STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

PAUL ELLIS	)	
	)	
VS.	)	W.C.C. 2008-03328
	)	
VERIZON NEW ENGLAND, INC.	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's appeal from the denial of his original petition for benefits alleging he sustained a head injury resulting from an assault on September 17, 2007. After a thorough review of the record and consideration of the arguments of the respective parties, we deny the employee's appeal and affirm the decision and decree of the trial judge.

The employee suffered a head injury while at a job site in Providence after being assaulted by a stranger who lived next door to the customer on whose house he was working. An original petition for workers' compensation benefits was filed and denied, and a timely claim for trial was made.

The facts surrounding the incident are not in dispute. Mr. Ellis worked for Verizon as a splice service technician which involved the outside repair of lines, as well as repair of residential telephone and cable lines. On September 17, 2007 at approximately 2:00 in the afternoon, the employee was sent to Union Avenue in Providence, an area he had never been before, to repair outside cable lines. The employee testified that when he arrived, he heard a

gentleman yelling in his direction. He said that a 20-something Asian man was yelling, among other things, "[t]he country is going down. The president is dead." (Tr. 13.) He initially ignored the man and went to the customer's house and did the necessary repair work. When the employee returned to his truck, he again heard the man yelling at him from a bike across the street. In response to the man's rants, the employee testified that he asked the man what his problem was. The man then got off his bike, picked up a piece of wood and repeatedly struck the employee on top of the head. The assailant then went across the street, got back on his bike and left. When the ambulance responded to calls made by the neighbors, the employee described himself as being confused, light-headed, bleeding, and in pain. The employee said he also gave a report to the police before he was taken to the hospital.

When the employee arrived at Rhode Island Hospital he was provided with medical care that included fourteen (14) staples in his head—eleven (11) in one wound, and three (3) in another. The employee treated with Dr. Stephen R. Butler, D.O., on three (3) occasions and offered his deposition at trial. Also, he stated that because of the emotional stress which arose from the injury he was referred to a licensed mental health counselor, Jeffrey Russell. He saw Mr. Russell once a week for five (5) weeks, the last time on November 2, 2007. On November 12, 2007, the employee returned to work. For the first two (2) weeks he rode with another employee and then resumed his regular work duties alone.

The employee offered the testimony of Robert Bellows, his supervisor at the time of the incident. After working for Verizon for more than thirty-nine (39) years, Mr. Bellows retired on December 13, 2008. He testified that after the incident took place, the union representing the Verizon employees requested that two men be placed in trucks servicing that specific area until the assailant was apprehended. The normal policy is that service technicians work alone. Police

records which were introduced into evidence reflect that the assailant was arrested two (2) days later, on September 19, 2007. Mr. Bellows explained that for a couple of weeks after the assailant was caught, if an employee was assigned to the Union Avenue area and objected to going alone, the job would be given to another employee. Mr. Bellows worked as an outside supervisor for Verizon from 1978 until 2008, and there had been no previous assaults in that area or any other area serviced by Verizon in that time.

The employee also offered the testimony of James Lucht, the Information Group Director at the Providence Plan, an organization which, among other information gathering projects, studies the violent crime activity throughout the city of Providence. Mr. Lucht testified that the Providence Plan assists the Providence Police Department in collecting data to create weekly reports which the department utilizes in making decisions as to allocation of personnel, as well as statistical tables and a series of maps in reference to violent crimes committed in Providence. A summary of this statistical analysis has been made available to the public through its website since at least 2005. He testified that the Providence Plan has tracked the users of the website and it consists, among others, of mostly people who are interested in moving into the city to find out information about certain neighborhoods and also those writing community development grants. Only occasionally do they get requests from corporations or community development groups to hold a seminar.

Mr. Lucht brought with him a map of the "hot spot" crime areas in Providence, which was created in 2002 and had been updated through 2007. (Tr. 76.) He testified that the highlighted spots on the map correspond with a violent crime and that for these purposes a violent crime consists of murder, sexual assault, robbery or aggravated assault. He explained that when any one of these crimes took place between 2002 and 2007, a dot was placed on the

map where it occurred. When there is a high frequency of these crimes close together in an area, the map reflects that by creating looms of color which represent the intensity or density of the crimes. The highest intensity of crime in an area is represented by dark purple or blue caused by the dots overlapping each other. The map reflects that the West End, where Union Avenue is located, was one of the highest crime areas in Providence for those years. Mr. Lucht also testified, however, that because the map shows only intensity of crime it would be impossible from the information available publicly to determine exactly which crimes are being committed in one hot spot.

Mr. Lucht admitted that the statistics are not broken down to particular seasons or even time of day, which could significantly alter the intensity of crime. He pointed out that the crime rate is higher in the summer than it is in the winter. Mr. Lucht stated that there can also be variations in the darkest hot spots because the Providence Plan maps crimes over space. He offered that if it is dense all around a certain area, the areas in between could be colored in just because of the selections made in how to display the mapping, despite a low crime rate in that particular spot.

The trial judge, relying on the decisions in Nowicki v. Byrne, 73 R.I. 89, 54 A.2d 7 (1947), and Dawson v. A & H Manufacturing Co., 463 A.2d 519 (R.I. 1983), found that the employee had failed to prove that he sustained a compensable injury arising out of and in the course of his employment. The trial judge noted that the case law reflects that Rhode Island is an "actual risk" jurisdiction rather than a "positional risk" one and the evidence did not establish that the employee's injury was the result of a risk of his employment with Verizon or incident to it, or to the conditions under which it was required to be performed. The trial judge noted that although the employee did a good job of showing the West End of Providence, where the assault

took place, is a high crime area, there is no way to distinguish between the nature of the crimes. Furthermore, he noted that there was no evidence that Verizon was aware of the high crime in that area. The original petition was denied and the employee filed a claim of appeal in a timely manner.

The Appellate Division's standard of review is narrowly delineated by statute. Section 28-35-28(b) of the Rhode Island General Laws states "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." *See also* Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996). In the present matter, we find that the trial judge was not clearly wrong in his conclusions.

The employee has put forth six (6) reasons of appeal in this case, raising essentially one issue. The employee argues that the trial judge erred in finding that he was not entitled to workers' compensation benefits based on the lack of a causal relationship between the employee's employment and his injury. He contends that the statistical evidence provided proved he was exposed to a special risk of being assaulted because Verizon sent him to work in a high crime area.

In Rhode Island, an employee is awarded workers' compensation benefits if he sustains an injury "arising out of and in the course of his or her employment." R.I.G.L. § 28-33-1. This court has adopted a three (3) part test to determine whether an injury occurred in the course of employment. The employee must establish that the injury occurred (1) during the period of employment; (2) at a place where the employee is reasonably expected to be; and (3) while he is reasonably fulfilling the duties of his employment or doing something incidental thereto. Di Libero v. Middlesex Construction Co., 63 R.I. 509, 516, 9 A.2d 848, 851 (1939).

In the present matter, the employee was assaulted in the middle of the afternoon during his regular work hours. The incident occurred in a place where the employee was reasonably expected to be because the employer sent him to respond to this particular area to provide services. In addition, the employee testified that the assault occurred as he was walking back to his truck after completing work at a customer's house. Based upon these facts, it is clear that the employee sustained the injury *during the course* of his employment with Verizon; however, we agree with the trial judge that those facts do not establish that the injury *arose out of* Mr. Ellis's employment.

In Nowicki, the Rhode Island Supreme Court quoted with approval the test it had previously adopted in Di Libero regarding the "arising out of" standard:

> An injury arises out of an employment when it occurs in the course of the employment and is the result of a risk involved in the employment or incident to it, or to the conditions under which it is required to be performed. The injury is thus a natural or necessary consequence or incident of the employment or of the conditions under which it is carried on. Sometimes the employment will be found to directly cause the injury, but more often it arises out of the conditions incident to the employment. But in every case there must be apparent some causal connection between the injury and the employment or the conditions under which it is required to be performed, before the injury can be found to arise out of the employment.

73 R.I. at 92, 54 A.2d at 9 (quoting Marchiatello v. Lynch Realty Co., 94 Conn. 260, 263, 108 A. 799, 799-800 (1919).

Subsequently, in Dawson, the Rhode Island Supreme Court applied this "actual risk" test, rather than the "positional risk" theory applied in a minority of jurisdictions. 463 A.2d 519. The "positional risk" doctrine "in essence makes all injuries, however neutral and unconnected with employment, compensable if they occurred at the place of employment." Id. at 521. As an "actual risk" jurisdiction, Rhode Island requires that an employee prove that "the risk of injury,

even though common to the public, was in fact a risk of his employment." Maggiacomo v. RIPTA, 508 A.2d 402, 403 (R.I. 1986).

In Di Libero, the court found that the employee was reasonably fulfilling the duties of his employment, or doing something incidental to it, and that his injury resulted from an actual risk of his employment when the employee was injured following orders by his employer to take a specific path when leaving the premises to go home. 63 R.I. at 517, 9 A.2d at 851. In a similar case, the court awarded compensation to an employee who was struck by a motor vehicle while crossing a public highway which ran between the employer's facility and a company owned parking lot where the employee was directed to park. Branco v. Leviton Mfg. Co., Inc., 518 A.2d 621 (R.I. 1986). The court found that because the employer placed the employee in the position of having to cross the public highway in order to get to work, "the risk entailed in crossing the highway must be considered a condition incident to his employment." Id. at 623.

After considering the reasoning of the court in these decisions, we agree with the trial judge that the facts of the present matter are more similar to those cases in which an employee's injury was the result of a random act or neutral force. In these instances, compensation benefits have been denied despite the fact that the injury occurred during work hours and either on the employer's premises or in a place the employee was expected to be. In Nowicki, it was found that there was no causal connection between the injury to the employee's arm from a stray bullet shot by someone during target practice off the premises and his employment at the airport or the conditions under which it was performed. 73 R.I. at 93, 54 A.2d at 9. Reiterating the "actual risk" theory, the court in Dawson, affirmed the finding that an employee's injury from a bee sting in the hallway of the employer's premises was also not compensable. 463 A.2d 519. There

was no evidence that exposure to bees was incidental to his employment and the bee sting was anything more than a random occurrence.

Based upon the employee's description of the incident in the matter before the panel, we are unable to discern any causal relationship between the attack which caused his injuries and his employment with Verizon. The assault on the employee in this case was completely random, and it is clear it had nothing to do with the employee's position as a splice service technician. Mr. Ellis testified that the man who assaulted him was screaming, "[t]he country is going down. The president is dead," and the police reports which were introduced into evidence state that the man thought that the employee was working for the CIA. (Tr. 13.) An assault of this nature was not a direct risk or direct result of his employment at Verizon. The employee's duties consisted of fixing cables in and around peoples' homes, and climbing telephone poles to fix cable and telephone wires. The assault did not take place in a customer's home or because of dissatisfaction with the services he provided, or hatred for the company in general. The only connection to the employment is that the employee was at that particular location to perform certain work, which may satisfy the "positional risk" standard, but not the "actual risk" doctrine utilized in Rhode Island.

The employee contends that although the assault may not have been a direct risk of his employment, the evidence offered at trial suggesting the employee was ordered to service a high crime area of Providence establishes that his employer subjected him to a special or increased risk of being assaulted. After reviewing the testimony of Mr. Lucht regarding the Providence Plan data, we agree with the trial judge's assessment that the information provided was not sufficiently specific to the circumstances of the employee's injury to establish a special or increased risk that he would be assaulted.

The terms "special risk" and "increased risk" are generally used in those cases where the risk is one that is common to the general public, but the employee is more susceptible to the risk by virtue of his employment. The Appellate Division and the Rhode Island Supreme Court have recognized that for certain types of employment, the risk of driving on the public highways is considered a condition incident to the employment, or a special risk of that employment. The employee in Toolin v. Aquidneck Island Medical Resource, 668 A.2d 639 (R.I. 1995), was an in-home nursing assistant who was injured in a motor vehicle accident while driving from a patient's home to her next assignment. The Rhode Island Supreme Court found that her injuries arose out of her employment "because travel from one patient's home to another was an integral and a necessary part of the employment contract and conferred an added benefit on Aquidneck in pursuing its business, the risk of travel on public roads must be considered a condition incident to Toolin's employment." Id. at 641.

Similarly, in Hobson v. Fleet Mortgage, W.C.C. No. 94-03229 (App. Div. 7/19/96), the Appellate Division focused on the fact that driving on the public roads, though not specifically a job duty, was necessary for the employee to perform those duties. The employee was a mortgage agent who was injured while returning to his home office from an appointment. The panel concluded that, "[t]he fact that the employee was in the vehicle returning to his home office subjected him to a special risk, the risk of traveling in a motor vehicle, and the injuries were, therefore, sustained arising out of and in the course of employment." Id.

Obviously, this case does not involve driving on the public roads, but rather the mere presence of the employee on a public road. Under the circumstances, we do not believe that the risk of being randomly assaulted by a complete stranger is a condition incident to Mr. Ellis's employment with Verizon.

This court has also used the term "special risk" when referring to a situation where an employee sustains an injury from being placed in a "zone of danger" by the employer while performing his or her job duties. Waterman v. Frank Waterman & Associates, W.C.C. No. 93-11862 (App. Div. 12/29/95). The employee claims that the special risk of his employment is the "increased risk" of being assaulted on the job which the employer created by sending him to service a customer in a high crime area. In Waterman, the employee was injured when an out of control vehicle crashed through the building she worked in and hit her while she was sitting at her desk. Id. The court noted that the employer was aware of the fact that vehicles had crashed through the same area of the building on at least three (3) previous occasions in the past eight (8) years. The danger of a vehicle crashing through that area of the building was deemed a special risk of the employee's employment as a result of the employer placing her desk there.

The employee in the present matter likens his situation to Waterman, where the court agreed with the trial judge that putting an employee in a zone of danger by exposing her to the risk of an out of control vehicle created a special risk to which the employee was subjected as an incident of her employment. Id. The employee in this case argues Verizon put him in the "zone of danger" by sending him to work in a high crime area, thereby exposing him to greater risk of assault. We agree with the trial judge that the statistical evidence from the Providence Plan was not sufficiently specific to establish a greater likelihood, or increased risk, that the employee would be assaulted at that particular time.

The street the employee was sent out to is incorporated in an area called the West End of Providence. The so-called "hot spot" map introduced as an exhibit indicates this is an area where many violent crimes are committed. However, the statistics reflect the totals of all murders, rapes, robberies, and aggravated assaults occurring from 2002 to 2007 and there is no

breakdown as to the number of crimes committed in each category, i.e., number of murders, rapes, robberies, and aggravated assaults. The trial judge found it unclear as to how many of the crimes marked on the map illustrated the statistics involving an aggravated assault as opposed to one of the other violent crimes throughout the five (5) years, or how many of each type of crime were committed from year to year. The court agrees with the trial judge that it makes a difference which specific crimes were being committed in the area, despite the employee's argument that a risk of any violent crime should be sufficient. The incident involved an assault on the employee, so the evidence must show that there was a special risk, or an increased risk, for the employee to be assaulted on the job.

Also, on cross-examination, Mr. Lucht admitted that the methodology used to create the map led to certain streets or smaller areas where crime was relatively low being shown overlapped by the larger high crime area. Lastly, Mr. Lucht admitted that the statistics were not broken down to reflect the crime rates at certain times of day, which he admitted would make a difference, as crime was much lower during the day when this incident took place, as opposed to at night. He also acknowledged that there were seasonal differences in the crime rate as well, with a higher incidence of crime in the summer than other seasons. In addition to the weakness in the employee's statistical evidence, his direct supervisor at the time testified that no technician had ever been assaulted during the more than thirty (30) years that he had worked as an outside supervisor for Verizon in any location it provided service.

The employee argues that the trial judge erred by considering lack of knowledge on the part of Verizon that Union Avenue was in a high crime area as a factor in denying the employee's petition. The trial judge noted, however, that even if the company was aware of the information supplied by the Providence Plan, he would still deny the petition on the grounds that

the risk of assault was not an actual risk of Mr. Ellis's employment. We would also add that in Waterman, *supra*, knowledge on the part of the employer that the employee was placed in a dangerous position was considered a factor in determining that the risk of being injured by a car crashing through the building was an actual risk of the employment.

Based on the foregoing, we find no error on the part of the trial judge and we, therefore, deny and dismiss the employee's reasons of appeal and affirm the trial court's decision and decree. 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.

ENTER:

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Olsson, J.

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Hardman, J.

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Ferrieri, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

PAUL ELLIS)
)
VS.) W.C.C. 2008-03328
)
VERIZON NEW ENGLAND, INC.)

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 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 October 14, 2009 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

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John A. Sabatini, Administrator

ENTER:

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Olsson, J.

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Hardman, J.

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Ferrieri, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Stephen J. Dennis, Esq., Robert S. Thurston, Esq., and Thomas M. Bruzzese, Esq., on

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