STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

ELSA BARATA	)	
	)	
VS.	)	W.C.C. 2011-05196
	)	
HOPKINS MANOR	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the appeal of the petitioner/employee from the trial judge's denial of her original petition in which she alleged that she injured her low back on January 18, 2011 when she slipped on ice in the employer's parking lot during her unpaid lunch break. The trial judge concluded that the employee's injury did not arise out of and in the course of her employment as she was not performing any duties of her employment or tasks incidental thereto. After careful consideration of the arguments of the respective parties and review of the pertinent case law, we grant the employee's appeal in part as to the employer's liability for the injury, but deny the employee's request for the award of weekly benefits as she failed to establish any incapacity due to the injury.

The employee, Elsa Barata, was employed by Hopkins Manor for approximately eleven (11) years as a dietary aide, which primarily involved serving food and washing dishes. Her scheduled work hours were from 6:30 a.m. to 2:30 p.m., with an unpaid lunch break from 12:30 p.m. to 1:00 p.m. The employer's policy was that if an employee left the premises during the lunch break they were required to punch out. The employee testified that the majority of

employees stayed on the premises during the lunch break. She asserted that they were encouraged to remain on premises so they would be available to assist the residents in the event of an emergency.

Ms. Barata testified that there was a break room on the premises which she estimated held between twelve (12) and fifteen (15) people. She explained that all of the housekeeping, dietary and activities personnel, as well as the certified nursing assistants, take their lunch break at the same time and the break room was always crowded by the time she got there. During the winter, the employee and several co-workers began taking their lunch break in the boiler room. Ms. Barata stated that about two (2) weeks before she sustained her injury, Mark Levesque, the administrator of the facility, spoke to her in the hallway and told her that they could not eat in the boiler room due to safety concerns and they would have to find another place or eat in their cars.

On January 18, 2011, the employee went out to her car in the employer's parking lot and ate her lunch after clearing the sleet and ice off of her vehicle. It was a stormy day with rain, sleet and ice and the parking lot was very icy and slippery. At the end of her break, she exited her car and heard Elizabeth Barros, a co-worker, call out to her to come to her vehicle to assist in getting her car window up as it was stuck. Ms. Barata took four (4) or five (5) steps toward Ms. Barros' vehicle before she slipped and fell backwards onto her buttocks. She tried to push herself up, but then fell onto her knees. Another co-worker, Tanya McMahon, then helped her to her feet. The employee then walked back into the building and reported the incident to her supervisor.

The employer immediately sent Ms. Barata to the North Providence Urgent Care facility. The employee subsequently sought treatment with a chiropractor and then with Dr. Todd E. Handel for her low back complaints. She indicated that her treatment was limited because she

could not afford to pay. She asserted that her condition remains the same and she is unable to perform her regular duties.

Mark Levesque, the administrator of the facility, acknowledged that the parking lot where the employee fell was owned and maintained by the employer. He described the layout of the employees' break room and estimated it could hold twenty (20) to twenty-four (24) people. He indicated that about twenty-two (22) employees took the same lunch break as Ms. Barata. Mr. Levesque acknowledged that not all employees eat in the break room; some eat on the loading dock in warmer weather, some eat in their cars, and some leave the premises. He stated that there was no written policy as to where employees were to eat lunch except that they must punch out if they leave the premises. He denied telling Ms. Barata that she should eat her lunch in her car and testified that he never received any complaints of overcrowding in the break room.

Two (2) co-workers of the employee also testified regarding the accepted practice of eating lunch in their cars at times. Stacy Robidoux from the Human Resources office produced the Employee's Handbook detailing various policies of the employer. There is no specific reference to encouraging employees to stay on the property during lunch break so they are available in case of emergencies.

The medical evidence in the record consists of the affidavits and records of the North Providence Urgent Care Center and the Rhode Island Spine Center, and the deposition and reports of Dr. Todd E. Handel. The employee was seen at the North Providence Urgent Care Center on January 18, 2011, the day of the injury, complaining of low back pain. The records indicate that the employee fell at work in the parking lot and landed on her buttocks. An x-ray of the lumbar spine was normal and the employee was diagnosed with a contusion of the lumbar spine. She was prescribed medication and advised to remain out of work until she returned for a

follow-up visit on January 20, 2011. In accordance with Rhode Island General Laws § 28-33-8(b), Dr. Alfred Toselli, the attending physician, signed a Notification of Claim of Compensable Injury form documenting the employee's injury, diagnosis and out-of-work status.

At the follow-up visit with Dr. Toselli, the employee continued to complain of low back pain with no improvement. She was given a note to stay out of work until January 27, 2011 and referred for an MRI. The MRI of the lumbar spine was performed on January 24, 2011 and reported as normal. When Ms. Barata returned to the Urgent Care Center on January 27, 2011 complaining of continued pain, Dr. Toselli signed the discharge paper stating she should remain out of work until January 31, 2011 and referred her to a neurosurgeon.

Instead of seeing a neurosurgeon, the employee was seen at the Rhode Island Spine Center by Dr. Donald R. Murphy, a chiropractor, on February 1, 2011. She informed him that she was experiencing severe low back pain and numbness in her left arm and leg after slipping on ice and landing on her buttocks and back and then hitting her head. Dr. Murphy had difficulty performing an examination due to the employee's severe pain reactions. He recommended a course of treatment but did not comment on disability or specifically provide an opinion as to causation. Ms. Barata attended treatment sessions sporadically between February and June. In March 2011, she underwent a lap band procedure, unrelated to her alleged work injury. On June 3, 2011, Dr. Ericka E. McGovern, a chiropractor at the Spine Center, at the request of the employee, referred Ms. Barata to Dr. Handel, to explore possible treatment with cortisone injections.

On July 28, 2011, the employee saw Dr. Murphy, requesting a note to remain out of work. Again, the doctor had difficulty performing an examination due to the employee's severe pain reactions. Dr. Murphy noted that he could not find any physical explanation for her

continuing pain complaints from a slip and fall over six (6) months ago and her inability to return to her normal work duties. He did, however, provide her with a note to remain out of work for the next week until she saw Dr. Handel for an injection.

Dr. Handel, a specialist in physical medicine, rehabilitation and pain management, first saw Ms. Barata on July 25, 2011 for complaints of constant back pain since falling on ice on January 18, 2011. After examining the employee, Dr. Handel diagnosed her condition as sacroiliac joint pain and recommended a cortisone injection which he then performed on August 2, 2011. When this procedure did not result in any improvement in her condition, Dr. Handel repeated the procedure on August 30, 2011, but again had no success in relieving her pain. In an addendum written on the day of the procedure, the doctor notes that the etiology of her pain is unclear since she has had no relief at all from the injections. He also noted that the employee had asked for pain medication following the procedure, specifically Oxycodone.

At the follow-up visit on September 13, 2011, Dr. Handel suggested muscle trigger point injections in an attempt to relieve what he believed to be piriformis muscle spasms that might be the cause of the employee's pain. Ms. Barata never returned to Dr. Handel to undergo these injections.

The trial judge cited the three (3) criteria set out in *DiLibero v. Middlesex Construction Co.*, 63 R.I. 509, 9 A.2d 848 (1939), in determining whether the employee's injury was compensable. He concluded that Ms. Barata did not satisfy the third prong of the test in that she failed to establish that she was carrying out the duties of her employment or performing some task incidental to her employment when she sustained her injury during her unpaid lunch break. Consequently, the trial judge denied her original petition. The employee filed a timely claim of appeal.

The employee has filed three (3) reasons of appeal; however, two (2) of them are simply general allegations that the trial judge's decision is contrary to the law and the evidence and are therefore summarily dismissed. In the third reason of appeal, the employee argues that the employee's activity of walking to and from her vehicle in the employer's parking lot to eat lunch in her vehicle was a long-standing, customary practice of which the employer had knowledge and therefore, a causal connection, or nexus, exists between the injury she sustained and her employment. After our review of the relevant case law, we agree that the employee's injury is compensable, although based upon slightly different reasoning.

The circumstances of the employee's injury in this matter lead first to the question whether the going-and-coming rule is applicable as the injury occurred outside of the physical structure housing the employer's business. Generally, the rule operates to deny workers' compensation benefits when an employee sustains an injury while traveling to or from the workplace. *Toolin v. Aquidneck Island Medical Resource*, 668 A.2d 639, 640 (R.I. 1995). The Rhode Island Supreme Court has held, however, that application of the rule is not automatic.

> Because of the harshness of the rule, this court has been willing to delineate exceptions to its application that depend on the particular circumstances of each case. Thus, we have held that an employee is entitled to compensation benefits if it can be demonstrated that a nexus or causal connection exists between the injury sustained and the employment.

Id. at 640-41 (citations omitted). In *DiLibero*, the Court first set forth the three (3) criteria which must be met in order to establish a nexus or causal connection between the injury and the employment. 63 R.I. 509, 9 A.2d 848. These criteria have been referenced repeatedly by the Court in determining causal relationship in workers' compensation matters.

> We first determine whether the injury arose within the period of the employee's employment. We thereafter evaluate the situs of the injury to determine whether the injury occurred at a place

> where the employee might reasonably be expected to be present. Third, we inquire whether the employee was reasonably fulfilling the tasks of his or her job at the time of the injury or was performing some task incidental to the conditions under which those tasks were to be performed.

Toolin, 668 A.2d at 641.

With regard to the first factor, it is clear that the employee's injury occurred during the period of the employee's employment despite the fact that the lunch period was unpaid and the employee was not technically under the control of the employer. The authors of *Larson's Workers' Compensation Law* note four (4) primary situations in which the period of employment is extended beyond the employee's normal fixed hours of work:

> . . . the time spent going and coming on the premises; an interval before working hours while waiting to begin or making preparations, and a similar interval after hours; regular unpaid rest periods taken on the premises; and unpaid lunch hours on the premises. . . . In each instance the time, although strictly outside the fixed working hours, is closely contiguous to them; the activity to which that time is devoted is related to the employment, whether it takes the form of going or coming, preparing for work, or ministering to personal necessities such as food and rest; and, above all, the employee is within the spatial limits of his or her employment.

2 Lex K. Larson, *Larson's Workers' Compensation Law* §21.02[1][a] at 21-3 to 21-4 (Matthew Bender Rev. Ed.). The employee's unpaid lunch period, therefore, would be deemed to be included in the period of employment if the employee spent that period on the employer's premises.

The second step of the analysis is determining whether the employee sustained her injury while on the premises of the employer. It is not disputed that the employer owned and maintained the parking lot where the employee was permitted to park her vehicle. Consequently, the parking lot is deemed to be part of the employer's premises. *See Rico v. All Phase Electric*

Supply Co., 675 A.2d 406 (R.I. 1996). The *Rico* case involved an employee who was injured when she slipped and fell in the employer's parking lot when walking from her vehicle to the entrance of the employer's building. In finding that the employee was injured at a place where the employer could reasonably expect her to be at that time, the Rhode Island Supreme Court, quoting a previous edition of *Larson's*, stated:

> In this vein we note that in regard to 'employees having fixed hours and place of work, injuries occurring on the [employer's] premises while they are going to and from work before or after working hours or *at lunchtime* are compensable, but if the injury occurs off the premises, it is not compensable , subject to several exceptions.'

Rico, 675 A.2d at 408 (quoting 1 A. Larson, *The Law of Workmen's Compensation*, § 15.00 (1995)) (emphasis added); *see* 2 Lex K. Larson, *Larson's Workers' Compensation Law*, § 13.05[1] at 13-50 ("[t]he basic rule, then, is that the journey to and from meals, on the premises of the employer, is in the course of employment."). In the present matter, the employer was aware that some employees went out to the parking lot and sat in their vehicles during their lunch break and did not object or forbid that practice. Therefore, Ms. Barata was injured in a place where the employer might reasonably expect her to be during her lunch break.

With regard to the third and final factor, we conclude that the employee "was injured while performing a task incidental to the conditions under which her duties were to be performed." *Rico*, 675 A.2d at 409. As noted above, the parking lot in which the employee slipped and fell was owned and maintained by the employer and as such, is part of the employer's premises. Employees were permitted to park their vehicles in the lot and to spend their lunch break in their vehicles. Because the parking lot is a portion of the employer's premises, it logically follows that "compensation coverage attaches to any injury that would be compensable on the main premises." L. Larson, *supra*, § 13.04[2][b] at 13-36.1. A slip and fall

by an employee on her lunch break while walking down a hallway to the lunch room would generally be compensable, barring any unusual circumstances. *See Moore v. Rhode Island Hospital*, W.C.C. No. 2013-05417 (App. Div. Jan. 17, 2017) (employee's injury compensable when on lunch break walking down hallway to lunch room and struck by picture which fell off wall).

In the present matter, Ms. Barata was injured when she slipped and fell in the employer's parking lot while on her lunch break. She did testify that she had finished her lunch and exited her vehicle to return to the building when a co-worker called out asking for assistance in raising her car window which was stuck. The employee slipped and fell as she began walking to the co-worker's vehicle. We do not find that these circumstances absolve the employer of liability. In discussing injuries occurring in parking lots, *Larson's* notes the wide breadth of incidents that have been found compensable in other jurisdictions. *See* L. Larson, supra, § 13.04[2][b] at 13-36.1- 13-37. In the present matter, the employee was not injured while assisting the co-worker with the balky car window, but while simply walking in the parking lot. The cause of her fall was the slippery surface of the parking lot which was the result of an accumulation of ice, snow and sleet. As part of the employer's premises, the employer is as responsible for maintaining the parking lot in a safe manner as it is for maintaining a safe environment inside its building. Therefore, we conclude that the injury sustained by Ms. Barata resulted from a risk created by the employer which was incidental to her employment.

In summary then, the circumstances of the employee's injury satisfy the three (3) criteria set forth in *DiLibero* to establish a nexus or causal relationship between the injury and her employment. Consequently, we find that the trial judge's finding that the employee failed to establish that the injury sustained on January 18, 2011 arose out of and in the course of her

employment is clearly erroneous. In light of our finding of clear error, we have undertaken a *de novo* of the record to determine whether the employee has established an entitlement to weekly benefits for an incapacity resulting from the effects of the work-related injury she sustained on January 18, 2011. *See Diocese of Providence v. Vaz*, 679 A.2d 879 (R.I. 1996); *Blecha v. Wells Fargo Guard-Company Serv.*, 610 A.2d 98 (R.I. 1992).

The employee submitted the affidavits with attached medical records from the North Providence Urgent Care Center and the Rhode Island Spine Center. The employee was sent to the North Providence Urgent Care Center immediately after she went back inside the building and reported to her supervisor that she fell in the parking lot. The history provided to the medical personnel was consistent with the employee's testimony as to how and where she fell at work. Dr. Toselli, who attended to the employee, signed the Notification of Claim of Compensable Injury form which indicated that the employee sustained a contusion of the lumbar spine and was not able to return to work. Dr. Toselli saw the employee on two (2) more occasions, January 20th and January 27th . At the last visit, the doctor noted in the patient care instructions that he was referring the employee to a neurosurgeon and she should remain out of work until January 31, 2011.

We find that these records establish that the employee sustained a contusion of the lumbar spine as a result of her fall in the employer's parking lot on January 18, 2011 which resulted in a period of partial incapacity from January 19, 2011 through January 31, 2011. However, the remainder of the medical evidence fails to prove that the employee's incapacity extended beyond that date.

The medical records of the Rhode Island Spine Center, which include two (2) typewritten reports of Dr. Donald Murphy, one (1) typewritten report of Dr. Ericka McGovern and several

pages of handwritten office notes, do not contain any specific diagnosis or statement as to the employee's ability to work. We have also thoroughly reviewed the deposition and records of Dr. Handel and conclude that the doctor's testimony does not meet the evidentiary standards necessary to satisfy the employee's burden of proof. The doctor made no oral or written statement with a sufficient degree of certainty pointing to the incident on January 18, 2011 as the cause of any disability or incapacity. Consequently, we find that the employee has failed to prove that she sustained any incapacity resulting from the work-related injury subsequent to January 31, 2011.

In accordance with our decision, we hereby grant the employee's claim of appeal and reverse the decision and decree of the trial judge. A new decree shall enter containing the following findings and orders:

1. That the employee has proven by a fair preponderance of the credible evidence that she sustained an injury on January 18, 2011, specifically a contusion to the lumbar spine, arising out of and in the course of her employment with the employer, connected therewith and referable thereto, of which the employer had knowledge.

2. That the employee was partially disabled from January 19, 2011 through January 31, 2011 due to the effects of the work-related injury she sustained on January 18, 2011.

3. That the employee has received Temporary Disability Insurance benefits.

It is, therefore, ORDERED:

1. That the employer shall pay to the employee weekly benefits for partial incapacity from January 19, 2011 through January 31, 2011.

2. That the employer shall reimburse the Temporary Disability Insurance fund for any benefits paid for the period from January 19, 2011 through January 31, 2011 and shall take credit for such payment against the amount of weekly benefits ordered to be paid.

3. That the employer shall pay the reasonable charges for any medical, hospital and surgical services which are necessary to cure, rehabilitate or relieve the employee from the effects of the work-related injury she sustained on January 18, 2011.

4. That the employer shall reimburse the employee's attorney the sum of Six Hundred Ninety-nine and 00/100 ($699.00) Dollars for the cost of the filing fees for the original petition and claim of appeal and the cost of providing a transcript of the trial proceedings on appeal.

5. That the employer shall pay a counsel fee in the amount of Six Thousand and 00/100 ($6,000.00) Dollars to Robert D. Goldberg, Esq., attorney for the employee, for services rendered during the trial of this matter and before the Appellate Division.

In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a new decree, a copy of which is enclosed, shall be entered on

Ferrieri, C.J. and Hardman, J. concur.

ENTER:

/s/ Ferrieri, C.J.

/s/ Olsson, J.

/s/ Hardman, J.