STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

DEBORAH MOORE	)	
	)	
VS.	)	W.C.C. No. 2013-05417
	)	
RHODE ISLAND HOSPITAL	)	

OLSSON, J. This matter is before the Appellate Division on the employer's claim of appeal from the decision and decree of the trial judge granting the employee's original petition, in part, in which she alleged that she injured her right shoulder, upper back and head during her lunch break on the employer's premises on August 16, 2013. The trial judge initially denied the petition at the pretrial conference, but after trial she found that the employee's injury to her right shoulder was compensable and awarded weekly benefits for partial incapacity from August 19, 2013 and continuing. After a comprehensive review of the record and the pertinent case law, we deny the employer's appeal.

The employee, Deborah Moore, testified that she worked for Rhode Island Hospital and/or Lifespan Corporation (the "employer") for eighteen (18) years in various positions. At the time of her injury, she had been working as a patient registrar on the fifth floor of the Ambulatory Patient Care unit (the "APC") at Rhode Island Hospital for about two and one-half (2 ½) years. The employee's job duties as a patient registrar consisted of checking patients' demographics, registering patients for appointments, verifying insurance coverage and collecting co-payments.

The employee explained that she worked Monday through Friday each week for eight (8) hours per day from 7:45 a.m. to 4:15 p.m. In accordance with the applicable union contract, she was entitled to a paid fifteen (15) minute break and an unpaid thirty (30) minute lunch break each day. She punched in on a time clock at the start of her day and punched out at the end of the work day. She was not required to punch out for either of the breaks unless she was leaving the building. She testified that there was no designated time that she was obliged to take these breaks; however, it was a policy within her department that the employees take the two (2) breaks together. Therefore, she was required to take a single forty-five (45) minute break each day which represented her paid fifteen (15) minute break and her unpaid thirty (30) minute lunch break. She asserted that there was never any clarification as to whether the first fifteen (15) minutes or the last fifteen (15) minutes of the forty-five (45) minute break constituted her paid break.

On Friday, August 16, 2013, at approximately 11:45 a.m., the employee left her desk to begin her forty-five (45) minute combined break and lunch period. She did not punch out as she was headed to the cafeteria on the first floor of the main building of the hospital. Ms. Moore explained that she was walking with a co-worker through a short corridor leading to the entrance to the cafeteria when a wood-framed picture covered with glass measuring about three (3) feet by two (2) feet suddenly fell off of the wall. As she saw the picture falling, she attempted to swat it away with her right arm, but her efforts were unsuccessful and the picture struck her right arm and then fell to the floor. The employee was not certain as to whether the picture struck any other part of her body and testified that it "felt like it just hit [her] arm;" however, she also testified that it may have also hit her over the back of her head. Tr. at 24:11-12. She related that she felt as though her whole shoulder was bruised.

After sitting in the cafeteria and drinking some water, Ms. Moore returned to her work area in the APC and reported the incident to Naomi Prestly, the lead registrar and her immediate supervisor. After speaking with Ms. Prestly, the employee was evaluated at the Employee Health Clinic. She then returned to her position at the APC and completed her work day. The employee did not return to work the following week and sought treatment with her primary care physician, Dr. Anthony Rocha, on August 22, 2013. Dr. Rocha advised her to remain out of work and referred her to an orthopedic surgeon. Ms. Moore saw Dr. Michael Feldman on August 30, 2013 and he eventually performed surgery on her right shoulder on October 31, 2013. As of the date of her testimony on April 9, 2014, the employee remained out of work. The employee testified that she never had any problems with her right shoulder before this incident at work.

The employer offered the depositions of Naomi Prestly, the lead registrar, and Alysia Smith, the manager of outpatient registration. Both witnesses confirmed that it was the practice of the department for employees to take a forty-five (45) minute break once a day which was a combination of the required fifteen (15) minute paid break and the thirty (30) minute unpaid lunch break. They explained that it was too difficult to provide coverage for employees for a separate fifteen (15) minute break and then a separate thirty (30) minute lunch break so the policy was to combine them into one (1) forty-five (45) minute break. Ms. Prestly testified that the time at which the employees took their lunch fluctuated depending on the demands of the day, but generally occurred at some point between 11:00 a.m. and 2:00 p.m. She stated that she refers to the combined paid fifteen (15) minute break and the unpaid thirty (30) minute lunch as a lunch break. Additionally, there was no administrative procedure that delineated when the paid portion of the break ended and when the unpaid portion began.

The medical evidence consists of the report from the Employee Health Clinic, the affidavit with attached reports and a records deposition of Dr. Anthony Rocha, and the affidavit with attached reports and records deposition of Dr. Michael Feldman. The report from the Employee Health Clinic dated August 16, 2014 contains the history that two (2) hours earlier, a painting fell off the wall and hit the employee's right shoulder which caused her to jerk her right arm backwards in order to push the item off of her shoulder. She also stated that she hit the right side of her head. The employee denied any prior history of shoulder or arm problems. Dr. Dana Sparhawk diagnosed an arm contusion and advised the employee to follow up on an as-needed basis unless her condition worsened.

Following the incident at work, Dr. Anthony Rocha, the employee's primary care physician, treated her on August 22, 2013 and diagnosed her with a right shoulder trauma/strain as a result of the incident at work. Dr. Rocha examined the employee again on August 29, 2013 and noted his diagnosis as right shoulder arthralgia. He referred her to Dr. Feldman for further evaluation.

Dr. Feldman, an orthopedic surgeon, initially examined the employee on August 30, 2013 for complaints of right-sided neck and shoulder pain and spasms due to the incident at work. The employee denied any prior injuries to her right shoulder or neck. Dr. Feldman diagnosed the employee with a contusion/sprain of the right shoulder and recommended physical therapy. At the follow-up visit on September 18, 2013, the employee was still in pain and had only participated in one (1) physical therapy session. The doctor ordered an MRI of the right shoulder which was done on September 20, 2013. On September 27, 2013, after reviewing the MRI, Dr. Feldman diagnosed Ms. Moore with a partial thickness rotator cuff tear and biceps tendinopathy in the right shoulder and recommended surgery. On October 31, 2013, Dr. Feldman performed a

right shoulder arthroscopy, debridement of a superior labral tear, and an open subpectoral bicep tenodesis. Subsequent to the surgery, the employee began a course of physical therapy and continued to follow up with Dr. Feldman. In a letter to the employee's attorney, the doctor attributed the employee's condition and surgery to the incident at work on August 16, 2013.

In a written decision, the trial judge noted that the primary issue was whether a causal relationship existed between the injury the employee suffered during a lunch break while she was on the employer's premises and her employment. Referring to the three (3) criteria set forth in DiLibero v. Middlesex Construction Company, 63 R.I. 508, 9 A.2d 848 (1939), the trial judge concluded that the employee's injury occurred during her period of employment, in a place where she was reasonably expected to be, and while doing something incidental to her employment. The trial judge further noted that injuries sustained during an employee's rest period may be compensable when those rest periods are a permitted incident of employment, citing Corry v. Commissioned Officers' Mess, 78 R.I. 264, 81 A.2d 689 (1951). The trial judge found that the combined forty-five (45) minute break and lunch period was a rest period that was an incident of Ms. Moore's employment.

In her decision, the trial judge also reviewed the medical evidence submitted by the parties and, relying upon the opinions of Drs. Rocha and Feldman, found that the employee did sustain a right shoulder injury on August 16, 2013 resulting in partial disability from August 19, 2013 and continuing. She noted that no medical evidence was presented to establish that the employee also sustained head and upper back injuries and she denied those claims. The employer filed a timely claim of appeal.

Our review of the trial judge's decision is statutorily limited pursuant to R.I. Gen. Laws § 28-35-28. Section 28-35-28(b) mandates that the "[t]he findings of the trial judge on factual

matters shall be final unless an appellate panel finds them to be clearly erroneous." Therefore, on matters of fact, we are barred from engaging in a de novo review of the evidence and substituting our own judgment for that of the trial judge without first determining that the trial judge was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). Regarding matters of law, the Appellate Division conducts a de novo review and "shall affirm, reverse, or modify the decree appealed from, and may itself take any further proceedings that are just * * *." § 28-35-28(a).

In the first of its two (2) reasons of appeal, the employer argues that the trial judge erred in finding that, in accordance with Corry**,** a lunch break is per se incidental to employment. It argues that the trial judge overlooked or misconstrued the Rhode Island Supreme Court's holding in Pallotta v. Foxon Packaging Corp., 477 A.2d 82 (R.I. 1984), which denied workers' compensation benefits to an employee who was injured while on her lunch break. Therefore, the employer argues that there is no bright line rule that lunch breaks are incidental to employment.

The employer is correct in its assertion that a lunch break is not per se incidental to employment pursuant to Corry. The Rhode Island Supreme Court did not state that an injury during a rest period is automatically considered to have occurred during the course of employment, but rather considered all of the facts and circumstances to determine whether the break period was permitted and occurred in a permitted area, and how that break furthered the interests of the employer. The Corry case involved an employee who was injured when she fell forty (40) feet from a terrace to the ground on the employer's premises during a rest period. Testimony in the matter revealed that employees were permitted to take rest periods in the morning and afternoon and that the terrace was a permissible and customary place for employees to take their rest periods. Despite the fact that the employee was not actually performing any of

the usual tasks associated with her employment, the Rhode Island Supreme Court concluded that the employee's injury occurred during the course of her employment because the rest period was a permitted incident of the employment. The Court further noted that, "[t]here can be no doubt that such periods were permitted as an incident of employment not only for the personal comfort of those employees but also to conserve efficiency in the discharge of their respective duties." 78 R.I. at 269, 81 A.2d at 692.

In her written opinion, the trial judge stated that "[t]he Court, in Corry, *supra*, held that rest periods are permitted incidents of employment, and as such there is no dispute that the employee's lunch break was something incidental to her employment." Dec. at 15. Although this statement may have been an over-generalization of the holding in Corry, we must agree with the trial judge's overall reasoning in finding that Ms. Moore's lunch break was an incident of her employment, similar to the rest period in Corry. First, in the present matter, the employer's witnesses confirmed that it was the policy of the employer that employees in Ms. Moore's department would take a forty-five (45) minute break which was a combination of a fifteen (15) minute paid break and a thirty (30) minute unpaid lunch period. This practice was for the benefit of the employer to make it easier to provide coverage when employees took their breaks. Consequently, any argument as to whether Ms. Moore was injured during the lunch portion of the forty-five (45) minutes or the break portion is irrelevant as the entire period was a permitted incident of her employment.

Second, the fact that the lunch period is deemed a permitted incident of employment does not automatically lead to the conclusion that any injury occurring during that period is compensable. In order to satisfy the criteria for proving causal relationship, the employee must still establish that the injury was sustained while reasonably fulfilling the duties of her

employment or doing something incidental thereto or to the conditions under which those duties are to be performed. Pallotta v. Foxon Packaging Corp., 477 A.2d 82, 84 (R.I. 1984). As the trial judge pointed out in the present matter, Ms. Moore, during her forty-five (45) minute break was walking in a hallway just outside of the entrance to the cafeteria on the employer's premises when the picture fell off of the wall and struck her. There is no dispute that the employee was at all times on the employer's premises in an area over which the employer maintained control. Under these facts and circumstances, we find no reason not to apply the basic rule expressed in Professor Larson's treatise, "that the journey to and from meals, on the premises of the employer, is in the course of employment." 2 Lex K. Larson, Larson's Workers' Compensation § 13.05[1] at 13-50 (Matthew Bender, Rev. Ed.).

The employer asserts that the trial judge overlooked or otherwise misconstrued the decision of the Rhode Island Supreme Court in Pallotta v. Foxon Packaging Corp., 477 A.2d 82 (R.I. 1984), in which the Court denied the claim of an employee who was injured during her lunch break. Although Pallotta provides support for the contention that not all injuries occurring during a lunch break are compensable, the facts in Pallotta are significantly distinguishable from those in the present matter.

The employee in Pallotta punched out for her unpaid lunch break and left the employer's building to purchase something to eat from the store across the street. On her return, she proceeded down a driveway located between the employer's building and an adjacent company and then sat down in the parking lot behind the neighboring company's building, about six (6) feet from the entrance to the employer's building. While sitting in this area which was owned by the neighboring company, the employee was struck on the head by a baseball thrown by a co-worker. The employee testified that it was customary for employees to eat their lunches and take

their coffee break in this area and that the employer had knowledge of the practice. In denying the employee's claim, the Court found that there was "no evidence in the record to show that the employee in any way benefited her employer during her lunch break while on the premises of the adjoining owner." Id. at 84.

The facts and circumstances in the present matter differ significantly from those in Pallotta. Ms. Moore was injured during her combined fifteen (15) minute break and thirty (30) minute lunch period which were combined as a result of the employer's policy for her department to make it easier for the employer to provide coverage for employees away from their posts on break. She did not punch out as she never left the employer's premises. The injury occurred on the employer's premises in an area under the control of the employer and did not result from any precipitating action or activity of the employee. She was merely walking down a hallway towards the cafeteria to have her lunch. Considering these facts and circumstances, we find no error in the trial judge's conclusion that the employee satisfied all of the criteria necessary to establish that her injury is compensable.

In the second reason of appeal, the employer avers that the trial judge overlooked and/or misconceived the records of Dr. Rocha which revealed that the employee had right shoulder complaints and treatment prior to the incident at work on August, 16, 2013. At trial, the employee specifically denied that she had any prior problems with her right shoulder. Tr. at 41:18-20. The records from Employee Health at Rhode Island Hospital indicate that the employee suffered an injury to her right shoulder on August 16, 2013 and that she had no history of prior right shoulder problems. In addition, Dr. Feldman noted in the history obtained from the employee that she did not have any prior shoulder complaints. In rendering her decision, the trial judge stated that she was relying upon the opinions of Drs. Rocha and Feldman, "which are

based on the representations made by the employee, which the Court believes to be truthful." Dec. at 17.

Despite the employee's declarations at trial and to her medical providers that she did not have any prior right shoulder problems, the records of Dr. Rocha which were submitted to the court by the employer via a records deposition indicate that the employee did in fact have prior complaints regarding her right shoulder. The records include two (2) reports of other physicians indicating that Ms. Moore received treatment for a right shoulder injury in 2004 following a motor vehicle accident. The first is a letter dated June 17, 2004 to Dr. Michael Lancellotti, a chiropractor, from Dr. William Golini, a neurologist, in which he documents his evaluation of the employee and the results of EMG and nerve conduction studies he conducted. Dr. Golini documented the employee's complaints of continued pain radiating from her neck to her right arm with paresthesias in her right hand and pain in her right shoulder resulting in difficulty raising her right arm. Er's Ex. D at 51. The doctor's diagnoses were mild right-sided C7 radiculopathy, mild right-sided carpal tunnel syndrome, and traumatic injury to the right shoulder. Id. at 52. He ordered an MRI of her cervical spine and right shoulder.

The second document is the report of an initial office visit dated September 15, 2004 from Dr. David Moss, an orthopedic surgeon, which was sent to Dr. Rocha. The history states that the employee's neck pain has improved but she has "significant persistent right shoulder pain." Er's Ex. D at 50. The doctor noted that an MRI of the shoulder revealed a question of a SLAP tear and he recommended right shoulder arthroscopy to perform a fixation of the labral tear or debride it. The employee indicated she wished to proceed with the surgery. No additional records were introduced indicating that the employee underwent the surgery or that there was any further treatment for the right shoulder complaints at that time.

After a thorough review of the trial judge's decision, it is our opinion that the trial judge overlooked the medical records of Dr. Rocha that pre-date the employee's injury on August 16, 2013. At the close of the trial, counsel for the employer questioned the competency of Dr. Feldman's opinions because information was discovered that proved the history he obtained that Ms. Moore had no prior shoulder injuries was inaccurate. Tr. at 45:16-23. It should be noted that counsel never specifically pointed out the records regarding the prior shoulder problem and neither the employee nor the doctors were ever questioned about those records. Though the trial judge comprehensively reviewed and summarized the medical evidence from Employee Health, Dr. Rocha, and Dr. Feldman following the employee's injury at work, there is no mention of the records described above which were included in a submission of records from Dr. Rocha's office which was introduced into evidence. Those records clearly establish that the employee had a prior problem with her right shoulder and that her testimony at trial and her declarations to her treating physicians following the incident at work were untruthful and contrary to her medical history.

Although the trial judge overlooked the medical evidence establishing that the employee suffered from a prior right shoulder injury, we conclude from our review of all of the medical evidence that the trial judge's conclusion that the employee sustained a work-related injury to her right shoulder should not be disturbed. There is no medical evidence demonstrating that the employee underwent the surgery proposed by Dr. Moss in 2004 and the surgical report from Dr. Feldman does not contain any indication that there was evidence of a prior surgery. The records of Dr. Rocha, the employee's primary care physician, who treated the employee periodically over the course of more than ten (10) years do not reveal any treatment for the right shoulder

since 2004. There is no testimony or evidence of any type establishing the employee complained of a right shoulder problem after 2004.

The employee bears the burden of proving the allegations set forth in the original petition by a fair preponderance of the credible evidence. Blecha v. Wells Fargo Guard-Co. Serv., 610 A.2d 98, 102 (R.I. 1992). We find that despite the employee's failure to reveal the prior shoulder problem, the medical evidence submitted to the court establishes that the employee suffered a new traumatic injury to her right shoulder on August 16, 2013 as a result of the incident at work. The description of the incident to all of the medical providers by the employee was consistent and not disputed in any way by the employer. The employee reported the incident promptly and sought medical treatment that day. Prior to this incident, the employee had been working for this employer for over two (2) years without difficulty. Considering the record as a whole, in particular the significant time elapsed with no evidence of continuing complaints regarding the right shoulder, we find that the opinions of Drs. Rocha and Feldman were still competent and probative as to the cause of the employee's current condition despite the lack of information regarding the 2004 shoulder problem. Therefore, we find that the right shoulder injury in dispute in this matter was due to a new traumatic injury to that region resulting from the accident at work on August 16, 2013.

In conclusion, based on the foregoing reasons, we find that the trial judge did not err in granting the employee's original petition in part as it pertained to a right shoulder injury which occurred on August 16, 2013. Consequently, we deny and dismiss the employer's appeal and affirm the trial judge's decision and decree granting the employee's original petition. 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

Ferrieri, C. J., and Hardman, J., concur.

ENTER:

/s/ Ferrieri, C. J.

/s/ Olsson, J.

/s/ 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 respondent/employer and upon consideration thereof, the employer's appeal is denied and dismissed, and it is

ORDERED, ADJUDGED, AND DECREED:

1. That the findings of fact and the orders contained in a decree of this Court entered on June 18, 2014 be, and they hereby are, affirmed.

2. That the respondent/employer shall pay a counsel fee in the amount of Two Thousand Five Hundred and 00/100 ($2,500.00) Dollars to Andrew S. Caslowitz, Esq., attorney for the employee, for the successful defense of the employer's claim of appeal.

Entered as the final decree of this Court this day of

BY 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 sent to Susan Pepin Fay, Esq., and Andrew S. Caslowitz, Esq., on

_____