STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
JEFFREY FURTADO	)	
	)	
VS.	)	W.C.C. 01-08344
	)	
CAP CITY OF RHODE ISLAND, INC.	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the petitioner/employee's appeal from a decree of the trial court which granted him only partial relief. The employee contends that the trial judge erred when he failed to find that the employee had sustained a left shoulder injury, as well as bilateral carpal tunnel syndrome, as a result of his work activities. After careful review of the record and consideration of the arguments of counsel, we find that the trial judge was clearly erroneous in finding that the employee failed to establish that he sustained an injury to his left shoulder during the course of his employment with the respondent. We therefore sustain the appeal of the employee.

The employee came before the court on an Original Petition alleging that he developed bilateral carpal tunnel syndrome, and problems with his left shoulder and neck as a result of repetitive activities at work. He further alleged that these conditions caused him to become disabled as of October 31, 2001. At

the pretrial conference, the trial judge found that the employee suffered from bilateral carpal tunnel syndrome and a left shoulder condition which had been caused by his employment. He awarded the employee weekly benefits for partial incapacity from October 31, 2001 and continuing. The employer claimed a trial in a timely manner.

The employee testified that he had worked for the respondent for a little over five (5) years as an installer of plows, hitches, caps, running boards, and other accessories on pickup trucks. He used various power tools and air drills in his work and he had to maneuver in awkward spaces at times. He related that he began to develop numbness in his arms and hands about two (2) years prior to October 2001. About one (1) year prior to October 2001, he noticed pain in his left shoulder. These problems gradually increased over time.

Around April 2001, the employee told Kenneth Slocum, the president and owner of the company, that he was having problems lifting because of the numbness and pain. Mr. Slocum testified and confirmed this conversation. In August 2001, the employee reported his problems to his primary care physician, Dr. Kenneth Sperber, who subsequently referred him to Dr. Michael J. Belanger, an orthopedic surgeon.

On October 30, 2001, the employee was lying on his back installing a plow frame when he suddenly dropped it on his head because of the numbness in his arms and the pain in his shoulder. He realized at that point that he could not

continue to work under those circumstances. He has not returned to work since that date.

The remainder of the evidence consists of the deposition and reports of Dr. Michael J. Belanger, the records and deposition of Dr. Arnold-Peter Weiss, and the records of the Temporary Disability Insurance division. Dr. Belanger first evaluated the employee on November 15, 2001 for complaints of left shoulder and bilateral hand pain and numbness. His diagnoses were left shoulder AC arthritis secondary to rotator cuff weakness and impingement, and bilateral carpal tunnel syndrome. He gave the employee an injection in the left shoulder, recommended therapy and advised him to wear splints. The doctor also sent the employee for EMG and nerve conduction studies of his upper extremities. He agreed that the employee should remain out of work.

When the employee returned to see Dr. Belanger on December 6, 2001, he informed the doctor that his left shoulder was slightly better after the injection, but his right shoulder was bothering him. The EMG studies revealed evidence of severe right carpal tunnel syndrome and moderate left carpal tunnel syndrome. Dr. Belanger noted in his report that the shoulder and hand problems were due to "repetitive use and overhead work." In the report of the follow-up office visit on January 8, 2002, Dr. Belanger stated that he believed that the employee's shoulder and hand problems are related to his work and prevent him from working.

The doctor decided that it was best to treat the most symptomatic area first – the right hand. The employee underwent carpal tunnel release surgery on April 12, 2002.

Dr. Arnold-Peter Weiss, an orthopedic surgeon specializing in hand surgery, conducted an impartial medical examination of the employee on February 5, 2002 at the request of the court. The doctor was provided with the letter from Dr. Belanger dated December 4, 2001, the report of the EMG and nerve conduction studies, and a detailed job description prepared by an ergonomic consultant at the request of the insurer. The job description listed the primary diagnosis as carpal tunnel syndrome. The form sent from the court to the doctor's office described the injury as "upper extremities." There was nothing in the doctor's report about any shoulder problem and he never examined the employee's shoulder.

The records from the Temporary Disability Insurance division indicate that the employee filed an application for benefits on November 19, 2001. Forms were completed by his primary care physician, Dr. Sperber, indicating that he had injured his neck and left shoulder and the injuries were work-related.

The trial judge found that the employee developed bilateral carpal tunnel syndrome as a result of his work activities as a result of which he became partially disabled as of October 31, 2001. There was no specific finding in the decree as to the alleged left shoulder and neck injuries. The employee filed a claim of appeal with the Appellate Division. After reviewing the record and

considering the arguments of counsel, the appellate panel remanded the matter to the trial judge with direction to review the evidence and make specific findings and orders with regard to the allegations of a left shoulder injury and a neck injury.

The trial judge issued a response to the remand order in which he concluded that the employee had failed to prove that he sustained any injuries to his left shoulder or neck on October 31, 2001. The trial judge's reasoning was as follows:

> "A review of the evidence which served as the basis for the findings contained in the trial decree satisfies the trial court that neither doctor found that the employee sustained a work-related injury to his neck or left shoulder. In addition, the Court preferred to rely upon the opinion of Dr. Arnold-Peter Weiss, which supports the lack of findings." (Order Pursuant to Remand, p. 2)

The matter was then returned to the Appellate Division for further proceedings.

It is evident from reading the trial judge's decision and the response to the remand order that he overlooked the affidavit with attached report of Dr. Belanger and the reports of Dr. Belanger which were admitted with his deposition. In his decision, the trial judge stated:

> "A review of both depositions indicate that neither doctor found that the employee sustained a work-related injury to his neck or left shoulder." (Dec. p. 6)

The trial judge never refers to Dr. Belanger's reports. At the first office visit on November 15, 2001, the employee complains about his left shoulder and the doctor notes a number of positive physical findings regarding the shoulder. The

diagnosis at that time includes left shoulder AC arthritis with rotator cuff weakness and impingement. Dr. Belanger injected the left shoulder that day. The reports of the office visits in December 2001 and January 2002 also note the left shoulder complaints, physical findings, and diagnosis. In the January 8, 2002 report, Dr. Belanger stated that the left shoulder problem and the carpal tunnel syndrome are related to the employee's work and prevent him from working.

In addition, an affidavit signed by Dr. Belanger was introduced into evidence with a letter from the doctor dated February 7, 2002 attached to it. In the letter, the doctor states that the employee has a left shoulder problem which is related to his work and that this opinion is rendered with a reasonable degree of medical certainty.

The trial judge's reliance on the opinions of Dr. Weiss is irrelevant to the issue of the left shoulder injury. Dr. Weiss never examined the employee's shoulder and never stated that such an injury would not be caused by his work. Dr. Weiss specializes in <u>hand</u> surgery. At the time of his examination of the employee, Dr. Belanger had already stated that he was focusing on the most symptomatic problem which the bilateral carpal tunnel syndrome. Documents forwarded to Dr. Weiss never mentioned the left shoulder as an area to be checked. Consequently, Dr. Weiss did not render <u>any</u> opinion about a left shoulder injury.

The trial judge was apparently distracted by the questions raised regarding the incident at work on October 30, 2001 when the employee dropped a plow frame on himself. A careful review of the testimony reveals that the employee did not state that he sustained the alleged injuries as a result of this specific incident. Rather, he dropped the plow frame as a result of the numbness in his hands and arms and the pain in his left shoulder, which made him realize that it was dangerous for him to continuing working under those conditions and he should seek treatment. Therefore, the employee did not report this incident to his supervisor or the doctors because it was not the cause of his injuries. The fact that he never mentions it to anyone cannot be used as a factor in denying his allegations.

Based upon the reasoning above, the opinions of Dr. Belanger as contained in his reports and his affidavit are uncontradicted and not inherently improbable. They clearly establish that the employee developed left shoulder AC arthritis and impingement as a result of repetitive activities at work which resulted in partial disability as of October 31, 2001 and continuing. There is no evidence that this disability resulting from the left shoulder injury should be apportioned in the manner that the disability from the bilateral carpal tunnel syndrome was apportioned. The employee's appeal is therefore granted with regard to the allegation of a left shoulder injury. A new decree shall enter containing the following findings and orders:

1. That the employee has established by a fair preponderance of the credible evidence that he sustained a personal injury on October 31, 2001, which arose out of and in the course of his employment with the respondent, connected therewith and referable thereto, of which the employer had notice.

2. That the employee developed bilateral carpal tunnel syndrome and left shoulder AC joint arthritis with impingement as a result of repetitive activities at work.

3. That the employee's average weekly wage is Five Hundred Thirty and 33/100 ($530.33) Dollars.

4. That the employee had a non-working wife and three (3) minor children dependent upon him for support.

5. That the employee has received compensation benefits pursuant to a pretrial order entered on February 21, 2002.

6. That as a result of his work-related injuries, the employee was partially disabled from October 31, 2001 and continuing.

7. That sixty percent (60%) of the employee's partial disability due to the bilateral carpal tunnel syndrome resulted from his work-related activities.

It is, therefore, ordered:

1. That the employer shall pay to the employee weekly benefits for partial incapacity at his full compensation rate from October 31, 2001 and continuing until further order of the court or agreement of the parties.

2. That the employer shall pay all reasonable medical, hospital, and surgical bills in accordance with the provisions of the Workers' Compensation Act.

3. That the employer shall reimburse trial counsel for the cost of the copy of the deposition of Jeffrey Furtado in the amount of One Hundred Five and 75/100 ($105.75) Dollars upon proof of payment of same.

4. That the employer shall reimburse trial counsel for the cost of the deposition of Dr. Michael J. Belanger upon proof of payment of same.

5. That the employer shall reimburse the employee the sum of Two Hundred Fifty and 00/100 ($250.00) Dollars for his portion of the expert witness fee paid to Dr. Michael J. Belanger.

6. That the employer shall reimburse trial counsel for the cost of a copy of the deposition of Dr. Arnold-Peter Weiss upon proof of payment of same.

7. That the employer shall reimburse the employee the sum of One Hundred and 00/100 ($100.00) Dollars for the cost of the filing fee of the claim of appeal and the cost of the transcript.

8. That the employer shall pay a counsel fee in the sum of One Thousand Five Hundred and 00/100 ($1,500.00) Dollars to John F. McBurney, III, Esq., for services rendered at the trial level in defense of the employer's claim for trial.

9. That the employer shall pay a counsel fee in the sum of One Thousand Five Hundred and 00/100 ($1,500.00) Dollars to Ronald J. Creamer, Esq., for services rendered at the appellate level.

We have prepared and submit herewith a new decree in accordance with our decision. The parties may appear on at 10:00 a.m. to show cause, if any they have, why said decree shall not be entered.

Healy and Sowa, JJ. concur.

ENTER:

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Healy, J.

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Olsson, J.

_____
Sowa, J.

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CAP CITY OF RHODE ISLAND, INC.	)	

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate division upon the appeal of the petitioner/employee from a decree entered on May 13, 2002 and an order rendered pursuant to a remand entered on January 6, 2003.

Upon consideration thereof, the appeal of the employee is granted in part and in accordance with the decision of the Appellate Division, the following findings of fact are made:

1. That the employee has established by a fair preponderance of the credible evidence that he sustained a personal injury on October 31, 2001, which arose out of and in the course of his employment with the respondent, connected therewith and referable thereto, of which the employer had notice.

2. That the employee developed bilateral carpal tunnel syndrome and left shoulder AC joint arthritis with impingement as a result of repetitive activities at work.

3. That the employee's average weekly wage is Five Hundred Thirty and 33/100 ($530.33) Dollars.

4. That the employee had a non-working wife and three (3) minor children dependent upon him for support.

5. That the employee has received compensation benefits pursuant to a pretrial order entered on February 21, 2002.

6. That as a result of his work-related injuries, the employee was partially disabled from October 31, 2001 and continuing.

7. That sixty percent (60%) of the employee's partial disability due to the bilateral carpal tunnel syndrome resulted from his work-related activities.

It is, therefore, ordered:

1. That the employer shall pay to the employee weekly benefits for partial incapacity at his full compensation rate from October 31, 2001 and continuing until further order of the court or agreement of the parties.

2. That the employer shall pay all reasonable medical, hospital, and surgical bills in accordance with the provisions of the Workers' Compensation Act.

3. That the employer shall reimburse trial counsel for the cost of the copy of the deposition of Jeffrey Furtado in the amount of One Hundred Five and 75/100 ($105.75) Dollars upon proof of payment of same.

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7. That the employer shall reimburse the employee the sum of One Hundred and 00/100 ($100.00) Dollars for the cost of the filing fee of the claim of appeal and the cost of the transcript.

8. That the employer shall pay a counsel fee in the sum of One Thousand Five Hundred and 00/100 ($1,500.00) Dollars to John F. McBurney, III, Esq., for services rendered at the trial level in defense of the employer's claim for trial.

9. That the employer shall pay a counsel fee in the sum of One Thousand Five Hundred and 00/100 ($1,500.00) Dollars to Ronald J. Creamer, Esq., for services rendered at the appellate level.

Entered as the final decree of this Court this day of

PER ORDER:

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ENTER:

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Healy, J.

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Olsson, J.

_____
Sowa, J.

I hereby certify that copies were mailed to Ronald J. Creamer, Esq., John F. McBurney, III, Esq., and Francis T. Connor, Esq., on

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