IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Shirley Sloan	:	
	:	
v.	:	No. 1024 C.D. 2002
	:	Submitted: August 30, 2002
City of Pittsburgh Police Department	:	
	:	
Appeal of: City of Pittsburgh/Frank Gates Service Company	:	

BEFORE: HONORABLE JAMES GARDNER COLINS, President Judge
HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE RENÉE L. COHN, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SMITH-RIBNER FILED: March 12, 2003

The City of Pittsburgh and Frank Gates Service Company (City) appeal from an order of the Court of Common Pleas of Allegheny County that reversed the decision of an Arbitrator following remand to the Arbitrator by this Court and ordered that Lieutenant Shirley Sloan of the City of Pittsburgh Police Department be awarded benefits pursuant to the Act commonly known as the Heart and Lung Act (Act), Act of June 28, 1935, P.L. 477, *as amended*, 53 P.S. §§637 - 638. The Act provides full-salary compensation for an officer who is injured in the performance of his or her duties and is temporarily incapacitated.

The City raises two questions: whether the trial court abused its discretion by determining that harassment that Sloan alleged actually occurred, thereby reversing the denial of the claim petition and assertedly usurping the fact finding powers of the Arbitrator, and whether the court erred in determining that the harassment and disparate treatment that Sloan alleged rose to the level of

abnormal working conditions under the Act. Sloan counter-states the question involved as whether the trial court properly followed the applicable law pursuant to the mandate of this Court's decision in *City of Pittsburgh v. Sloan*, 779 A.2d 598 (Pa. Cmwlth. 2001) (*Sloan I*), by holding that the Arbitrator agreed that the events complained of actually occurred, warranting an award of benefits.

The background of this case is set forth in detail in the Court's prior decision in *Sloan I*. In summary, Sloan has worked as a police officer for the City of Pittsburgh since 1980. She was promoted to the rank of lieutenant in 1993. She has a spotless record and has never been disciplined. Sloan removed herself from the workplace based upon the recommendation of the City's psychologist on July 16, 1996, and she subsequently filed two applications with the City seeking benefits under the Act, alleging that she sustained a work-related mental injury.

Arbitrator John J. Morgan conducted arbitration proceedings under the Act in 1998. Sloan testified, among other things, that at first she was treated equally, but after she was promoted to sergeant in 1990 that changed. She was sent into dangerous situations without backup, and she was assigned to the street beat during the midnight shift in subzero weather without a vehicle and was prevented from getting into any other officer's vehicle to get warm. Sloan testified that after she was promoted to lieutenant several male officers began to harass her. After she applied for a commander position, other police officers began to harass her sons through arrests on five occasions, all of which resulted in dismissal of the charges. Sloan's eldest son, a new police recruit, also was harassed; she stated that he was denied backup in dangerous situations, that he was nearly run down by a police driver and that "Sloan's mother" was written over a station fugitive posting.

Sloan filed fourteen complaints with the Office of Municipal Investigations (OMI) between October 1994 and December 1996. The City did not properly dispose of the complaints. Although the manager of OMI testified that all of Sloan's complaints were investigated and disposed of, after a month-long recess he could produce only four dispositions. One disposition letter was sent three years after the complaint was filed, and another was sent two and one-half years after the complaint. Other complaints were pending for years, although OMI regulations require dispositions within ninety days. This was not routine, he admitted. Following an incident of harassment involving her sons in October 1995 Sloan stopped working on the advice of the City police psychologist Dr. Gerald Massaro, but she returned to work in December 1995. In June 1996 she was transferred to the municipal court to a newly created "Court Liaison" position but was given no direction as to how to perform the task of reducing court costs and was not provided a key card to access the building, a desk, a telephone or an area to file documents. She left work again on the psychologist's advice July 16, 1996.

Sloan offered an expert psychiatric report from Dr. David Spence, who performed an independent medical evaluation and who opined that Sloan showed all the symptoms characteristic of depression. He stated further that she appeared to be credible in her claims of harassment and her reaction to them and that "[i]f the events which Ms. Sloan claims to have occurred did indeed occur, and if the Police Department did in fact fail to take appropriate reaction in response to those incidents, then it is reasonable to attribute Ms. Sloan's emotional distress and frustration to the actions and subsequent non action of various elements within the police department." Claimant's Ex. 1, Report of Dr. Spence, p. 6.

The City's witnesses included the acting head of the Public Safety Department, a sergeant who assumed the Court Liaison position, the manager of OMI and a city magistrate who ordered Sloan to leave the area where she was standing in court one day. The sergeant testified that she also did not have a key card, desk or telephone when she was transferred, but she secured these items with effort over time. The director of OMI testified as described above, and the magistrate testified that she sometimes projects her voice to maintain order but she did not intend to offend Sloan or to prevent her from returning to court.

The Arbitrator initially denied Sloan's claims on the ground that Sloan had not established that her mental injury was caused by abnormal working conditions involved in the performance of her duty. He stated that each of the allegations of harassment did not constitute abnormal working conditions in isolation, and some were too remote to be the cause of her mental injury. Further, he concluded that the City's failure to dispose of Sloan's written complaints did not constitute abnormal working conditions because she filed the complaints in her private capacity as a mother rather than in performance of her duties as a police officer. The trial court reversed the Arbitrator, holding among other things that he erred in requiring Sloan to establish abnormal working conditions, that he exceeded his authority in denying Sloan's right to benefits, that he made a decision for which no substantial supporting evidence can be found in the record and that his findings were inconsistent with the testimony and arguments of the City.

On the City's appeal this Court vacated and remanded. The Court noted the dispositive inquiry as to whether an injury is suffered in the performance of duty is whether the officer suffered the injury as the result of engaging in an obligatory task, conduct, service or function that arose from his or her position as a

police officer. *McLaughlin v. Pennsylvania State Police*, 742 A.2d 254 (Pa. Cmwlth. 1999). Further, an officer claiming benefits under the Act must show that the injury arose from abnormal working conditions. *Rodgers v. Pennsylvania State Police*, 759 A.2d 424 (Pa. Cmwlth. 2000). The Court noted also that ongoing harassment from co-workers or supervisors gives rise to abnormal working conditions. *Grimes v. Workmen's Compensation Appeal Board (Proctor & Gamble)*, 679 A.2d 1356 (Pa. Cmwlth. 1996). The Court held that work conditions that place an employee in the position of choosing between continuing her duties or being subjected to repeated harassment and having her children assaulted, harassed, insulted, nearly run down and sent into life-threatening situations without proper support cannot be considered normal under any definition.

Further, the Arbitrator erred as a matter of law in concluding that these conditions did not arise in the performance of Sloan's duties. The Court noted that due to the Arbitrator's erroneous conclusion that Sloan's allegations could not establish that she sustained a mental injury in the course of employment as a matter of law, he failed to make the necessary findings as to whether Sloan and her children were subject to harassment such that it caused Sloan to suffer a compensable mental injury. The Court remanded with the instruction that if the Arbitrator found that Sloan did suffer ongoing harassment giving rise to abnormal working conditions, then he should enter an award in favor of Sloan.

On remand, the Arbitrator issued a second decision that made findings nearly identical to those of his first decision, with the addition of a few phrases and a reference to statements in the trial court's opinion that did not exist. The Arbitrator quoted from the Court's remand instructions. Nevertheless, he then stated that Sloan's allegations of harassment were insufficient to sustain her burden

of proof. The Arbitrator made conclusions of law including that "[m]any of claimant's allegations concerned circumstances which did not occur in the performance of her duties," that "there was no requisite extraordinary event proven," and that Sloan "did have a subjective reaction of anxiety and depression to various circumstances," but that she did not sustain her heightened burden of proof "by objective evidence that any circumstances which occurred in the performance of her duty rose to the required level of being abnormal, i.e., actually subjected to harassment by co-workers giving rise to abnormal working conditions causing her to suffer a mental injury compensable under the Act." Arbitrator's Opinion and Order, October 18, 2001 (Arbitrator's Second Opinion), pp. 22 - 23.

On Sloan's appeal the trial court reversed. The court adopted and re-issued its prior opinion. The court also stated that after careful review of the Arbitrator's second opinion and order, the court thought that the Arbitrator agreed that the incidents complained of actually occurred but concluded that the harassment complained of did not give rise to abnormal working conditions. This Court's review of the trial court's order is limited to determining whether the necessary findings of fact are supported by substantial evidence, whether constitutional rights were violated and whether an error of law was committed. *City of Pittsburgh v. Kisner*, 746 A.2d 661 (Pa. Cmwlth. 2000).

The City first notes that in adopting its prior decision, the trial court failed to acknowledge that the issue of the applicability of the abnormal working conditions standard was settled in *Rodgers*, as well as this Court's statement in *Sloan I* that in light of *Rodgers* both parties agreed that Sloan was required to show that her injury arose from abnormal working conditions. On this point the Court agrees, and to the extent that the trial court again held that it was not necessary for

Sloan to show abnormal working conditions, the trial court erred. However, that was not the sole basis for the trial court's order, as the City acknowledges.

The City also argues that a trial court in its appellate capacity has no authority to re-examine an arbitrator's binding credibility determinations, *Kisner*, and it contends that here the trial court exceeded its mandate by engaging in an impermissible re-examination of the Arbitrator's credibility determinations. The trier of fact is free to credit or discredit testimony, including medical testimony, in whole or in part, and is under no obligation to accept even uncontroverted testimony as true. *Id.* (holding that where an arbitrator expressly discredited the testimony presented by a claimant and her medical witness and expressly credited contrary testimony by witnesses for the city, the trial court was not free to re-examine the evidence to determine whether claimant was in fact psychologically disabled). The City contends that nowhere does the Arbitrator accept as credible Sloan's allegations that she was harassed in the performance of her duties.

Sloan notes that the question of what constitutes abnormal working conditions is one of law. *Archer v. Workmen's Compensation Appeal Board (General Motors)*, 587 A.2d 901 (Pa. Cmwlth. 1991). Although corroborating objective evidence of an abnormal working condition is necessary where an employee is describing subjective feelings, no such evidence is necessary where allegations of harassment are made. *Id.* (citing *Pate v. Workmen's Compensation Appeal Board (Boeing Vertol Co.)*, 522 A.2d 166 (Pa. Cmwlth. 1987)). Furthermore, in *City of Pittsburgh v. Logan*, 570 Pa. 500, 810 A.2d 1185 (2002), the Pennsylvania Supreme Court recently reiterated its prior holding that psychic injury cases are highly fact sensitive and that for work conditions to be considered abnormal, they must be considered in context of the precise employment involved.

The Court agrees with the trial court that the Arbitrator did credit much of Sloan's evidence. On page 12 of the Arbitrator's second opinion he refers to Sloan's allegations of multiple incidents of harassment of her family, including of her son who is a police officer, but he states that these were not events requiring an official police response or exposing her to great physical danger. If the Arbitrator simply discredited Sloan and her witnesses, he need only have said so. On the same page the Arbitrator states that allegations of harassment against Sloan, including giving her dangerous assignments without backup, were not corroborated and would not necessarily rise to the level of abnormal working conditions. As has been shown, however, these types of allegations do not require corroboration, *Archer*, and they would constitute abnormal working conditions. *Sloan I*.

In regard to the mishandling by OMI of complaints filed by Sloan, the Arbitrator acknowledged the facts as described above. Despite the plain holding of this Court in *Sloan I* that failure to properly handle such complaints, in the context of this case, would constitute an abnormal working condition arising out of Sloan's performance of her job duties, the Arbitrator repeated that the complaints appear to have been filed by Sloan as a private citizen and to have concerned her family members and that the City's failures in this regard do not constitute abnormal working conditions. The Arbitrator credited Sloan's evidence as well as the City's, but he refused to draw the correct conclusion of law from that evidence.

This discussion relates to the second issue that the City purports to raise on this appeal, namely, whether the trial court erred in determining that Sloan's allegations of harassment and disparate treatment rose to the level of abnormal working conditions under the Act. The City contends that the Court has held that the language of the Act must be strictly construed and that benefits are

reserved for instances where an injury occurs by an event that requires an official police response. The City reviews Sloan's evidence and then cites *Andracki v. Workmen's Compensation Appeal Board (Allied Eastern States Maintenance)*, 508 A.2d 624 (Pa. Cmwlth. 1986), for the proposition that a claimant must produce objective evidence that corroborates his or her subjective description of the working condition as abnormal. The City asserts that this Court misapplied the abnormal working condition standard in *Sloan I*, and it casually ignores the evidence that Sloan was instructed to file complaints with OMI regarding her allegations of improper police conduct toward her and her family.

Sloan responds that in *Sloan I* this Court clearly stated that the circumstances to which Sloan was subjected constituted abnormal working conditions arising out of her employment. The Arbitrator was determined to deny benefits, and he ignored this Court's decision in *Sloan I* and misapplied the law. The Court agrees with Sloan that the issue of whether harassment of Sloan's children by police officers and the failure of the OMI procedures to address her complaints would constitute abnormal working conditions arising from her performance of her work duties was not before the Arbitrator on remand. The doctrine of law of the case holds that upon remand for further proceedings, a trial court may not alter the resolution of a legal question previously decided by an appellate court in the matter, and upon a second appeal an appellate court may not alter the resolution of a legal question previously decided by the same appellate court. *Couriers-Susquehanna, Inc. v. County of Dauphin*, 693 A.2d 626 (Pa. Cmwlth. 1997). In the present case, the Arbitrator was not free to ignore this Court's decision in *Sloan I* and to re-examine questions of law decided there by the

Court, and the City is not free to argue that this Court erred in those determinations and should now hold to the contrary.

The circumstances here unequivocally involved abnormal working conditions. In *Logan* an officer involved in a fatal shooting of a suspect received a credible gang threat that included a bounty on him, and his child received death threats at school from gang members. The Supreme Court noted that the issue in such cases is whether sufficient objective evidence exists to show abnormal working conditions. It indicated that spontaneous threats are a normal part of law enforcement, but the evidence showed that the threats against the officer and his child were not "garden variety" and were not part of an officer's normal working conditions. In addition, the city did not present any evidence to rebut the objective evidence presented. Here, the actions taken against Sloan and her children as means of harassing Sloan because of her promotions and the City's utter failure to properly resolve her resulting complaints, either in isolation or in combination with other objective evidence of harassment found by the Arbitrator, constituted abnormal working conditions. The trial court's order, therefore, is affirmed based on the reasoning set forth herein.

_____

DORIS A. SMITH-RIBNER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Shirley Sloan	:	
	:	
v.	:	No. 1024 C.D. 2002
	:	
City of Pittsburgh Police Department	:	
	:	
Appeal of: City of Pittsburgh/Frank Gates Service Company	:	

O R D E R

AND NOW, this 12th day of March, 2003, the order of the Court of Common Pleas of Allegheny County is affirmed to the extent that it concluded that the Arbitrator in the present matter agreed that incidents complained of actually occurred and that Shirley Sloan was entitled to benefits under the Act commonly known as the Heart and Lung Act.

DORIS A. SMITH-RIBNER, Judge