ROSEMARY B. DISPIRITO
v.
CITY OF PROVIDENCE
W.C.C. No. 2010-05217
Rhode Island Worker Compensation
State of Rhode Island and Providence Plantations
2013

DECISION OF THE APPELLATE DIVISION

OLSSON, J.

This matter is before the Appellate Division on the employee's claim of appeal from the decision and decree of the trial judge in which he found that the employee failed to prove by a fair preponderance of the evidence that she sustained compensable injuries arising out of and during the course of her employment. The issue before the trial judge was whether the employee was entitled to an award of workers' compensation benefits pursuant to the Rhode Island Workers' Compensation Act where the employee was injured off premises while on a paid coffee break. After a thorough review of the record and consideration of the arguments of the respective parties, we grant the employee's appeal and overturn the decision and decree of the trial judge.

The parties submitted a stipulation of facts which we will summarize as follows. The employee, Rosemary Dispirito, works for the City of Providence as a clerk in the Office of the Recorder of Deeds which is located at Providence City Hall, 25 Dorrance Street, Providence, Rhode Island. On the morning of July 23, 2010, Ms. Dispirito left City Hall and walked one block to Dunkin' Donuts to get a cup of coffee. As she began the return trip to City Hall, the employee fell off of a curb directly in front of the Dunkin' Donuts store. As a result of the fall, Ms. Dispirito sustained strains to her right shoulder, right knee, and back. These injuries resulted in partial disability from July 27, 2010 to October 18, 2010. The parties stipulated that the employee's average weekly wage is Seven Hundred Twenty and 36/100 ($720.36) Dollars.

The employee does not "punch out" for her coffee breaks and does not need permission to leave City Hall during her breaks. She is paid while on break. Ms. Dispirito was not directed by anyone at City Hall to leave the building on July 23, 2010.

On October 14, 2010, a pretrial order was entered in W.C.C. No. 2010-05217 denying the employee's petition for benefits. Thereafter, the employee filed a timely claim for trial. The parties submitted the stipulation of facts and memoranda and rested. In his bench decision denying the employee's petition, the trial judge referred to the three-prong test established in *DiLibero v. Middlesex Construction Co.*, 63 R.I. 509, 9 A.2d 848 (R.I. 1939), and reiterated in numerous subsequent decisions, to determine whether an injury is compensable under the Workers' Compensation Act. First, the injury must have occurred within the period of the employee's employment (*time*). Second, the location where the injury occurred must be a place where the employer might reasonably expect the employee to be present (*place*). Third, the employee must be reasonably fulfilling the duties of her job at the time of the injury, or be performing some task incidental to the conditions under which those duties were to be performed (*activity*). The trial judge noted that if these three (3) elements exist, compensation would be awarded notwithstanding the going-and-coming rule which generally precludes an award of compensation if an employee is injured while coming to or going from the place of employment.

Based upon the stipulated facts, the trial judge found that the employee was injured during the period of employment and was in a place that she might reasonably be expected to be, thereby satisfying the *time* and *place* prongs of the test. However, he concluded that at the time of the injury, Ms. Dispirito was simply performing a task for her personal comfort (obtaining coffee off premises) and was not fulfilling the duties of her employment or doing something incidental

thereto. Consequently, the *activity* element of the test was not established. Citing the reasoning of the Rhode Island Supreme Court in *Pallotta v. Foxon Packaging Corp*., 477 A.2d 82 (R.I. 1984), the trial judge, therefore, denied the employee's petition.

The appellate standard of review is very limited and is clearly delineated 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." In accordance with this standard, we are precluded from engaging in a *de novo* review of the evidence and substituting our 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). The parties in the matter presently before the panel have stipulated to the pertinent facts. Consequently, our review is limited to whether the law was properly applied in this factual context. After reviewing the relevant case law, we conclude that the trial judge's finding that the employee failed to prove that she sustained a compensable injury arising out of and in the course of her employment is clearly erroneous and we therefore grant the employee's appeal.

The employee has filed four (4) reasons of appeal in this matter. The first three (3) are general recitations simply stating that the decree is against the law, the evidence, and the weight thereof. Clearly, these recitations do not meet the statutory requirement that the reasons of appeal shall state specifically the matters which were determined adversely to the appellant and are therefore summarily dismissed. *See* R.I.G.L. § 28-35-28(a); *Bissonnette v. Federal Dairy Co.*, 472 A.2d 1223 (R.I. 1984). In her fourth reason of appeal, the employee contends that the trial judge failed to apply and/or misapplied the criteria set forth in *DiLibero* and its progeny in determining whether there was a nexus between Ms. Dispirito's employment and the incident which caused her injuries and disability. After reviewing the *DiLibero* analysis in conjunction with two (2) appellate decisions involving injuries occurring during coffee breaks, as well as Professor Arthur Larson's treatise on workers' compensation, we agree with the employee's contention.

We are in agreement with the trial judge that the first two (2) criteria of the *DiLibero* test are clearly satisfied. The employee's injury occurred during a paid coffee break which was within the period of her employment. With regard to the location where the injury occurred, we also find that Ms. Dispirito was at a place where her employer might reasonably expect her to be when she fell. Admittedly, the employee was not directed to go to that location by the employer and there is no evidence that the employer was aware of the route she was going to travel. However, the parties stipulated that the employee was not prohibited from leaving the building during her break, so long as she returned within the allotted time of the break, presumably fifteen (15) or twenty (20) minutes. Due to the short duration of the break, the employee would be limited as to how far she could travel. Therefore, the injury occurred within an area that the employee would reasonably be expected to travel, about one (1) block away from City Hall.

Our disagreement with the trial judge arises from the analysis of the third element of the *DiLibero* test: whether the employee was reasonably fulfilling the duties of her employment or performing some task incidental to the conditions under which those duties were to be performed. 9 A.2d at 851. We are guided in this analysis by the decision of the Rhode Island Supreme Court in *Boullier v. Samsan Co*., 100 R.I. 676, 219 A.2d 133 (1966), and our own decisions in *Gomes v. Brown University*, W.C.C. No. 88-7806 (App. Div. 1991) and *Phillips v. R.I. Textile Company*, W.C.C. No. 94-08663 (App. Div. 1996).

In *Boullier*, the employee worked as a painter in a jewelry factory using lacquers and thinners which emitted noxious fumes. The employer permitted employees to leave their benches whenever the fumes bothered them and go to any other part of the shop to obtain some fresh air. Upon feeling overcome by the fumes, the employee went to the ladies' room for some

fresh air and to smoke a cigarette, which was also permitted on the premises. In the ladies' room, she opened a window and struck a match which ignited her blouse, apparently because it had absorbed the fumes from the lacquers and thinners. *Boullier*, 100 R.I. at 678, 219 A.2d at 134-35.

The Rhode Island Supreme Court stated that although the incident occurred during a break or rest period, it happened in the course of her employment because the rest period was a permitted incident of her employment and the employee was in a place where the employer might expect her to be. A rest period is deemed to be an incident of the employment because it is not simply for the personal comfort of the employee, but also is "an aid in restoring her efficiency in the performance of her duties." *Id.* at 681, 219 A.2d at 136. In discussing this "personal comfort" doctrine, Professor Larson has stated:

> Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.

2 Larson, *Larson's Workers' Compensation Law* § 21 at 21-1. The Court concluded that the employee's trip to the ladies' room, which was instigated by her discomfort from the fumes, and her "attempted use of cigarettes was all a part of her efforts to rehabilitate herself so that she could return to her work reinvigorated," and therefore, this act was not a departure from her employment. *Boullier*, 100 R.I. at 681, 219 A.2d at 136. The employee was awarded workers' compensation benefits.

In *Gomes*, an employee's injury was deemed compensable by the Appellate Division after satisfying the three-prong *DiLibero* test even though the employee injured himself after he left his work site to go on a paid coffee break. The employee was employed at Brown University as a library assistant at the Rockefeller Library. The employee had two paid coffee breaks during the day, from 10:00 a.m. to 10:20 a.m. and again from 3:00 p.m. to 3:20 p.m. He was permitted to leave the building for his coffee break. On the date of his injury, he left the building for his break at 10:00 a.m. and was walking on the street toward a coffee shop when he slipped on ice and fractured his leg. *Gomes*, W.C.C. 88-7806 at 2.

The appellate panel found the *Boullier* decision to be on point with the factual scenario presented in *Gomes*. The panel applied the three-prong *DiLibero* test and the *Boullier* reasoning to find that there was a nexus between the employee's injury and his employment. As such, we found the *activity* prong satisfied by recognizing that activities incidental to the employment include many activities customary and usual at the place of employment for the benefit of the employee or which further his own personal comfort. *Gomes*, W.C.C. 88-7806 at 4. The Appellate Division noted that:

> [C]offee breaks are clearly a benefit to the employer as well as the employee in that it allows the employee to restore his efficiency in the performance required of his job duties. The petitioner's attempt at obtaining coffee was a part of his effort to rehabilitate himself so that he could return to his work refreshed and reinvigorated.

Id. at 7.

In *Gomes*, the injury occurred during the period of employment because the employee was on a regularly scheduled paid coffee break. The *place* prong of the *DiLibero* test was satisfied because "it [was] obvious that petitioner was at a place where he might reasonably be, i.e. the city

streets, in order for him to get to the nearby coffee shop." *Gomes*, W.C.C. 88-7806 at 6-7. The panel noted that the employee was "forced to leave" the library for his coffee break because there was no coffee shop in the building, and his supervisor permitted employees to leave the building to get coffee. *Id.* at 6. Having found a nexus between the injury and employment based upon these facts, the employee was awarded workers' compensation benefits.

In *Phillips*, the appellate panel relied upon both the *Boullier* case and the *Gomes* case to find that an injury sustained during a paid break was compensable. The employee in *Phillips* worked at a textile company. At break time, the employees were given the option of going to the cafeteria or going outside to smoke. Workers, as well as supervisors, would take boxes from inside the building and bring them outside to sit on. On the date in question, the employee carried a box, a coffee, and a cigarette outside the front door for a break, and when he bent over to put the box down, he injured his back. *Phillips*, W.C.C. 94-08663 at 2. The appellate panel noted that the *Boullier* and *Gomes* cases "establish as law the fact that an employee may be performing an act which could be considered personal to him when he is injured," and still be within the Workers' Compensation Act, "if there is shown a nexus or causal relationship between the injuries and the employment." *Id.* at 4.

Based upon the facts presented in *Phillips*, the appellate panel found the employee had satisfied the three (3) prongs of the *DiLibero* test to establish a nexus between his injury and his employment. The incident occurred during a permitted paid break during the regular work day at a place where other employees and some supervisors congregated during the break. The break period was an incident of employment for the personal comfort of the employee as well as an aid in restoring his efficiency in the performance of his job duties for the employer. The lifting and placement of the box was part of the employee's effort to rehabilitate himself so he could return to work "refreshed and reinvigorated." *Phillips*, W.C.C. 94-08663 at 4 (quoting *DeNardo v. Fairmount Foundries Cranston, Inc.*, 121 R.I. 440, 453, 399 A.2d 1229, 1236 (1979)).

As noted by Professor Larson in his treatise on workers' compensation, "[i]t is clear that one cannot announce an all-purpose 'coffee break rule,' since there are too many variables that could affect the result." 1 Larson, *Larson's Workers' Compensation Law* §13.05[4] at 13-53. Such variables include the duration of the coffee break, whether the break is a benefit fixed by an employment contract, whether it is a paid coffee break, whether the employer exercises any control as to where the employee can go while on break, and whether the actions of the employee during the break constituted a substantial personal deviation from the employment. *Id.* at 13-53 to 13-54. With regard to injuries occurring during breaks off the employer's premises, the guiding principle propounded by Professor Larson is that "[i]f the employer, in all the circumstances, including duration, shortness of the off-premises distance, and limitations on off-premises activity during the interval can be deemed to have retained authority over the employee, the off-premises injury may be found to be within the course of employment." *Id.* at 13-54.

The fact that the employee is paid for a break period of short duration and s/he travels only a short distance from the workplace does not presumptively lead to the conclusion that anything that happens during that break is compensable. The employee must actually utilize the break period for the purpose of rest and refreshment and not for personal errands, such as going to the bank or grocery shopping or retrieving one's dry cleaning. Such personal errands may be considered a substantial deviation from the purpose of the break period and therefore outside the scope of employment. *See Larson's*, *supra* at 13-58 to 13-59.

In the matter presently before the appellate panel, the employee was paid for her break, she did not need permission to take her break, nor was she prohibited from leaving the premises during the break period. The incident occurred approximately one (1) block from City Hall as the

employee was leaving a coffee shop where she purchased a coffee. There is no evidence that the employee did anything else but walk to the coffee shop during her break. Under these particular facts, where it was a paid coffee break that was short in duration and distance and without deviation from the purpose of rest and refreshment, the course of employment was not interrupted. Considering the principles established in the *Boullier*, *Gomes* and *Phillips* decisions, as well as the guidance provided by Professor Larson, we find that Ms. Dispirito's injuries arose out of and in the course of her employment.

Based upon the foregoing discussion, we grant the employee's appeal and reverse the decision and decree of the trial judge. In accordance with our decision, a new decree shall enter containing the following findings of fact and orders:

> 1. That the employee sustained personal injuries on July 23, 2010, specifically a right shoulder strain, a right knee strain, and a low back strain, arising out of and in the course of her employment with the respondent, connected therewith and referable thereto, of which the respondent had notice.
>
> 2. That the employee's average weekly wage is Seven Hundred Twenty and 36/100 ($720.36) Dollars.
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> 3. That the employee was partially disabled from July 27, 2010 to October 18, 2010 due to the effects of the injuries she sustained on July 23, 2010.

It is, therefore, ordered:

> 1. That the employer shall pay weekly benefits for partial incapacity to the employee from July 27, 2010 to October 18, 2010.
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> 2. That the employer shall pay all reasonable charges for medical services rendered to the employee in order to cure, rehabilitate or relieve her from the effects of her work-related injuries.
>
> 3. That the employer shall reimburse the employee's attorney the sum of Ninety-five and 00/100 ($95.00) Dollars for the cost of the filing of the original petition, the filing of the claim of appeal and the transcript of the trial proceedings.
>
> 4. That the employer shall pay a counsel fee in the amount of Nine Thousand Five Hundred and 00/100 ($9,500.00) Dollars to Thomas R. Ricci, Esq., and Joseph J. Ranone, Esq., attorneys for the employee, for services rendered at the pretrial conference, during the trial, and throughout the appellate process.

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, JJ., concur.

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 of the employee is granted the decision and decree of the trial judge is hereby reversed. In accordance with the Decision of the Appellate Division, the following findings of fact are made:

> 1. That the employee sustained personal injuries on July 23, 2010, specifically a right shoulder strain, a right knee strain, and a low back

strain, arising out of and in the course of her employment with the respondent, connected therewith and referable thereto, of which the respondent had notice.

2. That the employee's average weekly wage is Seven Hundred Twenty and 36/100 ($720.36) Dollars.

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3. That the employer shall reimburse the employee's attorney the sum of Ninety-five and 00/100 ($95.00) Dollars for the cost of the filing of the original petition, the filing of the claim of appeal and the transcript of the trial proceedings.

4. That the employer shall pay a counsel fee in the amount of Nine Thousand Five Hundred and 00/100 ($9,500.00) Dollars to Thomas R. Ricci, Esq., and Joseph J. Ranone, Esq., attorneys for the employee, for services rendered at the pretrial conference, during the trial, and throughout the appellate process.

Entered as the final decree of this Court this day of _____.

John A. Sabatini, Administrator

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Thomas R. Ricci, Esq., Joseph J. Ranone, Esq., and George E. Furtado, Esq., on _____.