

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT  
APPELLATE DIVISION

DAVID BOURQUE )

)

VS. )

W.C.C. 00-00237

)

RIDGEWOOD POWER )

DECISION OF THE APPELLATE DIVISION

SOWA, J. This matter came before the Appellate Division as a petitioner/employee's appeal from the decision and decree of the trial judge entered on September 4, 2002.

The employee had filed an employee's petition to review alleging a return of total incapacity from September 9, 1999 and continuing. On February 10, 2000, Dr. Stanley Stutz was named by the court as an impartial medical examiner and the case was continued for receipt of the doctor's report. At a pre-trial conference on March 16, 2000, the employee's petition was denied. A timely appeal was filed for a trial de novo.

At the conclusion of the trial of this matter, the trial judge rendered a bench decision and entered a decree which contained the following findings and orders:

"1. That the petitioner has failed to demonstrate by a fair preponderance of the credible evidence that he

sustained a return of incapacity on September 9, 1999 causally connected with the work-related injury.

“2. That the petitioner has failed to demonstrate by a fair preponderance of the credible evidence that any incapacity experienced by him subsequent to September 9, 1999 was causally connected with his work-related injury of April 7, 1999.

“3. That the petitioner has failed to demonstrate by a fair preponderance of the credible evidence that he’s experienced any physical disability caused by or connected subsequent to September 9, 1999, causally connected with the work-related injury of April 7, 1999.

“4. That the petitioner has failed to demonstrate by a fair preponderance of the credible evidence that he experienced any psychological conditions caused by or flowing from the work-related injury of April 7, 1999.

“It is, therefore, ordered:

“1. That the petition be denied and dismissed.”

From this decree, the employee has duly claimed his right of appeal.

Pursuant to R.I.G.L. § 28-35-28(b), a trial judge’s findings on factual matters are final unless found to be clearly erroneous. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). The Appellate Division is entitled to conduct a *de novo* review only when a finding is made that the trial judge was clearly wrong. Id. (citing R.I.G.L. § 28-35-28(b); Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986)). Such review, however, is limited to the record made before the trial judge. Vaz, *supra* (citing Whittaker v. Health Tex, Inc., 440 A.2d 122 (R.I. 1982)).

Cognizant of this legal duty imposed upon us, we have carefully reviewed the entire record of this proceeding and we find no merit in the employee's reasons of appeal and affirm the trial judge's decision and decree.

The employee filed three (3) reasons of appeal. The first reason of appeal alleges error arguing that the medical evidence established that the petitioner's back injuries and related psychological pain disorder were caused by the work injury which occurred on April 7, 1999. It is clear that the petitioner in a workers' compensation proceeding has the burden of producing credible evidence of probative force to support his or her petition. Delage v. Imperial Knife Company, Inc., 121 R.I. 146, 147, 396 A.2d 938, 939 (1979). The petitioner has the burden of proving that there is a causal connection between the injury sustained and the employment. Natale v. Frito-Lay, Inc., 119 R.I. 713, 382 A.2d 1313 (1978).

David Bourque was employed by Ridgewood Power as a mechanic operator. He sustained an injury on April 7, 1999, described as a "low back strain, thoracic strain, and left elbow strain resolved," which was memorialized in a pretrial order entered in W.C.C. No. 99-00385. That order called for payment of compensation benefits from April 11, 1999 to June 21, 1999. The employee testified that his pain dramatically increased in September, 1999 after an episode of sneezing forty (40) to fifty (50) times, requiring additional medical attention, initially at Rhode Island Hospital Emergency Room, and, thereafter, with Dr. Mark Palumbo. Treatment was also rendered by Drs. Christopher Huntington, Glenn Narkievich,

Francis R. Sparadeo, Ronald W. Theborge and Frank LaFazia. The employee also testified that he saw Drs. Babbitt, Derocher, and Warren. Mr. Bourque testified that he had constant back pain and did not feel well mentally because of that back pain. As a result, he has been disabled from work.

The employee introduced the deposition testimony of Dr. Palumbo. The doctor examined the patient on four (4) occasions between October 5, 1999 and February 1, 2000. The record reflects and the trial judge noted that there were no objective findings in any of the examinations. In addition, the opinions regarding disability and causal relationship were based entirely on the symptoms and history given to the doctor by the patient. In the deposition, Dr. Palumbo acknowledged that the history of the multiple sneezing incident of September 1, 1999 was not given to him, nor were the patient's prior work activities.

The employee introduced the deposition of Dr. Huntington. Dr. Huntington acknowledged that the patient's degenerative disc disease was not caused by the fall on April 7, 1999, but it was his opinion that the pre-existing condition was worsened by that event. That opinion was based entirely on the history given to him by the patient, including the fact that he never had back pain prior to the fall.

Deposition testimony was also elicited from two (2) psychologists, Drs. Theborge and Sparadeo. Both doctors made findings, but the record reflects that the opinions rendered regarding causation were based entirely on the history provided by the employee.

Dr. Stutz was appointed as the impartial examiner by the trial judge. The doctor's report was marked as Court's Exhibit Number 1. Dr. Stutz opined that the employee presented with symptoms but no signs. He further stated that the employee could return to his regular job and that a return to such duties would not be unduly injurious to his health.

The report of the Donley Center, in response to the referral by the trial judge, was marked as Court's Exhibit Number 2.

In his decision, the trial judge rejected the testimony of Dr. Palumbo noting that at the time of his second evaluation, the examination was essentially within normal limits. Dr. Huntington conducted his initial evaluation in February, 2001. The doctor's reports and testimony suggested some minimal objective findings but that essentially his opinion was based upon the patient's subjective complaints of pain.

The trial judge noted that the opinions of both Drs. Thebarger and Sparadeo were related to the incident of April, 1999, based on a history that the employee was suffering from physical conditions which resulted in pain which caused disability. Because of the inability to obtain a cure for the physical injury and pain, the patient developed a depression.

The trial judge, in his decision, indicated that he was faced with a clear conflict of medical opinions and orthopedic opinions. In resolving that conflict, he chose to rely on the findings of Dr. Stutz as it related to the orthopedic findings. The trial judge, when faced with conflicting medical opinions, may pick

and choose which opinions to rely upon and such a decision will not be disturbed on appeal. Parenteau v. Zimmerman Eng., Inc., 111 R.I. 68, 78, 299 A.2d 168, 174 (1973). Since the psychological opinions were based upon the belief that the employee had a physical incapacity, and that opinion was rejected, the foundation for the psychological opinions thereby failed.

A review of the testimony of Drs. Sparadeo and Thebarger reveals that the opinions offered were based on the history presented by the petitioner, to wit, that he was unable to cope with the physical pain resulting in a depression. The psychological opinions had their foundation on the belief that the employee had a physical incapacity. The trial judge accepted the findings of Dr. Stutz that the employee did not have a physical incapacity, and therefore, there was no foundation for the opinions of Drs. Sparadeo or Thebarger. The trial judge correctly viewed those opinions as incompetent.

The second reason of appeal alleges error arguing that there was competent medical evidence that the petitioner's back injuries and related psychological pain disorder were caused by the work injury which occurred on April 7, 1999 as there was no other cause for his injuries which were clearly established by the medical evidence to have been disabling. It is noted that Dr. Huntington, in his deposition testimony, acknowledged that the degenerative disc disease pre-existed any event on April 7, 1999. The opinions regarding the alleged psychological pain disorder were rejected by the trial judge as lacking a

foundation, based upon the acceptance of the opinion of Dr. Stutz. Therefore, the second reason of appeal is rejected.

The third reason of appeal alleges that because there was no conflict in the medical testimony, the trial court abused its discretion in appointing an impartial medical examiner and relying on the opinion of the impartial medical examiner to deny petitioner's claim for benefits. Rhode Island General Laws § 28-33-35(a) states that: "Any judge of the court may, at any time after an injury, on his or her own motion . . . appoint an impartial medical examiner. . . ." The statute further states that "the report of the findings of the impartial medical examiner . . . shall be admissible as an exhibit of the court." Furthermore, counsel for the employee, who entered as the second attorney in January 2001, actually filed two (2) motions on March 16, 2001 and March 22, 2001, requesting the appointment of an impartial examiner, apparently unaware that one had previously been appointed. The trial judge was clearly within his discretion to appoint Dr. Stutz as an impartial medical examiner and to accept the findings noted in his report.

For the aforesaid reasons, the employee's reasons of appeal are denied and dismissed and we, therefore, affirm the trial judge's decision and decree.

In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, a copy of which is enclosed, shall be entered on

Olsson and Connor, JJ. concur.

ENTER:

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Olsson, J.

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Sowa, J.

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Connor, J.

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the petitioner/employee and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on September 4, 2002 be, and they hereby are, affirmed.

Entered as the final decree of this Court this            day of

BY ORDER:

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ENTER:

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Olsson, J.

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Sowa, J.

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Connor, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq., and  
Susan Pepin-Fay, Esq., on

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