STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

CATHERINE DUFF	)	
	)	
VS.	)	W.C.C. 2003-05205
	)	
STATE OF RHODE ISLAND	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's appeal from the decision and decree of the trial judge, which found that the employee failed to prove by a fair preponderance of the evidence that she sustained a work-related stress injury. After conducting a careful review of the record in this matter and considering the arguments of both parties, we affirm the decision and decree of the trial judge and deny and dismiss the employee's appeal.

This matter came before the court on the employee's original petition for workers' compensation benefits alleging severe psychological stress and anxiety caused by continuously being subjected to a generally hostile and sexually hostile work environment. She further contends she was retaliated against after reporting the harassment. The employee alleges her exposure to this hostile work environment eventually resulted in her experiencing a mental breakdown and inability to work as of November 25, 2002.

The employee began working in the proofing room, which was affiliated with the Legislative Council, at the Rhode Island State House in June of 1997. She claims she was immediately subjected to a hostile work environment where co-workers regularly used vulgar

language. After only three (3) weeks, and after her husband inquired with the Speaker of the House, she was transferred to the Legislative Council's research office. She served as a citations clerk in this office until November 25, 2002, when she left work following a dispute with a co-worker and did not return. Before leaving the State House on November 25, 2002, the employee missed time at work on a number of different occasions and for varying periods of time as a result of the alleged work-related injury.

The employee testified to a number of incidents involving co-workers while employed at the State House. The first occurred in October of 1997 when a female co-worker, Priscilla Green, kissed the employee on the face and mouth against the employee's will. This was allegedly witnessed by other co-workers; however, their testimony was not presented at trial. Eventually, the employee brought, and settled, a civil suit against Ms. Green as a result of this encounter. The employee alleged the legal action resulted in harassment by Ms. Green and other co-workers, such as intercepting her phone calls and stealing her lunch. Further harassment by Ms. Green included a confrontation in the bathroom and an incident where Ms. Green drove her car towards the employee and slammed on the brakes within an inch of hitting her.

The employee was also involved in an incident with Jimmy Reid, a maintenance worker at the State House in October of 1999. The employee testified he hugged and kissed her on the cheek following a dispute over a copy being made of the employee's office key. This incident was reported to police but the employee declined to take further action.

A third incident, involving her supervisor, John O'Connor, occurred in October of 2002. Around this time, another co-worker had filed suit against the Rhode Island Legislature, and the employee was called to testify before a grand jury. Shortly after testifying, the employee was

approached by Mr. O'Connor at work. After asking the employee about her testimony, she alleges he began to rub her shoulder and kissed her left ear, telling her she "did good." (Tr. 107.)

The employee also testified to a number of instances where she felt threatened by other co-workers. These consisted of confrontations while at the State House, where the co-workers did things such as swearing at the employee or approaching her with their hands balled into fists. One such incident involved a co-worker named Wendy Collins walking by the employee in a rest room at the State House and striking the employee in the breast with her elbow.

The employee sought treatment at hospitals on at least two occasions. After the incident with Ms. Green in the bathroom, which occurred in May of 1999, the employee did not feel well and was taken to the hospital where tests were run, including an electrocardiogram. She was released later that day. The second visit was to Miriam Hospital. In May of 2000 the employee had chest pains which she related to stress at work. She stated she was at the hospital for a couple of days and that she wore a heart monitor. The employee's social worker, Margaret Parsons, testified that the employee treated at the hospital for panic attacks.

Throughout her testimony the employee referred to a journal she had maintained while employed at the State House. The journal itself was not entered into evidence, although it was repeatedly utilized to refresh the employee's recollection of events. The employee maintained handwritten notes as the incidents occurred, but destroyed them after transcribing them on her computer. There also was some dispute as to whether or not the employee had amended the notes after initially documenting the incidents.

In support of her petition, the employee presented the testimony and records of Ms. Parsons and the medical reports of Drs. June Cai and Daniela Boerescu.

Ms. Parsons, a licensed clinical social worker, began treating the employee on October 15, 1997 upon referral by the employee's primary care physician, Dr. Edward Olchowski. As a clinical social worker Ms. Parsons is able to provide psychotherapy and make mental health diagnoses. The employee treated with Ms. Parsons at varied intervals until August 9, 2004. Ms. Parsons opined that the employee suffered from generalized anxiety disorder caused by her work situation as well as a concurrent major depression caused by "the cumulative stress that she was under as well as the loss that she was going through." (Tr. 214.) Throughout her treatment the employee and Ms. Parsons addressed a number of non-work related stressors in the employee's life. These included the death of her father and other friends and relatives, family substance abuse issues and physical abuse by her mother. Ultimately, Ms. Parsons testified that "in [her] professional opinion in [her] field of specialty" it was not in the employee's "best interest to return to work at the State House." (Tr. 215.)

Dr. Cai, a psychiatrist with Miriam Hospital, evaluated the employee on December 19, 2002 and diagnosed her with a depressive disorder. She noted the employee had a history of severe distress from her work environment. On a number of occasions Dr. Cai provided the employee with sick leave notes in which she recommended the employee take time off from work. These notes indicated that the employee reported symptoms of depression hindering her ability to go back to work. However, in letters to the employee's attorneys, Dr. Cai specifically noted she did not evaluate the employee's general capacity to work.

Lastly, the employee presented the medical records of Dr. Boerescu, a psychiatrist with Rhode Island Hospital. It appears that when entered into evidence these records were mistakenly identified as being those of Dr. Cai. The employee treated with Dr. Boerescu from November 5, 2003 until at least October 21, 2004. Throughout treatment the doctor diagnosed her with

varying levels of depression, post-traumatic stress syndrome and apparently major depressive disorder.[1] Nowhere in her records does Dr. Boerescu comment on the employee's ability to return to work.

After considering the evidence, the trial judge denied the employee's original petition for workers' compensation benefits. In doing so, the trial judge found that the employee failed to prove she suffered a work-related injury which actually disabled her from earning full wages. The trial judge indicated that none of the medical experts rendered an opinion that the employee was disabled from work and causally relating that disability to her employment. The employee filed a timely claim of appeal from this determination.

In reviewing this decision, we are bound by the provisions of R.I.G.L. § 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." We are precluded from undertaking 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). Bearing this in mind and after careful reviewing the record in this matter, we find no error on the part of the trial judge in reaching her ultimate determination.

The employee presents six (6) reasons of appeal. However, only reasons two (2), four (4), and five (5) are stated with the specificity required under R.I.G.L. § 28-35-28. These reasons allege error in the trial judge's consideration of the testimony and records of Ms. Parsons and Drs. Boerescu, Cai and Olchowski. Reasons one (1), three (3) and six (6), offer only general recitations that the decree was in error, arguing the employee did prove through the preponderance of the evidence that she sustained a work-related injury arising out of her

[1] The doctor's records identify depression, post-traumatic stress syndrome and the abbreviation, "MDD." (Pet. Ex. 5.)

employment. The employee fails to specify, as is required, "in what manner or where in the record the trial [judge] allegedly erred." *See* Falvey v. Women and Infants Hosp., 584 A.2d 417, 419 (R.I. 1991); *see also* Bissonnette v. Fed. Dairy Co., Inc., 472 A.2d 1223, 1226 (R.I. 1984). Accordingly, the employee's first, third and sixth reasons of appeal are denied and dismissed.

In the fourth reason of appeal, the employee argues that Ms. Parson's testimony established that the employee was disabled due to a work-related injury. Her fifth reason of appeal argues that the medical records of Drs. Cai and Boerescu establish the same, but also contends the trial judge was further in error when she failed to consider Dr. Boerescu's records in her decision. We find no merit in these arguments.

Rhode Island workers' compensation law recognizes mental injuries caused by emotional stress "resulting from a situation of greater dimensions than the day-to-day emotional strain and tension which all employees encounter daily without serious mental injury."[2] R.I.G.L. § 28-34-2(36); *see also* Seitz v. L & R Indus., Inc., 437 A.2d 1345, 1350-51 (R.I. 1981). Specifically, benefits have been granted to employees who have suffered mental injuries arising out of sexual harassment, so long as the employee has proven an actual disability. *See* Nappo v. G-Tech, W.C.C. No. 1996-05503 (App. Div. 06/01/99); Souza v. Jan Co., Inc., W.C.C. No. 1995-06675 (App. Div. 10/26/98). In the case at hand, the employee has failed to do so.

We do not dispute that the employee may have suffered from some emotional distress. We also agree that some of the evidence presented could causally relate this distress to her employment at the State House. However, under Rhode Island General Laws § 28-34-1,

[2]In her Show Cause Memorandum, the employee argues that this injury may be a mental injury caused by physical trauma thus avoiding the higher standard under Seitz. This argument is irrelevant to the appeal at hand, as the trial judge determined the employee failed to prove a disability at all. However, we would note that this argument was not properly raised as a reason of appeal, and thus we are limited in our ability to consider it. *See* Bissonnette, 472 A.2d at 1226 (R.I. 1984) (reaffirming that the appellate panel may only decide questions of law properly raised on appeal).

disability "means the state of being disabled from earning full wages at the work at which the employee was last employed." In mounting this appeal, the employee also ignores the long established principle that workers' compensation benefits are awarded for the impairment of earning capacity, and not the injury itself. *See* Parkinson v. Leesona Corp., 115 R.I. 120, 125, 341 A.2d 33, 36 (1975); Microfin Corp. v. De Lisi, 111 R.I. 703, 708, 306 A.2d 797, 800 (1973); Peloso Inc. v. Peloso, 103 R.I. 294, 297, 237 A.2d 320, 323 (1968). Without a loss of earning capacity, the employee is not entitled to receive benefits.

Ms. Parsons testified that the employee suffered from generalized anxiety disorder caused by her work situation as well as major depression caused by "the cumulative stress that she was under as well as the loss that she was going through." (Tr. 214.) She also opined that a return to the State House would not be in the employee's best interest. This falls far short of establishing that the employee was unable to resume her employment due to a work-related injury. To award benefits in such a situation would circumvent the long line of case law requiring an actual impairment of earning capacity for an employee to receive benefits. *See* Parkinson, 341 A.2d at 36; De Lisi, 306 A.2d at 800; Peloso, 237 A.2d at 323. Merely because it is not in an employee's best interest to go to work, does not mean they are unable to perform their job duties.

The employee also argues that Dr. Cai's medical records establish she was disabled. While the employee points to the sick leave notes the doctor provided on behalf of, and at the request of, the employee, she ignores the doctor's stated refusal to address her ability to work. In letters dated July 12 and 15, 2003, Dr. Cai admitted that she suggested the employee take time off from work when acutely distressed and also wrote her sick leave notes as needed. However, in these same letters she clearly states that she did not specifically assess the employee's general capacity to work. Further, at no point in her records does Dr. Cai adopt the position that the

employee was unable to work. The trial judge found that this evidence did not prove the employee was disabled. Where the trial judge's reasoning is not clearly erroneous, and it is not here, her findings on factual matters are final. *See* R.I.G.L. § 28-35-28(b); Vaz, 679 A.2d at 881.

The employee contends in the fifth reason of appeal that the trial judge erred in failing to consider the medical records of Dr. Boerescu in her decision. We find that this apparent failure was nothing more than harmless error on the trial judge's part. Dr. Boerescu's records were introduced into evidence in lockstep with Dr. Cai's as the employee's fifth exhibit. Further, when introducing these records, employee's counsel erroneously referred to them as the office notes of Dr. Cai. The trial judge referenced and evaluated this fifth exhibit and found the evidence did not establish a disability. It stands to reason that the trial judge did not fail to evaluate Dr. Boerescu's records, but merely overlooked the fact that the exhibit contained the notes of two doctors, and not one. In any case, Dr. Boerescu's notes only indicated that the employee suffered from depression, among other maladies, and never stated she was unable to work. We cannot disagree with the trial judge's determination that this evidence failed to establish a disability. Thus, the employee's fifth reason of appeal necessarily fails.

Lastly, we address the second reason of appeal. The employee argues that the trial judge's decision impermissibly refers to her treatment with Dr. Olchowski. While acknowledging that Dr. Olchowski's medical records were never offered as an exhibit, we nonetheless find that the trial judge's reference to his treatment of the employee was not in error. First, the trial judge merely recounts the employee's testimony that she sought medical treatment with Dr. Olchowski for multiple problems. This testimony was developed by the employee's counsel on direct examination. The employee cannot cite evidence she introduced at trial as grounds to now overturn the decision. The trial judge also referred to the employee's testimony

on cross-examination, when the employee stated she was not aware that Dr. Olchowski had diagnosed her with depression and prescribed her Paxil to treat it. The employee's counsel failed to object to this line of questioning. Absent a formal objection, the employee is precluded from raising this argument on appeal. *See* Davol, Inc. v. Aguiar, 463 A.2d 170, 173 (R.I. 1983). Consequently, the employee's second reason of appeal is denied.

After our thorough review of the record and careful consideration of the parties' arguments, the employee's appeal is denied and the decision and decree of the trial judge are 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

Sowa and Connor, JJ., concur.

ENTER:

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Olsson, J.

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Sowa, J.

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Connor, 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 September 5, 2005 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

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Olsson, J.

_____
Sowa, J.

_____
Connor, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Richard J. Savage, Esq., and Elaine Wallor, Esq., on

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