STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

PATRICIA A. WARD	)	
	)	
VS.	)	W.C.C. 05-02816
	)	
K-MART CORPORATION	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter was heard before the Appellate Division upon the petitioner/employee's appeal from the decision and decree of the trial court which denied the employee's original petition for a left ankle fracture sustained on March 9, 2005 when she fell in the bathroom at work. After a thorough review of the record and consideration of the arguments of the parties, we agree with the trial judge that the employee failed to establish by a preponderance of the evidence that her injury was due to conditions of her employment.

The employee worked as a part-time sales associate for K-Mart Corporation for approximately thirteen (13) to fourteen (14) years. The employee's account of the evening of the injury is occasionally unclear. The employee testified that on March 9, 2005, she began her shift at 6:00 p.m. At approximately 6:45 p.m., she started feeling cramps in her stomach and immediately went to the employees' restroom. She was sick with diarrhea. She left the stall and as she walked to the sink, her foot turned underneath her and she fell to the floor. She was unable to help herself up from the floor due to intense pain in her lower left leg. She had diarrhea again while sitting on the floor. After twenty (20) minutes, a co-employee came to the

restroom. The employee asked her to get JoAnn Michin, another co-worker, to come and help her. Ms. Michin cleaned up the employee in the restroom and stayed with her until rescue personnel arrived. She was taken to Rhode Island Hospital.

At Rhode Island Hospital, the employee was examined by Dr. Richard Terek, an orthopedic surgeon. Dr. Terek performed surgery on her ankle five (5) days after the incident, and the employee stayed at the hospital for an additional five (5) days after the surgery. Dr. Terek referred the employee to Dr. Christopher DiGiovanni, an orthopedic surgeon. Dr. DiGiovanni performed a second surgery on the employee's ankle on August 2, 2005. At the time of her testimony, the employee was still undergoing physical therapy, continued to have pain in the ankle, and had not returned to work.

Although the employee initially stated that she slipped and fell, she then responded that she did not know the condition of the floor. On cross-examination, the employee admitted that when she went to the restroom, in addition to suffering from diarrhea, she was sweaty and lightheaded. She stated that she did not know if there was anything on the floor of the restroom because she was in too much agony after she injured her ankle. In essence, the employee acknowledged that she did not know the condition of the floor and could not unequivocally state she slipped and fell due to a substance on the floor.

JoAnn Michin, a department manager at K-Mart, testified that she has worked with the employee for at least ten (10) years. She considers the employee a friend and occasionally gives her a ride home after work. Ms. Michin was at work on March 9, 2005 when the employee was injured. At approximately 7:00 p.m. she was notified by the manager that the employee wanted her assistance in the restroom. When she arrived in the restroom, the employee was sitting on the floor, screaming she had hurt her foot. Ms. Michin advised the manager to call the rescue

and then cleaned Ms. Ward up a bit. After the employee was taken away by the rescue, Ms. Michin went back into the bathroom and cleaned up some residue from where the employee was sitting and had had another episode of diarrhea, and also some "moisture" from where her legs were on the floor. Ms. Michin stated that she did not notice anything on the floor when she first entered the bathroom to assist the employee.

Adrienne Brown, a registered nurse employed at Rhode Island Hospital Emergency Room, testified regarding two (2) reports or records that she authored or partially authored. She stated that she was not familiar with the employee, nor did she recall treating her. In one (1) document, the Fax Admission Report, Ms. Brown recorded a history that the employee was in the bathroom at work with acute onset of diarrhea; that she felt lightheaded; and had a near syncopal episode (i.e., nearly passed out). She also recorded that Ms. Ward slipped on water in the bathroom. Ms. Brown admitted on cross-examination that she could not say whether she took this history directly from the employee, or if she simply took the information from other nurses' notes or other documents in the patient's file.

Paula Williams, the human resource manager at K-Mart, testified that she contacted Ms. Ward at the hospital on March 11, 2005, after learning that she had been injured two (2) days earlier. Ms. Williams took down a written statement from the employee regarding the incident. Ms. Williams testified the employee related to her that she experienced terrible cramps and suffered from diarrhea in the restroom. She felt hot and as she got up to go to the sink, she felt dizzy. As she reached for the sink, she slipped and fell.

On cross-examination, Ms. Williams acknowledged that the written statement does not state that the employee slipped, but rather that the employee was dizzy and fell. Ms. Williams explained she wrote down verbatim what the employee told her over the phone and then read it

back for the employee to verify, and if the statement does not say the employee slipped then the employee did not tell her she slipped.

Kristin Morris, the Assets Protection Coach for K-Mart, testified that she is responsible for coordinating the safety of the building, customers and assets of the company. She has known the employee for ten (10) years and occasionally shares a ride home with her. Ms. Morris spoke to the employee the day after the incident while she was in the hospital. The employee confided in Ms. Morris that she had been suffering from dizzy spells and was concerned about them. Ms. Ward also stated that her doctors were attempting to adjust her medication to determine the cause of the dizzy spells.

The emergency room records reveal slightly varying histories. The report of the rescue personnel states that the employee experienced acute diarrhea and nausea and had a near syncopy. It further notes that she twisted her left leg while letting herself to the floor. The triage assessment in the emergency department record indicates that she twisted her left ankle and had pre-syncope diarrhea. The nursing assessment on the same document states that the employee complained of left ankle pain after a fall in the bathroom. She also complained of diarrhea and dizziness. The admission report completed by Nurse Brown stated that the employee was in the bathroom at work with acute onset diarrhea. The employee felt lightheaded and had a near syncopal episode. It further notes that she slipped on water in the bathroom.

A handwritten note at the bottom of the Emergency Physician's Record records that the employee was in the bathroom with acute onset of diarrhea and felt lightheaded. The employee tried to get to the sink for cold water, but slipped while getting to the sink. It also indicates that she had a near syncope episode.

Dr. Richard Terek, an orthopedic surgeon, testified that he first saw the employee on March 9, 2005 in the hospital. He indicated that a resident orthopedic surgeon recorded a history that the employee slipped and fell at work when he admitted her from the emergency room. The doctor responded that he did not have an opinion as to the cause of the broken ankle and that the employee had related that she twisted it and fell at work. Dr. Terek stated that he subsequently spoke with Ms. Ward about what happened and she told him that she had diarrhea and "fell when she stood up, and was dizzy." Pet. Exh. 7, p. 14.

Dr. Christopher DiGiovanni, an orthopedic surgeon, began treating the employee on July 20, 2005 on a referral from Dr. Terek. After reviewing the emergency room records and his own file, the doctor stated that the ankle fracture occurred when the employee "had an apparent syncopal episode in the bathroom at work, seemed to get up, became dizzy, slipped, fell and broke her ankle." Pet. Exh. 8, p. 5. Dr. DiGiovanni explained that the loss of volume from diarrhea can briefly change the blood flow to the brain, which can cause someone to become disoriented and fall. On cross-examination, Dr. DiGiovanni furthered explained that if the employee "had explosive diarrhea, that is a plausible means of rising and potentially becoming disoriented and dizzy and falling." Id. at p.13.

After thoroughly reviewing the evidence presented in this matter, the trial judge concluded that the employee's physical condition, including nausea, lightheadedness and diarrhea, caused her to fall and fracture her left ankle. Consequently, he denied her petition on the grounds that she had failed to prove by a fair preponderance of the evidence that her injury was causally connected to her employment with K-Mart. The fact that the incident occurred on the employer's premises during working hours was not sufficient to establish compensability.

The role of the Appellate Division in reviewing the factual determinations made by a trial judge is sharply circumscribed. Rhode Island General Laws § 28-35-28(b) states, "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." The Appellate Division is entitled to conduct a de novo review only after an initial finding is made that the trial judge was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996); Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986). Cognizant of this limited standard of review, we have reviewed and examined the entire record. For the reasons hereinafter set forth, we find no merit in the appeal of the employee. As a result, we affirm the trial court's decision.

The employee has filed two (2) reasons of appeal. In the first reason, she contends that the trial judge overlooked and misconceived the testimony of the employee and Ms. Michin and the medical records which, she asserts, establish that the employee slipped on the bathroom floor. In the second reason of appeal, the employee argues that the trial judge erred in applying the applicable law to the facts of this case and wrongly determined that the employee's injury was due to her own medical profile and the effects of the acute diarrhea. We find no merit in her contentions.

The petitioner in any workers' compensation matter bears the burden of presenting to the court "credible evidence of probative force" to substantiate the allegations of her petition. DeLage v. Imperial Knife Co., Inc. 121 R.I. 146, 148, 396 A.2d 938, 939 (1979), *citing* Botelho v. J. H. Tredennick, Inc., 64 R.I. 326, 12 A.2d 282 (1940). In order to successfully prosecute her petition, the employee must establish by a fair preponderance of the evidence that a causal connection exists between the injury she sustained and her employment or the conditions under

which it is performed. Gaudette v. Glas-Kraft, Inc., 91 R.I. 304, 306, 163 A.2d 23, 24 (1960). A "preponderance of evidence" is defined as follows:

> "Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not."

Black's Law Dictionary, 5th Edition (1979).

The issue in the present matter is whether the employee presented sufficient evidence to establish a causal relationship between the incident which caused the fractured ankle and her employment. The trial judge found that the evidence preponderated in favor of the conclusion that the employee suffered an idiopathic fall. An "idiopathic fall" has been defined as

> ". . . one which occurs when an employee is suddenly overtaken by an internal weakness, illness or seizure which induces the fall where the originating cause is a physical condition personal to the victim and unrelated to the situation in which he happens to be or to the external conditions of his employment."

Zuchowski v. U. S. Rubber Co., 102 R.I. 165, 172-173, 229 A.2d 61, 65 ((1967), *citing* Riley v. Oxford Paper Co., 149 Me. 418, 103 A.2d 111 (1954). Generally, injuries sustained due to an idiopathic fall are not compensable. However, such injuries may be compensable if the employee was exposed to a special risk in connection with his employment, such as an idiopathic fall from a height above floor level. *See* Corry v. Commissioned Officers' Mess (Open), 78 R.I. 264, 81 A.2d 689 (1951); Carroll v. What Cheer Stables Co., 38 R.I. 421, 96 A. 208 (1916).

The employee asserts that the totality of the evidence establishes that Ms. Ward fell in the bathroom as a result of a slippery, wet, or moist floor, and, therefore, her injury is compensable. However, our review of the evidence does not yield such a definitive conclusion.

Despite initial statements that she "slipped and fell," the employee acknowledged that she had no idea what the condition of the floor was or whether there was any water on it. She could

only state that as she was walking towards the sink, her foot turned and she fell. On cross-examination, the employee also stated that she had diarrhea and felt sweaty and lightheaded while in the bathroom. She also had another episode of diarrhea after she fell to the floor.

The testimony of Ms. Michin does not clearly establish that there was a substance on the floor at the time of the fall. Ms. Michin stated that there was nothing on the floor when she initially entered the bathroom. Tr. p. 61. After the employee was removed by the rescue personnel, Ms. Michin re-entered the bathroom and cleaned up the area which was soiled from diarrhea. At that time, she noted some "moisture" or "wetness" where the employee's legs had been. Tr. p. 62. There was no indication that the "moisture" or "wetness" was present at the time of the employee's fall. In contrast, the facts that the employee had an episode of diarrhea while seated on the floor, she stated that she felt sweaty immediately prior to falling, and the rescue personnel had moved her on the floor while lifting her onto the stretcher, could just as easily tend to support the conclusion that the moisture was not present until after the fall.

The employee also relies upon the testimony of Ms. Williams, who took the employee's statement of the incident in a telephone conversation. When questioned as to what Ms. Ward told her, Ms. Williams responded:

> "She told me that she had terrible cramps and she went to the employee's bathroom and had diarrhea and that she felt hot and she got up to go to the sink and she felt dizzy and I guess she was reaching for the sink and she slipped and fell. I guess she was reaching so that she would hold on and she wouldn't fall." Tr. p. 26.

However, the written statement which she took down from her conversation with the employee does not contain the word "slipped." Ms. Williams testified that she recorded in writing what the employee told her word for word and then read it back to the employee who verified that it was her statement. As Ms. Williams indicated, the word "slipped" is not in the written statement

because the employee did not use that word in describing the incident to her. Therefore, the trial judge was not incorrect in stating that the word "slipped" was not contained in the written statement.

In her argument, the employee neglects to address the testimony of Ms. Morris, who spoke to the employee over the telephone on the day following the incident. At that time, Ms. Ward stated that she had been having dizzy spells and her doctor was adjusting her medication in an attempt to determine the cause of the dizzy spells.

The statements describing the incident in the medical records are contradictory. The history recorded by the rescue personnel indicates the employee had acute diarrhea and nausea, nearly fainted, and twisted her left leg while letting herself to the ground. One history stated that the employee was in the bathroom at work with acute onset diarrhea. She felt lightheaded and nearly fainted as she tried to get to the sink, but slipped on water. Another history indicated that she slipped while getting to the sink after feeling lightheaded and nearly fainting. The triage note indicated the employee twisted her ankle and almost passed out. The nursing assessment stated that she experienced diarrhea and dizziness. The only fact made clear by the medical records is that the employee was quite ill, experienced diarrhea and dizziness, and nearly fainted at the time of the fall.

Dr. Terek testified that he recalled speaking with the employee about the incident in his office a few weeks later. His recollection was that she stated that she had diarrhea and fell when she stood up and was dizzy. Pet. Exh. 7, p. 13-14. He did not recall any mention of a substance on the floor. Dr. DiGiovanni's testimony does not particularly assist the employee's case either. His opinion as to what occurred was gleaned from the hospital records as well as some minimal information from the employee and the referral from Dr. Terek. Initially he stated:

> "That she had had an apparent syncopal episode in the bathroom at work, seemed to get up, became dizzy, slipped, fell, and broke her ankle." Pet. Exh. 8, p. 5.

He then explained that a syncopal episode can occur when someone experiences diarrhea, which changes the blood flow to the brain for a brief period and the person may become disoriented and dizzy and fall. Id. at pp. 6 and 13. Again, none of the doctors mention slipping on a substance on the floor and falling.

It is apparent to this Court that the employee's testimony, medical records and witnesses' testimony all point to the more likely scenario that the employee was very ill, was unbalanced, nearly fainted, lost her footing and turned her ankle over. The one (1) hospital report and one (1) witness that purport to prove the floor was wet are not sufficient to satisfy the burden of proof in light of the totality of the evidence. The fact the employee happened to become ill at work and fell while on the employer's premises does not automatically transform her injury into a compensable injury. As stated by the Rhode Island Supreme Court in Zuchowski, *supra*:

> "The mere coincidence that petitioner happened to fall in respondent's plant on the floor in and of itself does not transfer a non-compensable injury into one which will confer benefits under the compensation act. To hold as petitioner contends would convert workmen's compensation into a form of health insurance. This we cannot accept, as it was never the intent of the legislature to afford this type of protection to an injured workman." 102 R.I. at 174-175, 229 A.2d at 66.

The trial judge thoroughly and exhaustively reviewed all of the evidence. The employee's contention that he overlooked or misconceived material evidence is without merit. Our review of the record leads to the conclusion that the trial judge was not clearly wrong in finding that the employee failed to prove by a fair preponderance of the evidence that her injury arose out of and in the course of her employment. There was very little to substantiate the assertion that she slipped on some substance that was on the floor. In contrast, there was an

abundance of evidence that the employee was quite ill and suffered from a condition which caused dizziness, lightheadedness, and disorientation. Consequently, we find no error on the part of the trial judge.

For the reasons stated above, we deny the employee's 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

Connor and Hardman, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Connor, J.

_____
Hardman, J.

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K-MART CORPORATION)

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 August 18, 2006 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

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Olsson, J.

_____
Connor, J.

_____
Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Stephen J. Dennis, Esq., and George E. Furtado, Esq., on

_____