IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Audubon Villa, Petitioner	:	
v.	:	No. 1977 C.D. 2007
Workers' Compensation Appeal Board (Fisichella), Respondent	:	Submitted: February 1, 2008

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: March 19, 2008

Audubon Villa (Employer) petitions for review of an order of the Workers' Compensation Appeal Board (Board) affirming the Workers' Compensation Judge's decision granting Kathleen Fisichella's (Claimant) claim petition. We affirm.

On or about October 3, 2003, Claimant filed a claim petition alleging that she sustained a work-related injury in the nature of severe mental anguish, anxiety, emotional distress, elevated blood pressure, and a transient ischemic attack on October 2, 2003, while in the course and scope of her employment with Employer as its director of nursing. Employer filed a timely answer denying the allegations. Hearings before the WCJ ensued.

In support of her claim petition, Claimant testified on her own behalf and presented the testimony of several fact witnesses as well as documentary evidence. Claimant also presented the deposition testimony of: (1) Elmer Criswell, a professor of criminal justice and polygraph examiner; (2) Jean Ferguson, a clinical psychologist; (3) Jeffrey Gerard, M.D.; and (4) Donald Masey, Psy.D. In opposition to the claim petition, Employer presented the testimony of three fact witnesses and the deposition testimony of Barbara Kuhlengel, M.D.

Based on the evidence presented, the WCJ found that Claimant was employed as Employer's nursing supervisor in a part time capacity from December 2000 to July 2003 when she accepted the full-time position of director of nursing. The WCJ found that after Claimant became the director of nursing, she was verbally assaulted in the course of her employment on July 22, 2003 by a subordinate male employee who had applied for the director of nursing position but was not offered the position by Employer.[1] The WCJ found that the verbal assault: (1) did not constitute a normal working condition for Claimant as the director of nursing; (2) was an extraordinary event for Claimant as director of nursing; (3) was not a perceived threat for Claimant as director of nursing; (4) had a relationship to Claimant's work as the director of nursing; (5) constituted objective evidence of the work injury; and (6) was an abnormal working condition for Claimant in her capacity as the director of nursing. The WCJ found further that

[1] The WCJ found that the verbal assault upon Claimant by the male employee, who was stocky in stature, occurred on July 22, 2003, when the male employee shouted near Claimant's face in a loud, rude, and obnoxious manner and in a very, very threatening, overwhelming and overbearing way, that she would be in for a rude awakening, that Employer's administrator would be very sorry for Claimant's placement in the director of nursing position, that he was a better person for the position in accordance with his feelings, and that he had a lot of ammunition and guns.

Claimant was frightened and intimidated by the July 22, 2003 verbal assault which was caused by the actual objective abnormal working conditions on July 22, 2003 and not by subjective, perceived, and/or imagined employment events. The WCJ also found that Employer was notified by Claimant of the verbal assault and that Employer did nothing about the situation.

The WCJ found further that Claimant received several threats to her life after accepting the director of nursing position. These threats consisted of notes left: (1) on Claimant's car, which was parked on Employer's premises; and (2) inside Claimant's place of work including her office, her work mailbox, the shower room and the lounge, and Claimant's drawer at a nursing station. Threatening notes were also found at Claimant's home inside a screen door and the mailbox. The notes stated: (1) "I am watching you"; (2) "You have two days to resign or die"; (3) "It's 9/11, and you will die"; (4) "You have three days to resign or die"; and (5) "We are warning you you have two days to resign or die".

The threatening notes were found on July 24, 2003, July 25, 2003, July 29, 2003, August 13, 2003, August 14, 2003, August 17, 2003, August 22, 2003, September 8, 2003, September 11, 2003 and September 17, 2003. In addition, Claimant discovered damage to her vehicle, which was parked on Employer's premises, on August 28, 2003 and September 16, 2003.

The WCJ found that the threats upon Claimant in the course of her employment with Employer on the foregoing dates were: (1) work events on those dates; (2) extraordinary events for Claimant as the director of nursing; (3) not perceived threats for claimant as director of nursing; (4) related to Claimant's work as director of nursing; and (5) abnormal working conditions for Claimant in her capacity as director of nursing. The WCJ found further that Claimant's nervousness, upset feelings, crying spells as a result of her upset and tense

emotions, feelings about a possible attack and real physical destruction of Claimant by someone at some point, were caused by actual objective abnormal working conditions on the foregoing dates and not by subjective, perceived, and/or imagined employment events.

The WCJ found that Claimant informed Employer that she wanted to return to her old position at the end of her contract as director of nursing on November 18, 2003, and that she believed she could not continue in the position of director of nursing as a result of the threats. The WCJ found that Employer informed Claimant that it did not have to abide by the contract and that it was eliminating her former position.

The WCJ found that Claimant did not return to her position as director of nursing after October 2, 2003. On that date, after finding scratches on her car on October 1, 2003, Claimant suffered a terrible headache and nosebleed, had numbness on the right side of her face, had readings of 200/110 for blood pressure and of 120 for a heart rate, and received a diagnosis of transient ischemic attack after an EKG.

The WCJ found further that shortly after Claimant left her employment, she received additional threatening notes that stated "Old DON, you did the right thing by leaving. You're a loser. You're a bitch. You're trouble" and "We are watching you and we will get you." The WCJ found that Claimant was physically attacked in her yard on January 3, 2004 and that two more threatening notes were found in the yard after the attack which stated "We told you we would get you when you least expected it. The police will never know, and stay (sic) of court." The WCJ found that Claimant continued to receive threatening notes and damage to her vehicle from February 11, 2004 through December 5, 2005.

Based on the credible medical evidence presented by Claimant, the WCJ found that Claimant suffered psychological injuries resulting from the abnormal working conditions related to her position as director of nursing. Accordingly, the WCJ granted Claimant's claim petition.

Employer appealed the WCJ's decision. Upon review, the Board affirmed. This appeal followed.

Herein, Employer raises the sole issue of whether Claimant's exposure to threatening remarks constituted abnormal working conditions. Employer, citing City of Pittsburgh v. Workers' Compensation Appeal Board (Plowden), 804 A.2d 82 (Pa. Cmwlth. 2002), argues that fear of bodily harm from potential criminal conduct is not sufficient to establish abnormal working conditions. Employer argues that Claimant only established her subjective reaction to the threats which may or may not have been work-related. Employer contends that the fact that Claimant received notes for several years, subsequent to her separation from employment, supports the premise that the threats were not work-related. Employer contends further that the WCJ found that Claimant could not identify any person making threats against her nor whether the threats were made by an employee. Therefore, Employer argues, the holding in Plowden applies to the present case because Claimant failed to prove that the threatening incidents were indeed related to her position as director of nursing and not merely a subjective reaction to threats that may or may not have been work-related. Thus, Claimant is not entitled compensation benefits.

Initially, we note that this Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, or a violation of appeal board procedures, and whether necessary findings of fact are supported by substantial evidence. Lehigh County Vo-Tech

School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Mrs. Smith's Frozen Foods v. Workmen's Compensation Appeal Board (Clouser), 539 A.2d 11 (Pa. Cmwlth. 1988).

To recover workers' compensation benefits for a psychic injury, a claimant must prove by objective evidence that he or she has suffered a psychic injury and that such injury is other than a subjective reaction to normal working conditions; that is, the claimant must establish that the injury arose from abnormal working conditions. Davis v. Workers' Compensation Appeal Board (Swarthmore Borough), 561 Pa. 462, 751 A.2d 168 (2000); Martin v. Ketchum, Inc., 523 Pa. 509, 568 A.2d 159 (1990). Even if a claimant shows actual, not merely perceived or imagined, employment events that have precipitated psychic injury, the claimant must still prove the events to be abnormal in order to recover. Davis; Hershey Chocolate Co. v. Commonwealth, 546 Pa. 27, 682 A.2d 1257 (1996).

In abnormal working condition cases, the ultimate determination of whether the employee established abnormal working conditions is a question of law fully reviewable on appeal. Davis. Psychic injury cases are highly fact sensitive, and for actual work events to be considered abnormal, they must be considered in the context of the specific employment. Davis; Wilson v. Workmen's Compensation Appeal Board (Aluminum Company of America), 542 Pa. 614, 669 A.2d 338 (1996). Such a fact-sensitive inquiry requires deference to the fact-finding functions of the WCJ and, accordingly, we limit our review of those factual findings to determining whether they are supported by the evidence and overturn them only if they are arbitrary and capricious. RAG (Cyprus) Emerald Resources, L.P. v. Workers' Compensation Appeal Board (Hopton), 590

Pa. 413, 912 A.2d 1278 (2007). Thus, we view the appellate review of this question as a two-step process of reviewing the factual findings and then the legal conclusion. Id.

In Plowden, the case relied upon by Employer in this appeal, the claimant was initially employed by the City of Pittsburgh in the job category of Clerk II. Shortly thereafter, the claimant began serving in the intake office of the personnel department where his initial primary duty was assisting community members with their enlistment in the Job Training Partnership Act program, a program designed to aid disadvantaged members of the community in obtaining employment. Approximately a year later, the claimant was assigned to work as part of the Mayor's Task Force on Youth Violence (Task Force). The Task Force was designed to address youth violence and gang activity in the City. The program specifically targeted the "hundred baddest kids" and offered them varied services, including assistance with obtaining employment. The role of the personnel department was to ensure that these youth were eligible to work. The claimant's responsibilities under this new assignment involved assisting program members with obtaining proper documentation required for employment.

On two occasions, as part of his new duties, the claimant was required to transport several of the youths to obtain employment documents. On the second of such trips, one of the youths bragged to the claimant about his criminal background and activities, but never threatened him in any way. It was at that point, the claimant claimed, that he actually realized the gang members' propensity towards crime and violence. Following this realization, the claimant alleged that several incidents occurred that made him feel that his life was in danger. With regard to these incidents, the claimant presented testimony regarding (a) an

incident at a bus stop, (b) an occasion where he was allegedly followed, and (c) incidents of threatening phone calls.

After finding Claimant's evidence credible, WCJ issued a decision granting the claimant's petition. The WCJ determined that the claimant had become totally disabled due to a mental injury in the nature of severe depression, anxiety, and paranoia, which resulted from abnormal working conditions in his employment with the City. The City appealed to the Board and the Board affirmed the decision of the WCJ. Upon appeal, this Court reversed.

We concluded that only the incidents of threatening phone calls appeared to be related to the claimant's employment. Specifically, this Court stated that:

> [Claimant] could not identify any of the persons associated with [the incident at the bus stop and the occasion where he was allegedly followed] as being part of the Task Force youth, and there is no objective indication that these alleged incidents were indeed related to [Claimant's] position with the Task Force. [Claimant's] testimony merely recounts his subjective reaction to perceived threats that may or may not have been work-related. Again, the only incidents that clearly appear to be related to [Claimant's] position in the Task Force are the threatening phone calls he received while at work.
>
> With regard to these calls, however, there is no indication that another individual with his job duties would not experience similar conditions or events. It is reasonable to say that any individual assigned to work with potentially violent gang members may, as a ramification of dealing with such people, expect to encounter very stressful situations from time to time, which may very well include the receipt of a threatening phone call. Although unfortunate, such an occasion in the context of working with potentially violent youth could not be considered extraordinary, and therefore is not

> enough to constitute an abnormal working condition. Certainly, when [Claimant] accepted these job duties, working with the "Mayor's Task Force on Youth Violence," he should have realized that conflict, and perhaps even some slight element of danger or unrest, might be involved.
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> Therefore, as it was [Claimant's] burden to establish all of the elements necessary to support his claim, and he failed to demonstrate that his psychic injury resulted from abnormal working conditions, his claim petition should have been denied. . . . .

Plowden, 804 A.2d at 86-87. Accordingly, this Court reversed the Board's order. Id.

With regard to the instant matter, we disagree with Employer that Plowden is controlling. As pointed out previously herein and by this Court in Plowden, psychic injury cases are highly fact sensitive, and for actual work events to be considered abnormal, they must be considered in the context of the specific employment. Davis; Wilson. Moreover, this Court in Plowden did not hold that a claimant must be able to identify any person making threats against him or her or that the threats were made by an employee in order to succeed on a claim petition wherein the claimant is alleging that an injury arose from the receipt of threats that constituted abnormal working conditions. A claimant's burden is to establish that the injury arose from abnormal working conditions. As pointed out by the Board, it was necessary only to determine that the threats were made against Claimant as a result of her promotion or were directed against her as an employee or because of her employment.[2] Upon review of the record in this matter, we conclude that the WCJ did not err in finding that Claimant met her burden.

[2] We note that the WCJ found, and Employer does not dispute, that Claimant was *(Continued....)*

The WCJ found that Claimant was verbally assaulted and threatened at the work site by a subordinate male employee on July 22, 2003. The WCJ also found that the notes which contained threats to Claimant's life were received both at her place of employment and at her home on numerous occasions between July 24, 2003 and September 16, 2003. The WCJ found further the threats were as a result of Claimant's position as director of nursing and thus were work-related. The WCJ also found that as a result of the threats, Claimant was subjected to abnormal working conditions. In addition, the WCJ found that Claimant continued to receive threats and was actually physically assaulted after she separated from Employer. These findings are supported by the record.

In addition, unlike the claimant in Plowden, in the present case, there is an indication that another individual with Claimant's job duties as director of nursing would not experience similar conditions or events that were experienced by Claimant in the nature of threats to her life. In other words, there is nothing in the record to establish that Claimant should have expected to have her life threatened based on her promotion to the director of nursing position. The WCJ found that Claimant's job duties as the director of nursing required her to, *inter alia*, interview candidates for employment, fire employees, counsel and discipline employees, conduct weekly care conferences on residents, assure the development of proper care plans for Employer's residents and avoidance of residents' deterioration, conduct monthly meetings with the medical director and other staff members, and be responsible for the overall operation and staffing of the nursing department. While Claimant may have expected some conflict to occur with

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verbally assaulted and threatened by a subordinate male employee shortly after becoming the director of nursing. Accordingly, with regard to that incident, Claimant was able to identify the

(Continued....)

respect to her job duties, particularly when disciplining employees, she certainly could not be expected to tolerate threats to her life and damage to her property as a result of her position.

Accordingly, the Board's order is affirmed.

JAMES R. KELLEY, Senior Judge

employee making the threats against her.

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O R D E R

AND NOW, this 19th day of March, 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

JAMES R. KELLEY, Senior Judge