

FILED

MAY 25 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 304710-III

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION NO. III

DEBBIE ROTHWELL,

Appellant

-vs-

NINE MILE FALLS SCHOOL DISTRICT; MICHAEL GREEN,

Respondents

REPLY BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

The facts presented to the trial court on summary judgment were the same as the facts considered by this court in its prior decision. The trial court's decision granting summary judgment was contrary to the Court of Appeals decision and violated the law of the case doctrine. The series of incidents that befell Ms. Rothwell do not qualify as an industrial injury. Respondents focus solely upon Ms. Rothwell's PTSD as a single portion of the emotional distress she was subjected to.

ARGUMENT

1. MISSTATEMENT OF FACT:

In their Statement of Facts, respondents contend several times that Ms. Rothwell "insisted" on cleaning up the suicide site. See Resp.'s Br., pp. 4-5. This is completely contrary to the evidence.

Insist: To stand or tread upon, to pursue or follow diligently, persist; . . . to take and maintain a stand; to make a firm demand (often with on or upon); as, he insists on the rights of the minorities.

To demand strongly; as, I insist that you come. *Syn.*
persist, demand, maintain, contend, urge, require.

Webster's New Universal Unabridged Dictionary (emphasis added).

Ms. Rothwell's testimony does not support respondents' contention of "insistence."

. . . you know, and I didn't want to lose my job, so I said, you know, I take the class, so I can do it. Don't want to do it, but can do it.

(CP 69).

. . . and I felt like my job was threatened there by not doing it.

(CP 69).

I told him "I'll clean it up." I didn't want to lose my job.

(CP 69).

A. I felt like he was being a bully.

Q. And what led you to think that?

A. Well, back then, it seemed that, you know, it was his way or the highway. Plain and simple.

(CP 86-87).

This testimony is ample to raise an issue of fact of whether Ms. Rothwell consented to do the cleanup work, or whether she felt intimidated into doing so. Her testimony does not support a claim that she "insisted" on doing it.

2. THE LAW OF THE CASE IS APPLICABLE IN THIS APPEAL:

The evidence developed by discovery and brought before the court with the summary judgment motion is not in any respect different from the evidence which was considered in the first appeal of this matter.

In the first appeal, this court determined that the sequence of events pleaded in the complaint which Ms. Rothwell experienced did not satisfy the requirements of an industrial injury.¹ In its Opinion, this court noted the following events which occurred to Ms. Rothwell:

1. She was directed by Superintendent Michael Green to clean up the scene of the suicide. *Rothwell v. Nine Mile Falls School District*, 149 Wn. App. 771, at 774, 206 P.3d 347 (2009).
2. She went into the entryway where the suicide had taken place and learned the identity of the victim. 149 Wn. App., at 774-775.
3. She became distraught and upset, went to her car and left the school grounds for approximately 30 minutes to compose herself. 149 Wn. App., at 775.
4. She returned and the school principal directed her to go through the classrooms to determine whether the student in question had left any

¹ *Rothwell v. Nine Mile Falls School District, et al.*, 149 Wn. App. 771, 206 P.2d 347 (2008).

bombs. She went to the classrooms and found this exercise disturbing. 149 Wn. App., at 775.

5. Upon returning to the suicide scene, she picked up a book bag; law enforcement deputies told her the bag needed to remain, and the deputies visibly flinched and ducked when she dropped the bag on the floor. 149 Wn. App., at 775.
6. The cleanup included needles, plastic gloves, brain matter, bone bits, and blood. By the time she was done, she was emotionally distraught and physically ill. 149 Wn. App., at 776.
7. The Spokane Bomb Squad arrived and detonated the book bag in the entryway of the school. 149 Wn. App., at 775.
8. Superintendent Green ordered her to clean the entryway to the school where soot from the bomb detonation had stained the wall and sidewalk. She stayed for several hours until approximately 4:15 a.m. cleaning the entry to the school. By that time she was emotionally distraught and physically ill. 149 Wn. App., at 775-776.
9. Ms. Rothwell was ordered by Superintendent Green to return to the school the following morning to hand out cookies and coffee to students, parents, and staff members which she did. 149 Wn. App., at 776.
10. Ms. Rothwell was ordered to clean up candles, cards and memorabilia left at the scene of the suicide, which she did for several days. This was extremely emotionally disturbing to her. 149 Wn. App., at 776.

All of the foregoing elements were recapped in Ms. Rothwell's deposition testimony which was in the record before the trial court when it heard the summary judgment motion. (CP 56-90).

The initial decision of this court in 2009 was upheld when the Supreme Court denied review the following year. *Rothwell v. Nine Mile Falls School District*, 169 Wn.2d 1017, 238 P.3d 502 (2010).

Since the evidence was the same, the decision of this court should have been binding on the trial court in its summary judgment determination, under the law of the case, and it should be binding here in this second appeal.

The doctrine of law of the case

. . . provides where there has been a determination of applicable law in a prior appeal, the law of the case doctrine ordinarily precludes an appeal of the same legal issues. It also provides a question determined on appeal, or which might have been determined had they been presented, will not be considered in a subsequent appeal if there is no substantial change in the evidence at the remanded trial. *State v. Wall*, 129 Wn.2d 416, 425, 918 P.2d 905 (1996) (quoting *Folsom v. County of Spokane*, 111 Wn.2d 256, 263-64, 759 P. 2d 1196 (1988)).

Roberson v. Perez, 119 Wn App. 928, 931, 83 P.3d 1026 (2004).

Roberson goes on to point out that the doctrine of law of the case has been incorporated in RAP 2.5(c):

. . . If the same case is again before the appellate court following a remand:

. . .

(2). . . [T]he appellate court may, at the instance of a party, review the propriety of an earlier decision of the appellate court in the same case and where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

In the first appeal, the question before this court was whether Ms. Rothwell's claim, based upon the series of events which occurred as outlined in her complaint, constituted an industrial injury which would bar her action against the school district. This court found that:

Ms. Rothwell's mental condition was not the result of exposure to a single event or a sudden and tangible happening of a traumatic nature. Nor did the trauma produce an immediate and prompt result.

149 Wn. App. 771, at 781.

That is the precise question which was addressed by the trial court in its ruling on summary judgment. The appellate court can review one of its previous decisions when

the decision is erroneous and when justice would best be served by review. *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 652, 935 P.2d 555 (1997). There is no reason for this court to review its previous decision here. It was not erroneous. The trial court committed error by granting summary judgment on the same set of facts that the Court of Appeals had found, as a matter of law, did **not** constitute an industrial injury. The order granting summary judgment violated the law of the case.

3. LIBERAL CONSTRUCTION:

Respondent cites a number of decisions which recite that the Industrial Insurance Act is to be liberally construed in order to achieve its purpose “of providing compensation to all covered employees injured in their employment. . .”

Dennis v. Dept. of Labor and Industries, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987). All of the citations by Respondents are cases in which the injured worker was seeking coverage under the Act. None of the cases cited were, like this case, where the employer was pleading the Act as a defense to a civil action for injury. None of the cases cited were claims for

negligent or intentional infliction of emotional distress by an employer on the employee. In this case, finding coverage under the Industrial Insurance Act is not resolving all doubts “in the injured worker’s favor”. Respondents reverse the rule in their statement:

Although Mrs. Rothwell is not seeking benefits under the Act, the court is nevertheless required to liberally construe provisions of the Act in favor of finding an ‘injury.’

(Resp. Br. P. 13).

That is not the same as finding “in the injured worker’s favor.” Not a single citation is furnished to support this statement by respondent.

The prior appeal mentions the principle of finding in the injured worker’s favor (149 Wn. App., at 777-778) but nevertheless found that the facts did not constitute an industrial injury. That also should be the law of the case.

4. ATTENDING PHYSICIAN RULE:

Respondents cite *Young v. Dept. of Labor and Industries*, 81 Wn. App. 123, 129, 913 P.2d 402 (1996). The *Young* case reiterates established law in this state that in

workers compensation cases, the court must give special consideration to the attending physician's opinion. That principle is not at issue in this case, since John Baumann, psychologist, is the only expert witness in this case who has expressed an opinion as to causation of Ms. Rothwell's PTSD. Respondents do not reveal that Mr. Baumann testified that Ms. Rothwell also had guilt and grief in dealing with the suicide of the student. He stated:

. . . and a person who was well acquainted as she was with the suicide victim would likely feel guilt, whether they had the PTSD diagnosis or not. That this was all part of the same bag and baggage for her.

(CP 97).

The evidence is abundant that by carrying out the direction of Superintendent Green, Ms. Rothwell was exposed to a number of disturbing happenings on the day of the suicide, on the following day, and for at least two weeks thereafter. All of these incidents inflicted emotional distress caused by her following directives to clean up the suicide scene, to search classrooms for bombs, to clean up the building entrance, to serve coffee and cake to grieving parents and students, and to pick up candles and notes in

the ensuing weeks thereafter. The suicide scene cleanup may have been the most prominent emotional distress that she incurred, and according to Mr. Baumann, was the principal cause of Ms. Rothwell's PTSD. It was not the sole cause, and it was not a "sudden and tangible happening" or a "single traumatic event."

5. DECISIONS OF THE BOARD OF INDUSTRIAL INSURANCE APPEALS:

At pages 26 through 28 of their brief, respondents cite several decisions of the Board of Industrial Insurance Appeals. Most of these decisions are distinguishable on their facts.

In re James V. Jacobs, BIIA No. 48634 (October 7, 1977): Discussed a claim where a land surveyor was hiking on a mountain for several hours and collapsed from overexertion. The Board found that this was a "sudden and tangible happening." This is in contrast to Ms. Rothwell who experienced a series of separate incidents extending over a considerably longer period of time, resulting in progressive

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symptoms that were not diagnosed until approximately two years later.

In re Laura Cooper, BIIA No. 54585 (February 9, 1981): Involved a triggering of multiple sclerosis by a five-hour intensely distressed conflict between Ms. Cooper and her school principal. This was a single ongoing stressful experience, unlike Ms. Rothwell's series of disparate distressing occurrences.

In re Renford Gallier, BIIA No. 893109 (December 13, 1990): Two hours of hand-carrying boxes and removing office belongings resulted in aggravation of a preexisting shoulder strain. This again is different than the disparate occurrences which Ms. Rothwell experienced.

In re Adelaine Thompson, BIIA No. 904743 (July 20, 1992): In this case the claimant had experienced a prior nervous breakdown, and sustained a conversion reaction by a circumstance where she believed that she had been exposed to hydrochloric acid over a period of about two hours. That again is a completely different experience than the events that occurred to Ms. Rothwell.

In re David T. Erickson, BIIA No. 65990 (July 15, 1985): In this case the worker was harassed over a period of three weeks by a mentally deranged coworker; resulting in the worker progressively becoming depressed to the point where he committed suicide. The Board found:

In sum, we hold that the decedent's suicide was not a "volitional" act on his part. His industrially-induced mental condition caused him to believe he had no choice other than to take his own life. Faced with no choice, one can hardly be said to have acted volitionally.

Although the time period in that case was three weeks, the progression of the depression was consistent and steady, from repeated insults of the same type. The court could logically call this a single injury. By contrast, Ms. Rothwell had a series of incidents, none of which were repetitive in the same fashion.

The only Board decision with a similar set of facts is *In re Daniel R. Heassler*, BIIA No. 892447 (November 13, 1990). In that case the claimant, who was a paramedic, had been called to the scene of a 63 year old man who had shot himself in the right temple. He provided life support and transported the victim to the hospital. Shortly after the

event, he had suicidal thoughts “. . . and I haven’t been back to work since.” He sought medical treatment the next day and several months later consulted a psychiatrist, who diagnosed him with major depression, post-traumatic stress disorder, generalized anxiety disorder, and alcohol abuse.

There are distinctions between the facts in *Heassler* and the facts in this case. Mr. Heassler’s reaction was immediate, and he was unable to return to work after that. Ms. Rothwell’s reaction was not so immediate, and she worked for several years following the event. Ms. Rothwell was not diagnosed with her condition until more than two years after the incident at the high school. She also had several disturbing incidents at the time, whereas Mr. Heassler had only one.

It is correct that “while decisions of the BIAA are not binding on this court, we accord substantial weight to the agency’s interpretation of regulations falling within its area of expertise.” *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 86, 77, 11 P.3d 726 (2000) cited in *Ochoa v.*

v. Dept. of Labor and Industries, 143 Wn.2d 422, 20 P.3d 939 (2001).

Even giving “great weight” or due regard to the BIIA decisions, none of them are anywhere near on all fours with the facts of this case.

CONCLUSION

The record before the trial court on the summary judgment motion consisted of sworn testimony which, in almost every respect, repeated the allegations of the complaint which were reviewed by the Court of Appeals in the first appeal of this case in 2009. The first appeal established that the series of incidents that occurred to Ms. Rothwell do not constitute an industrial injury by its statutory definition. The Court of Appeals was correct in its first opinion, and should affirm that decision by reversing the trial court and remanding the case for trial.

Dated: May 24, 2012 Respectfully submitted:

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