane Products Corp., 583 A.2d 524, 527-28 (R.I. 1990)). The employee's reliance on Verte is misplaced. As the appellate panel stated in Aldana v. Employment 2000, Inc., the General Assembly amended § 28-35-28 (P.L. 1992, ch. 31, § 13) by adding subsection (b), restricting the appellate division from "undertak[ing] a *de novo* review of conflicting medical opinions without initially concluding that the trial judge was clearly wrong * * *." W.C.C. No. 2004-04176 (App. Div. 02/24/06) (citing Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996)).

Although the standard set forth in Verte was overturned by the Legislature decades ago, the employee requests that we extend such a standard to allow for a *de novo* review "where * * * the trial court has not made an express crebility [sic] determination with respect to the

[e]mployee's testimony * * *." Employee's Br. at 2. We have no authority to overturn the Legislature, no less on a matter that the Rhode Island Supreme Court considered well-settled decades ago. In addition, the trial judge did make a credibility determination regarding the employee's testimony when he explicitly accepted the testimony of Mr. Freches, which directly contradicted that of the employee as to whether she had neck problems prior to May 10, 2011 and whether she had reported the alleged work injury. "It is well settled that where the testimony of two witnesses is conflicting and the trier of facts expressly accepts the testimony of one of the witnesses, he implicitly rejects that of the other." Blecha v. Wells Fargo Guard-Co. Serv., 610 A.2d 98, 102 (R.I. 1992) (quoting Turgeon v. Davis, 120 R.I. 586, 592, 388 A.2d 1172, 1175 (1978)); see also Zorrilla v. Pawtucket Country Club, W.C.C. No. 2009-07609 (App. Div. 03/03/14) at *12. By accepting the testimony of Mr. Freches on those issues, the trial judge implicitly rejected the employee's testimony as not credible.

The employee has filed seven (7) reasons of appeal, two (2) of which fail to satisfy the requirements for specificity in the appellate process set forth in § 28-35-28(a). The first and seventh reasons merely restate generalized assertions that are more particularly described in the remaining five (5) reasons of appeal. "Section 28-35-28(a) 'requires that the reasons of appeal filed with the [court] specifically state all matters determined adversely to the appellant.'" Pimental v. Lifespan Corp., W.C.C. No. 2012-01244 (App. Div. 01/13/15) at *4 (quoting Bissonnette v. Fed. Dairy Co., 472 A.2d 1223, 1226 (R.I. 1984)). Thus, because of the failure to comply with the requirement for specificity set forth in § 28-35-28(a), the first and seventh reasons of appeal are dismissed.

In her second reason of appeal, the employee stresses that the question of whether her act of lifting a heavy sink without co-worker assistance violated the employer's policy is irrelevant

to her claim. As our workers' compensation system is not based on fault, an injury sustained during the performance of a permissible act in an impermissible manner is compensable. Lomba v. Providence Gravure, Inc., 465 A.2d 186, 189-90 (R.I. 1983) (citing DeNardo v. Fairmount Foundries Cranston, Inc., 121 R.I. 440, 451, 399 A.2d 1229, 1235) (1979)). Here, such an argument is misplaced, as the trial judge relied on the testimony of the employer's witnesses in finding that the employee's injury did not occur at work as described by the employee, as opposed to finding that the employee was injured due to lifting the sink improperly. See Decision at *9-10. The trial judge never mentions any potential violation of company policy as a reason for denying the employee's claim.

In the third reason of appeal, the employee points to the lack of medical evidence to support testimony that the employee complained of neck pain prior to May 10, 2011 or otherwise support a conclusion that the employee's injury was caused by activities outside of work. Since the employee bears the burden of proving by a fair preponderance of the credible evidence that she was injured at the workplace, the employer is not required to produce such evidence. Nor would such evidence be expected, as the employer did not allege that the employee sought medical treatment prior to May 17, 2011. The trial judge properly noted a lack of such evidence in his decision. Decision at *10. We are satisfied that the trial judge did not overlook or misconceive any of the evidence presented in arriving at his decision in this matter.

Likewise, contrary to the employee's contention, the trial judge did not overlook or misconceive the employee's statement that she received light duty work following May 10, 2011. Decision at *3. Indeed, Mr. Freches testified that he had a conversation with the employee on May 10, 2011 in which the employee's complaint of neck pain (without mentioning any work-related injury) prompted him to provide the employee with light duty work. Tr. at 53-

54. Again, however, the mere fact that the employee was provided with lighter work on the day she alleges she was injured is not determinative of the issue of whether she was in fact injured at work. It was simply one of the factors which the trial judge considered in making his determination. In addition, Mr. Freches recommended that the employee seek medical treatment as she seemed to be in pain. We find no support for the employee's contention that a supervisor would be more likely to direct an employee to seek medical treatment for a work injury than for an injury sustained outside of work.

In her fourth reason of appeal, the employee argues that the "trial judge overlooked and misconceived the written medical evidence that the [e]mployer received written notice of a work-related injury from the Miriam Hospital on May 17, 2011 * * *." Reasons of Appeal at 2. The employee clarified her claim in her brief, arguing that the Miriam Hospital report (the "Report") is "medical evidence that clearly established that the [e]mployee's injuries were work related." Employee's Br. at 4. In relevant part, the Report noted that the employee's "presenting complaint" consists of the following: "[P]resents with right shoulder injury while at work last Tuesday. Patient information obtained from the patient." The trial judge noted the Report in his decision. Beyond the employee's self-report, the Report did not include any information to support an inference that the employee's injury occurred at work. There exists no legal alchemy to transmute a pure self-report, providing an entirely self-serving assertion regarding causal connection, into medical evidence that clearly establishes such a causal connection. The Report may establish that the employee suffered from a problem with her neck; however, the issue in this matter is whether an incident occurred at work which caused that problem. The statement of the employee contained in the Report is not sufficient to presumptively establish that causal connection.

Continuing in her fourth reason of appeal, the employee alleges that the trial judge "erred in finding 'significant' the mere fact that [the employee] sought treatment one week after the incident that [allegedly] caused her injury * * *." Reasons of Appeal at 2-3 (quoting Decision at *10). Alternative explanations may exist to explain why the employee chose to wait until May 17, 2011 to seek medical treatment; however, the mere presence of alternative explanations does not support a finding that the trial judge clearly erred. In finding Mr. Freches "strong and straightforward in his testimony that the employee had problems prior to [May 10, 2011] and that she never reported a work-related injury to him[,]" the trial judge discussed the circumstances surrounding the alleged work-related injury and detailed the contradictions between the witnesses' testimony. The trial judge did not err in considering, among other factors, that the employee delayed seeking medical treatment for a week after the alleged incident, and several days after Mr. Freches suggested that she seek treatment.

In her fifth reason of appeal, the employee contends that the trial judge "overlooked and misconceived the testimony from both the [e]mployee and [Mr. Freches] that [the employee] was in obvious pain" following the alleged incident on May 10, 2011. Reasons of Appeal at 3. We disagree. The trial judge noted verbatim Mr. Freches' testimony that the employee's neck was "bothering her." Decision at *7; see also Tr. at 54. The trial judge's thorough discussion of the employee's and Mr. Freches' respective testimony demonstrate that the trial judge did not overlook or misconceive such evidence.

Lastly, we address the employee's sixth reason of appeal, which is stated below in its entirety:

> The [d]ecision and [d]ecree is against the law and evidence and clearly erroneous because the trial judge improperly cited to and referenced the [e]mployee's testimony about prior incarcerations for shoplifting (Decision, p. 3-4), as such testimony was clearly irrelevant to the question of whether her injuries were

> caused by activities performed while at work for the [employer] and sustained in the course of her employment.

Reasons of Appeal at 3.

Two (2) arguments may be discerned. First, the employee appears to argue that such evidence was inadmissible; however, the employee's counsel failed to object to this line of questioning. Absent a formal objection, the employee is precluded from raising on appeal that the trial judge erred in citing to or referencing such testimony. Duff v. State, W.C.C. No. 2003-05205 (App. Div. 10/17/10) (citing Davol, Inc. v. Aguiar, 463 A.2d 170, 173 (R.I. 1983)); see Tr. at 17-19.

Second, the employee contends that the trial judge's decision is clearly erroneous "as such testimony was clearly irrelevant to the question of whether [the employee's] injuries were caused by activities performed while at work * * *." Reasons of Appeal at 3. This argument must also fail, as the Rhode Island Rules of Evidence set forth that, "[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record." R.I. R. Evid. 609(a). Instances of theft are relevant to the issue of a witness' credibility. See State v. Merida, 960 A.2d 228, 235 (R.I. 2008). Furthermore, the trial judge simply referenced this information during his recitation of the testimony of the employee and never referred to it during the course of his analysis and explanation of his decision.

Based on the foregoing reasons, we find that the trial judge did not err in holding that the employee did not sustain her burden of proof in demonstrating that it was more probable than not that she sustained an injury during the course of her employment. We therefore deny and dismiss the employee's appeal and affirm the trial judge's decision and decree. 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 in this matter on

Hardman and Ferrieri, JJ. concur.

ENTER:

/s/ Ferrieri, C.J.

/s/ Olsson, J.

/s/ Hardman, J.

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PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

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VS.	)	W.C.C. No. 2011-04057
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BLACKSTONE SUPPLY CO.	)	

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division on the claim of appeal of the petitioner/employee and upon consideration thereof, the employee's 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 March 7, 2014 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Ferrieri, C.J.

_____
Olsson, J.

_____
Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Howard L. Feldman, Esq., Keith A. Cardoza, Esq., and William Gardner IV, Esq., on

_____