

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DEBORAH VINCENT,)	No. 65448-9-I
)	
Appellant,)	DIVISION ONE
)	
v.)	
)	UNPUBLISHED OPINION
DEPARTMENT OF LABOR AND)	
INDUSTRIES OF THE STATE OF)	
WASHINGTON,)	
)	
Respondent,)	
)	
BOARD OF INDUSTRIAL INSURANCE)	
APPEALS, CITY OF SEATTLE,)	
)	
Defendants.)	FILED: July 25, 2011
)	

Schindler, J. — Deborah Vincent appeals the order of the Board of Industrial Insurance Appeals (the Board) affirming the decision of the Department of Labor and Industries (the Department) denying benefits under the Crime Victim Compensation Act, chapter 7.68 RCW (CVCA). Following a hearing, the Industrial Appeals Judge (IAJ) concluded that Vincent failed to establish a prima facie case that her wrist injury was caused by a criminal act within the meaning of the CVCA. The Board affirmed the decision. Vincent contends the Board erred in affirming the IAJ's refusal to consider

her medical records as untimely and as inadmissible hearsay. Because the IAJ did not abuse its discretion in refusing to consider the medical records, we affirm the decision to deny benefits.

FACTS

On September 12, 2005, Vincent went to her bank to dispute an overcharge. After arguing with the customer service manager about the overcharge, Vincent said, "I might as well go home and slash my wrist." Seattle Police Officers Mark Wong and Steven Pomper responded to a call reporting that a bank customer threatened to commit suicide. The bank manager identified Vincent as the person threatening suicide. As Vincent was walking toward her car, Officer Wong asked if he could speak with her. Vincent turned to look at Officer Wong but then continued walking to her car, got into her car, and closed the door. Officer Wong and Officer Pomper approached the car and Officer Wong talked to Vincent through the open car window. Vincent ignored their repeated requests to provide her identification. Vincent said that she was not interested in cooperating with the police and needed to leave. When Vincent started the car, Officer Wong reached in the car, turned off the car, and removed the keys so she could not drive away.

Officer Wong asked Vincent if she was interested in speaking with a mental health counselor, and Vincent replied that she was not interested and wanted to leave. Officer Pomper said Vincent was distraught and crying, "she didn't want any help. She didn't want to go to the . . . doctor's, or a hospital." Vincent called her friend Michael Hamerly on her cell phone and handed the cell phone to Officer Pomper. Officer

Pomper said Hamerly told him that Vincent had a history of post-traumatic stress disorder and making suicide threats but he did not believe she was serious.

Officer Wong repeatedly asked Vincent to get out of the car but Vincent refused to do so. Officer Wong testified that Vincent said, “I’m going to slit my throat,” “I’m going to take a bunch of pills,” and “I may as well go home and take a bunch of pills.”

Officer Wong decided to take Vincent into protective custody and take her to a hospital. Officer Wong testified that he “reached in with his right hand behind Ms. Vincent’s upper left arm, midway between her shoulder or armpit, and her upper left arm” to help her get out of the car. Officer Wong said that he used an “amount of force that would be required . . . to help an elderly or an injured person get up from a seated position,” in order to help get Vincent out of the car. At first, Vincent “kind of went limp,” but after Vincent started standing up, “there was nothing much else to it.” Officer Wong described the force used to handcuff Vincent as “that of ‘a weak handshake,’ with no bending of the fingers and no twisting.” Officer Wong said that Vincent never complained of any pain.

Officer Pomper described the amount of force Officer Wong used in lifting Vincent out of the car as “the same as that used to assist anyone out of a car, such as an elderly person.” Officer Pomper testified that no force was used to place Vincent in handcuffs, and that she was compliant and did not say she was in any pain. An ambulance then took Vincent to a hospital for a psychological evaluation.

Approximately three years later, on January 31, 2008, Vincent filed an application with the Department for benefits under the CVCA. Vincent claimed she was

eligible for benefits as a result of an alleged assault by Officer Wong. The Department denied the claim because there was no evidence of a felony or gross misdemeanor crime, a requirement for benefits under the CVCA.

Vincent appealed the order denying benefits. The IAJ held a hearing on the appeal. Vincent represented herself pro se. Vincent and Hamerly testified in her case in chief. Vincent did not present any medical records or medical testimony before resting her case. The Department presented the testimony of Officer Wong and Officer Pomper.

At the conclusion of the Department's case, Vincent sought to reopen her case to submit unidentified medical records. Vincent asserted that she had previously submitted some medical records to the Department during an unsuccessful mediation prior to the hearing.

The Department objected to reopening the case to admit medical records on two grounds:

First, Ms. Vincent's case has already been closed. And . . . she has failed to establish a legal basis for presenting any . . . rebuttal evidence through medical records.

Second, any medical records being offered would be hearsay. There's -- she's cited no exception to the hearsay rule, and they would be inadmissible under the hearsay rule. She's not indicated that she has available a custodian of medical records to testify and lay a foundation; nor does [she have] live medical testimony available, and is not seeking to present that, either.

The IAJ denied Vincent's request to reopen and admit the medical records.

The IAJ issued a proposed decision and order affirming the Department's denial of benefits to Vincent. The decision addresses the statutory requirements for benefits

under the CVCA and includes detailed findings of fact. The IAJ found that Vincent failed to meet her burden of showing she was entitled to benefits under the CVCA.

Ms. Vincent's evidence consisted of her own testimony and that of her personal friend, whose testimony was based on hearing some conversation over a cell phone. Ms. Vincent's testimony was that Officer Wong used excessive force when he grabbed her wrist to have her step out of her car and that action constituted fourth degree assault. Such a crime would be a gross misdemeanor However, based on Ms. Vincent's own testimony, I cannot find that she was the victim of assault or any other criminal act in this case.

On September 12, 2005, regardless of her intentions, Ms. Vincent threatened to harm herself, and that threat was taken seriously. The police were called, and responded to the scene. The police asked her for identification on several occasions, and she did not produce any. Even if, as Ms. Vincent testified, she ultimately gave the police her identification, she did so only after she had been uncooperative both with producing her identification and getting out of her car, as requested. The evidence indicates that the police officer took her by the arm in order to detain her, due to her threat to harm herself at the bank. Again, whether she meant to harm herself or not is not the issue here. There was a reasonable basis to believe that she needed to be detained for her own safety and for further evaluation at the hospital, based on that threat. Ms. Vincent has not shown that the police officer used excessive force or intended to inflict any bodily harm on Ms. Vincent as he attempted, after repeated requests, to have her step out of her car, or that the amount of force in fact used by the officer is punishable as a felony or gross misdemeanor. Based on her demeanor at the hearing, Ms. Vincent presented as a person of delicate sensibilities with a history of mental health issues. I find her testimony somewhat exaggerated. Taken as a whole, the evidence does not support a showing of a prima facie case.

Even assuming that Ms. Vincent had presented a prima facie case, I would find that the Department's evidence, through the testimony of police officers Mark H. Wong and Steve E. Pomper, successfully rebutted Ms. Vincent's prima facie case. I find the Department's witnesses more credible than the claimant and her witness in this case and have therefore given greater weight to their testimony. Even if the Department did not dispute the fact that an injury had occurred, the Department has shown that the actions of Officer Wong did not constitute assault or any other criminal act as he was in the performance of his official duties and used the "escort hold" to get Ms. Vincent out of her car, and that the amount of force he used in doing so was reasonable and not excessive. The burden would therefore shift back to Ms. Vincent to prove her claim by a preponderance of credible evidence, which burden she has not met, and

is therefore not entitled to benefits under the Crime Victims Act.

I conclude that the evidence of record in the present case does not support a prima facie case of benefit allowance for Ms. Vincent. The Department's order dated May 8, 2008 disallowing the claim in the absence of sufficient evidence of a felony or gross misdemeanor, is correct and should be affirmed.

Vincent filed a petition for review of the proposed decision and order denying her claim for benefits under the CVCA to the Board. Vincent submitted approximately 92 pages of medical records as part of her appeal. Vincent argued that the medical records supported her claim that she was the victim of a crime and the IAJ erred in refusing to consider and admit the medical records.

The Board affirmed the IAJ's evidentiary rulings. The Board ruled that the proposed decision and order was "supported by the preponderance of the evidence and is correct as a matter of law." The Board affirmed the Department's order denying compensation to Vincent under the CVCA, concluding:

Ms. Vincent failed to establish a prima facie case that her left wrist injury on September 12, 2005, was proximately caused by her being a victim of a criminal act within the meaning of RCW 7.68.070.

Vincent appealed the Board's decision and order to superior court.¹ Vincent's attorney argued the medical records should have been considered because the documents were a part of the record and Vincent did not properly submit the records at the administrative hearing because she was pro se. The superior court affirmed the Board's decision and order. Vincent appeals.

ANALYSIS

¹ The extensive medical records that Vincent attached to her petition for review to the Board were included in the record that the Board transmitted to the superior court. The superior court concluded that the medical records "were not timely offered by Ms. Vincent and were not admitted into evidence" by the Board.

Vincent contends that the Board erred in refusing to admit her medical records and excluding the records “without a showing of unconscionable conduct.”²

The Administrative Procedures Act, chapter 34.05 RCW governs judicial review of a final administrative decision to deny benefits under the CVCA. RCW 7.68.110; see also L.H. v. Dep't of Labor & Indus., 86 Wn. App. 512, 516 n.1, 940 P.2d 657 (1996); Stafford v. Dep't of Labor & Indus., 33 Wn. App. 231, 234, 653 P.2d 1350 (1982). In reviewing an administrative action, the appellate court sits in the same position as the superior court. Tapper v. Emp't Sec. Dep't, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). An appellate court reviews the record of the administrative proceedings, not the findings and conclusions of the superior court. Brandley v. Dep't of Emp't Sec., 23 Wn. App. 339, 342, 595 P.2d 565 (1979).³ We review the evidentiary rulings for an administrative hearing officer's abuse of discretion. See Univ. of Wash. Med. Ctr. v. Dep't of Health, 164 Wn.2d 95, 104, 187 P.3d 243 (2008). Discretion is abused only where no reasonable person would take the view adopted by the hearing tribunal. Jankelson v. Cisel, 3 Wn. App. 139, 142, 473 P.2d 202 (1970).

WAC 263-12-115(4) governs the admissibility of evidence at the hearing before the IAJ:

The industrial appeals judge on objection or on his or her own motion shall exclude all irrelevant or unduly repetitious evidence and statements that are inadmissible. . . . All rulings upon objections to the admissibility of evidence shall be made in accordance with rules of evidence applicable in the superior courts of this state.

² Vincent represents herself on appeal pro se.

³ Vincent makes multiple assignments of error directed to rulings by the superior court. Because we review the Board's determinations and not those of the superior court, we do not reach Vincent's arguments regarding the superior court's rulings or conclusions. See Brandley, 23 Wn. App. at 342.

The IAJ did not abuse its discretion by refusing to consider Vincent's medical records. The medical records were not timely and were inadmissible as hearsay. The record shows that Vincent made no argument and cited no authority to argue that the records were admissible. Even if admissible, the records do not support the conclusion that any injury was the result of a criminal act under the CVCA. Assuming that the records demonstrated that Vincent suffered an injury, evidence of Vincent's injury is not determinative of whether the injuries were the result of a crime.

Vincent also argues that absent a finding that she engaged in "unconscionable conduct," the IAJ's exclusion of the evidence was erroneous. In support of her argument, Vincent cites a number of discovery sanction cases.⁴ The discovery sanction cases do not apply to the evidentiary ruling excluding the medical records.

For the first time on appeal, Vincent asserts the medical records were admissible under ER 904. Her failure to raise this issue below constitutes a waiver of this assertion. RAP 2.5(a); Stelter v. Dep't of Labor & Indus., 147 Wn.2d 702, 711 n.5, 57 P.3d 248 (2002); Rose v. Dep't of Labor & Indus., 57 Wn. App. 751, 756, 790 P.2d 201 (1990). Likewise, Vincent's argument on appeal that CR 60 entitles her to relief is without merit. Vincent could have filed a motion for relief from judgment under CR 60 before the Board⁵ but did not do so.⁶ See Kingery v. Dep't of Labor & Indus., 132

⁴ Vincent cites to Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997); Washington State Physicians Ins. Exch. & Assoc. v. Fisons Corp., 122 Wn.2d 299, 858 P.2d 1054 (1993); Carlson v. Lake Chelan Cmty. Hosp., 116 Wn. App. 718, 75 P.3d 533 (2003); In re Estate of Foster, 55 Wn. App. 545, 779 P.2d 272 (1989); and In re Golant, 239 F.3d 931 (7th Cir. 2001).

⁵ The civil rules for superior court, including CR 60, apply to proceedings before the Board. RCW 51.52.140; WAC 263-12-125.

⁶ Vincent also seeks to rely on information outside the administrative record to argue that she was confused about the procedural rules applicable in proceedings before the Board. However, because this information is not part of the administrative record below, we cannot consider these documents on appeal. See Stelter, 147 Wn.2d at 711 n.5 (failure to raise issue below constitutes waiver); Brandley, 23

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Wn.2d 162, 172, 937 P.2d 565 (1997).

Wn. App. at 342 (appellate court reviews only the record of administrative proceedings).

We affirm the decision and order affirming the Department's denial of benefits under the CVCA.

Schiveller, J.

WE CONCUR:

Spencer, J.

Grosse, J.