STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

DEBRA MELLO	)	
	)	
VS.	)	W.C.C. 2006-02151
	)	
CITY OF PROVIDENCE	)	
DEBRA MELLO	)	
	)	
VS.	)	W.C.C. 2006-00825
	)	
CITY OF PROVIDENCE	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. These two (2) matters were consolidated for trial and remain consolidated at the appellate level. The employer appeals from the decision and decrees of the trial judge granting the employee's two (2) original petitions, one (1) alleging certain physical injuries and the other alleging stress, which arose out of a physical assault by a co-worker on January 6, 2006. The trial judge awarded compensation for a closed period from January 12, 2006 through April 1, 2006. After reviewing the transcript of the lengthy trial, as well as the documentary evidence presented by the parties, we deny the employer's appeal and affirm the decision and decrees of the trial judge.

W.C.C. No. 2006-00825 is an original petition in which the employee alleges that she sustained injuries to her head, left shoulder, upper back and neck on January 6, 2006 when she was assaulted by a co-worker in the workplace. W.C.C. No. 2006-02151 is an original petition alleging that the employee developed "stress, occupational disease" as a result of the assault at work. In both petitions, she contends that she became disabled on January 7, 2006 and continued to be disabled. The petitions were denied at the pretrial conference and the employee claimed a trial.

The employee, Debra Gwen Mello,[1] began working for the City of Providence in 1983. Since 1987, she has been employed in the Department of Inspections and Standards in various capacities. In May 2005, after discussions about several different jobs with the director of the department, Samuel Shamoon, the employee took the position of supervisor of code enforcement and prosecution, which was a non-union position. Her previous jobs had all been positions within the union. Ms. Mello expected to receive a certain salary in her new position, but Mr. Shamoon was not able to persuade his superiors to provide for it in his budget. The employee made her disappointment known to Mr. Shamoon, as well as others in the union and City Hall, over the next several months.

On December 8, 2005, the employee became very ill at work and was taken by rescue to Miriam Hospital. She then saw her personal physician and was advised to stay out of work for three (3) weeks. Ms. Mello testified that she spoke to Mr. Shamoon on December 20, 2005, and he informed her that he needed her to return to work because he was leaving for a vacation in London. She stated that when she came in to work the following day, he told her that if she did not return to work, he would replace her. In contrast, Mr. Shamoon testified that he never told Ms. Mello that she had to return to work, and that she simply called and said that she was feeling

[1] The employee, Debra Gwen Mello, is referred to as Deb, Debra, and Gwen, at various times in the transcript.

better and was ready to come back. He acknowledged that it would have been difficult if she was not in the office while he was not there, but that other people had helped out with her work when needed while she was ill.

In the late morning on Friday, January 6, 2006, Alice Azarian, a 78-year-old, long-time employee in the Plumbing Division of the Department of Inspection and Standards, came into the employee's office crying and complaining that Linda Baccari and Jean Roy had been making derogatory and harassing comments to her. After calming her down and sending her back to her desk, Ms. Mello left the building and drove her car around to the back side of the building to exit the parking lot. On the way, she stopped and parked her car at the entrance to the back of the building where the Structures, Zoning, and Building departments were located. She left her car's engine running and went into the building.

Once inside the building, she inquired of Linda Baccari if Peter Casale, the chief of the division of structures and buildings, was in his office. This area of the building is a large open area with desks for employees behind a counter where contractors and the general public come to ask questions and obtain building permits. Ms. Baccari responded that he was not in and then made a comment to the effect that she did not understand why everyone comes to Peter as though he is the director. Ms. Mello responded that that was not the case and requested that Ms. Baccari follow her into a back room or hallway, away from the area open to the public. Both Baccari and Mello were shouting at each other and using profane language. Ms. Mello alleges that Ms. Baccari pushed her left shoulder and her head, shoulder and upper back hit the wall behind her.

Ms. Mello then walked past Ms. Baccari back into the open area. At some point, Ms. Mello pushed over a bookcase, swept items off of Ms. Baccari's desk with her arm, and tossed a

stool in her direction, which may have skimmed her shoulder. Ms. Mello then walked through the building to her office, which was located on the other side of the building. Ms. Baccari telephoned Mr. Casale and informed him of what had happened. When he arrived in the office, he had pictures taken of the office and went to speak with Ms. Mello. She was crying and apologetic about what had transpired.

That afternoon, Ms. Mello was advised by the Director of Human Resources that she was suspended with pay until further notice. In a letter dated March 22, 2006, the employee was terminated from her employment due to the incident on January 6, 2006 which involved "destruction of City property, physical harm to another City employee, and inappropriate conduct, both verbal and physical," on her part. Linda Baccari, a member of the union, was suspended without pay for three (3) days for her "unprofessional, disruptive, and inappropriate conduct" on January 6, 2006.

Records of Miriam Hospital reflect that the employee was seen in the emergency room on January 8, 2006 for complaints of headache, neck pain and shoulder pain since being pushed by an employee and hitting her head on a wall on Friday. The diagnosis was cervical strain and anxiety. On January 12, 2006, Ms. Mello was evaluated by Dr. Steven G. McCloy at Axiom Occupational Health for continued complaints of headache, pain in the left shoulder, neck and back, as well as episodes of dizziness. On recommendation of the doctor, the employee underwent a CT scan of the head which did not reveal any abnormalities. In a letter dated March 29, 2006, Dr. McCloy stated that in his opinion the employee was disabled from her job from January 12, 2006 to January 22, 2006 due to the injuries resulting from the incident at work on January 6, 2006.

In support of her petitions, the employee also presented several witnesses who testified regarding their observations of the events on the day of the incident and the past conduct of Ms. Mello and Ms. Baccari. Dr. Albert R. Hamel, a clinical psychologist, testified in court and his records were admitted into evidence. The employer presented its own group of city employees, including Ms. Baccari and Mr. Shamoon, who testified about their observations and impressions. In addition, Dr. Daniel S. Harrop, a psychiatrist, testified before the court in regard to his evaluation of the employee conducted on July 19, 2006 and his report was admitted into evidence.

The trial judge, in a twenty-seven (27) page written decision, thoroughly reviewed the testimony of all of the witnesses and the documentary evidence. He found Ms. Mello to be a credible witness and found that Ms. Baccari's testimony was lacking in credibility. Consequently, he accepted the employee's version of events, including the physical assault by Ms. Baccari. Relying upon the records of Dr. McCloy, the trial judge determined that the employee sustained a cervical strain and left shoulder girdle strain resulting in partial incapacity from January 12, 2006 to January 22, 2006 due to the incident at work on January 6, 2006. He further concluded that the incident caused the employee to become disabled due to a stress-related psychological disorder from January 13, 2006 to April 1, 2006. The employer now appeals the decrees entered regarding both petitions.

The parameters of the appellate panel's limited review of a trial judge's decision is set forth 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." The panel must initially make a finding that the trial judge was clearly wrong or misconceived or

overlooked material evidence before undertaking its own *de novo* review of the evidence. Blecha v. Wells Fargo Guard-Company Serv., 610 A.2d 98, 102 (R.I. 1992).

The scope of review is even more limited when the factual determinations are based upon the trial judge's evaluation of the relative credibility of the witnesses. The Rhode Island Supreme Court has stated that "[a] credibility determination is particularly within the province of the factfinder." Almeida v. Red Cap Construction Inc., 638 A.2d 523, 524 (R.I. 1994). In reviewing the trial judge's decision, we must afford "a great deal of respect to the factual determinations and credibility assessments made by the judicial officer who has actually observed the human drama that is part and parcel of every trial and who has had an opportunity to appraise witness demeanor and to take into account other realities that cannot be grasped from a reading of a cold record." In the Matter of the Dissolution of Anderson, Zangari & Bossian, 888 A.2d 973, 975 (R.I. 2006). With these standards guiding our evaluation process, we have thoroughly reviewed the record in these matters and conclude that the trial judge was not clearly wrong in his assessment of the evidence.

The employer has filed five (5) reasons of appeal. Initially, the employer contends that the trial judge overlooked the deposition testimony of Shirley Porreca Johnson and was therefore clearly wrong in his assessment of the employee's credibility. Ms. Johnson, an employee of the city, testified by deposition on August 16, 1995 in a workers' compensation case filed by Ms. Mello against the city. Ms. Johnson had inquired of Ms. Mello, the union steward at the time, whether she could get an advance on her sick leave because she was going to be out of work for three (3) weeks due to surgery and did not have sufficient sick leave credits accrued to cover that time period.

Ms. Mello made inquiries of the union and reported that Ms. Johnson was not eligible for advanced sick leave because she had not been a regular employee of the city for five (5) years. Ms. Johnson had been a temporary employee a portion of the five (5) years she had worked for the city. Ms. Mello was apparently quite upset with this situation and told Ms. Johnson that she should trip over a wire that ran across the office floor and Ms. Mello would be her witness in the workers' compensation case. The fact that the wire running across the floor was a hazard was well-known in the office. Ms. Johnson did not take her up on the suggestion then or at a later date when Ms. Mello brought it up again. Ms. Johnson expressed surprise at the conversation, but stated that Ms. Mello seemed to be angry at the city and city officials because of a lot of things that were going on at the time.

In his decision, the trial judge listed all of the exhibits which were introduced by the parties. The deposition of Shirley Porreca is included in this list. Dec. 2. In rendering his decision, the trial judge stated that he carefully reviewed all of the evidence, including live testimony, depositions, and other documentary evidence. Dec. 20. The employer argues that because the trial judge did not specifically discuss the content of the deposition in his decision, he must have overlooked this evidence that Ms. Mello is not trustworthy. We must disagree.

The deposition was taken more than ten (10) years before the incident which is the subject matter of these petitions. That testimony does not establish that Ms. Mello lied under oath about her own workers' compensation claim. It did not shed any light on what exactly happened on January 6, 2006 between Ms. Mello and Ms. Baccari. Although the trial judge did mention the deposition as an exhibit, he obviously attributed no weight to it in his assessment of the employee's credibility and her truthfulness in relating the events of January 6, 2006. Instead, his analysis focused primarily on the testimony of the numerous witnesses regarding their

firsthand observations of the actual event on January 6, 2006 and their assessment of the behavior and personalities of Ms. Mello and Ms. Baccari, which was far more relevant than a ten (10) year old deposition. Based upon our review of the record and decision, we do not find that the trial judge overlooked the deposition of Ms. Porreca Johnson.

In the second, third and fourth reasons of appeal, the employer takes issue with the trial judge's evaluation of the credibility of the employee and points to portions of the testimony of other witnesses which contradicted that of the employee on certain points. As noted previously, the trial judge reviewed the testimony of each witness at length and commented as to his assessment of their credibility. One cannot expect that the decision will contain every word of testimony given during the trial. The trial judge obviously highlighted those portions that he considered most relevant to his decision. The fact that he attributed greater weight to certain portions rather than those statements cited by the employer simply reflects his decision making process and the sifting of the evidence.

It is clear from the testimony of the various witnesses that the offices of the Department of Inspection and Standards were fraught with interpersonal conflicts, particularly among the female employees. In this situation, the trial judge's observation of each of the individual witnesses during their testimony is invaluable in assessing credibility. The trial judge very ably sorted through the testimony noting the conflicting statements which caused him to reject the testimony of Linda Baccari and Jean Roy, as well as those consistencies in the testimony of other witnesses which led him to accept the employee's version of events.

The primary focus of his inquiry was what happened between Ms. Mello and Ms. Baccari while they were in the hallway or back room, out of sight of everyone. The trial judge had to decide whether he should believe Ms. Mello that Ms. Baccari pushed her against the wall, or

accept Ms. Baccari's statement that they simply bumped against each other in passing. The employee's behavior thereafter was described in some detail by the various witnesses and the trial judge was well aware of that conduct. However, he concluded that Ms. Baccari was the instigator of the incident and did physically assault Ms. Mello. The employee's conduct thereafter was simply a reaction to the preceding events, albeit a rather extreme one. We do not find any indication that the trial judge overlooked or misconceived any of the testimony given by the various witnesses.

In the final reason of appeal, the employer argues that the employee did not prove that her physical injury was the sole and exclusive cause of her mental injury and therefore her claim for disability due to a psychological disorder is not compensable in accordance with the decision in Amick v. National Bottle, 507 A.2d 1352 (R.I. 1986). Our review of the medical evidence supports the trial judge's conclusion that the employee sustained her burden of proving that she became disabled due to a psychological disorder which was caused by the incident at work on January 6, 2006.

Section 28-34-2 of the Rhode Island General Laws provides that the disablement of an employee from one (1) of the occupational diseases or conditions listed "shall be treated as the happening of a personal injury." Disablement from a mental injury is included on that list.

> "The disablement of an employee resulting from mental injury caused or accompanied by identifiable physical trauma or from a mental injury 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 shall be treated as an injury as defined in § 28-29-2(7)."

R.I.G.L. § 28-34-2(36). In the present matter, the trial judge concluded that Linda Baccari, a co-worker, physically assaulted Ms. Mello during the altercation on January 6, 2006. The employee

alleges that she became disabled due to a mental injury caused by this physical trauma. Dr. Hamel's testimony supports this contention.

The employee treated with Dr. Hamel for intermittent periods over the course of ten (10) years. She initially sought counseling in 1995 and then briefly in 1997 and 2000 for some personal and relationship issues. In June 2005, Ms. Mello returned to Dr. Hamel for what she described on an intake form as stress and anxiety regarding issues at work. This was the point in time when she was deciding whether to accept a promotion to a non-union job. The doctor's notes reflect an update on a past romantic relationship and some concern regarding her sister's family. The next note is dated December 23, 2005 and describes her physical ailments, but indicates she had to return to work. The next visit was January 13, 2006, after the incident at work.

In a letter dated March 5, 2006, Dr. Hamel stated that the employee suffers from Major Depressive Disorder (Recurrent, Moderate) which is a chronic condition that has not prevented her from working in the past. She also suffers from Adjustment Disorder with Mixed Emotional Features (Severe), which resulted from the incident on January 6, 2006 and the events leading up to it in December 2005, and as of January 6, 2006, caused her to become disabled from work. Prior to that event, the employee had been functioning at work and in her daily life, despite her chronic depression.

Dr. Harrop stated that in rendering his opinions as to causation and disability, he assumed that Ms. Mello was not physically assaulted. He concluded that the employee had a Major Depressive Disorder which had waxed and waned over the years and most recently was of moderate severity. The doctor cited her past relationship issues and family concerns as contributing to her condition. He was under the impression that the employee had been treating

with Dr. Hamel regarding these issues continuously from June 2005 through December, which is not reflected in the records or testimony of Dr. Hamel. Dr. Harrop did acknowledge that if there was a physical assault, then the incident would be beyond the ordinary stresses normally encountered by employees and he would expect it to result in some period of disability.

The trial judge indicated that the opinions of the two (2) physicians were not really in conflict once the fact that a physical and verbal confrontation occurred on January 6, 2006 was taken into account. He found that the period of disability related to the mental injury ended on April 1, 2006 based upon statements made by the employee and Dr. Hamel in conjunction with her application for unemployment benefits.

In Amick v. National Bottle, 507 A.2d 1352 (R.I. 1986), the Rhode Island Supreme Court upheld the denial of an employee's petition to review requesting payment of medical bills for treatment for depression. The employee had sustained a series of injuries over several years, some work-related and some not. He became depressed over his ongoing inability to return to work and limited physical capabilities. His psychiatrist testified that his depression was caused by the series of physical traumas he sustained over the years. The Court found that denial of the petition was appropriate because the employee had failed to prove that his mental injury was "directly and exclusively referable" to his work-related injury. Id. at 1354.

In the present matter, Dr. Hamel testified that at least one (1) of his diagnoses, the adjustment disorder, was specifically caused by the events at work in December and January, and disabled the employee from work. The doctor's reports and testimony satisfy the employee's burden of proving a causal relationship between her employment and her current disability. The holding in Amick does not impose any higher standard of proof for a mental injury than is required to establish a compensable physical injury. We would note that in Amick the employee

alleged in his petition to review seeking payment of medical bills that his depression flowed from the effects of his work-related back injury. Ms. Mello alleged in her original petition that she suffered a mental injury and disability as a direct result of an incident at work.

As we noted in our decision in Price v. Bess Eaton, W.C.C. No. 1999-05327 (App. Div. 2006), "the mere fact that an employee has a history of psychological problems or treatment, or has previously experienced events which may lead to a more fragile psyche, does not preclude a finding of a compensable psychic injury and disability." Id. at 7. An employer takes its employees as they are, with whatever preexisting conditions or predispositions they may have. Clemm v. Frank Morrow Company, 90 R.I. 37, 153 A.2d 557 (1959). So long as the employee presents competent expert testimony establishing that the incident or injury at work triggered or precipitated the disability resulting from the psychological disorder, the claim is compensable.

In the present matter, Ms. Mello had functioned at a high level at work and engaged in regular activities of daily living, despite her chronic depression and periodic treatment during particularly stressful points in her life. Dr. Hamel testified that she was incapable of working immediately following the incident at work on January 6, 2006. Dr. Harrop acknowledged that, assuming the incident occurred as described by Ms. Mello, such an altercation would be beyond the normal stressful situations encountered in the workplace and would likely result in some period of disability. The incident on January 6, 2006 was an identifiable traumatic incident arising out of and in the course of Ms. Mello's employment with the city and resulted in a period of disability from January 12, 2006 through April 1, 2006. The medical evidence presented in this matter satisfies the employee's burden of establishing the nexus between her employment and her psychological injury and disability.

For the foregoing reasons, we deny and dismiss the employer's appeals and affirm the decision and decrees of the trial judge. In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, final decrees, copies of which are enclosed, shall be entered on

Healy, C. J., and Salem, J. concur.

ENTER:

_____
Healy, C. J.

_____
Olsson, J.

_____
Salem, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

DEBRA MELLO)
)
VS.) W.C.C. 2006-00825
)
CITY OF PROVIDENCE)

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 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 April 6, 2007 be, and they hereby are, affirmed.

2. That the employer shall pay a counsel fee in the amount of One Thousand Three Hundred and 00/100 ($1,300.00) Dollars to Stephen J. Dennis, Esq., attorney for the employee, for the successful defense of the employer's appeal in this matter.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Healy, C. J.

_____
Olsson, J.

_____
Salem, J.

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

_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

DEBRA MELLO)
)
VS.) W.C.C. 2006-02151
)
CITY OF PROVIDENCE)

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 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 April 6, 2007 be, and they hereby are, affirmed.

2. That the employer shall pay a counsel fee in the amount of One Thousand Three Hundred and 00/100 ($1,300.00) Dollars to Stephen J. Dennis, Esq., attorney for the employee, for the successful defense of the employer's appeal.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Healy, C. J.

_____
Olsson, J.

_____
Salem, J.

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

_____