

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

ALFREDA BADWAY

)

)

VS.

)

W.C.C. 00-01198

)

BELL ATLANTIC

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DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter came to be heard before the Appellate Division upon the appeals of both the petitioner/employee and the respondent/employer from a decree of the trial court which granted the employee's Original Petition in part. The employee alleged that she became disabled as of March 8, 1999 due to right carpal tunnel syndrome, right stenosing tenosynovitis, and an injury to her neck. The trial judge found that the employee had developed right carpal tunnel syndrome as a result of her employment with Bell Atlantic and awarded weekly benefits from May 19, 1999 to August 3, 1999. After consideration of the parties' reasons of appeal and arguments, we deny the employer's appeal and grant the employee's appeal in part.

The employee, Alfreda Badway, worked for Bell Atlantic for over twenty (20) years. Since May of 1994, she worked as an administrative assistant, entering data, filing, filling out time sheets, and ordering supplies. She worked seven and one-half (7 1/2) hours per day, five (5) days per week. Six and one-half (6 1/2)

hours of her day was spent performing data entry, primarily with her right hand. Prior to working as an administrative assistant, the employee worked for over sixteen (16) years as a 411 operator, a job which required her to sit at a computer with a keyboard and screen all day. She primarily used her right hand to look up the requested information.

The employee first developed some symptoms in her right hand in 1994, including a tingling sensation in her index and middle fingers. However, she did not lose any time from work due to the symptoms. In 1997, the employee gave birth to her youngest child, taking six (6) months off before the birth and one (1) year off afterwards. By July of 1998, she had returned to work and resumed her regular duties as an administrative assistant.

In early 1999, the employee again experienced symptoms in her right hand. She had difficulty moving her index and middle fingers and complained that they would “get stuck.” On or about March 7, 1999, she told her supervisor, Juan Hernandez, about her symptoms and showed him her hand. The supervisor told her to seek medical treatment. The employee was initially treated at the Atmed Treatment Center on March 8, 1999, where she was diagnosed with tendonitis. She was referred to Dr. Arnold-Peter C. Weiss, an orthopedic surgeon specializing in hand surgery. She also had been treating with Dr. Jeffrey D. Reed, a chiropractor, for several years for ongoing complaints regarding her neck and back.

Dr. Weiss first treated and diagnosed the employee with right carpal tunnel syndrome on March 25, 1999. He performed right carpal tunnel release surgery on the employee on May 19, 1999. There is no indication in his treatment reports as to the cause of the employee's condition. In addition, the employee apparently had her medical treatment put through her private health insurance. Over a year later, on April 21, 2000, in response to a letter from the employee's attorney outlining the employee's work duties, Dr. Weiss concluded that the employee's right carpal tunnel syndrome was causally related to her work activities.

The employee did not return to work after March 8, 1999 and received extended sick leave benefits from Bell Atlantic for about one (1) year. She also received Temporary Disability Insurance benefits. She did not file a petition for workers' compensation benefits until February 28, 2000.

The trial judge found that the employee had developed right carpal tunnel syndrome as a result of her work activities with Bell Atlantic. She concluded that the employee was totally disabled from May 19, 1999 to May 27, 1999 and partially disabled from May 28, 1999 to August 3, 1999. There is no discussion of the alleged neck injury or right stenosing tenosynovitis. The trial judge also ordered the employer to pay all reasonable and necessary medical bills. Both parties appealed from this decision and decree.

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. See [Diocese of Providence](#)

v. Vaz, 679 A.2d 879 (R.I. 1996). The Appellate Division is entitled to conduct a *de novo* review of the record only after 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)).

The employer has filed eight (8) reasons of appeal. The first (3) reasons are general statements that the trial decree is against the law and the evidence and the weight thereof. The Rhode Island Supreme Court has frequently stated that the Workers' Compensation Appellate Division "generally may not consider an issue unless that issue is properly raised on appeal by the party seeking review." Falvey v. Women and Infants Hosp., 584 A.2d 417, 419 (R.I. 1991) (citing State v. Hurley, 490 A.2d 979, 981 (R.I. 1985)). In order for issues to be properly before the Appellate Division, the statutory requirements of R.I.G.L. § 28-35-28 must be satisfied. The pertinent language of that statute mandates that ". . . the appellant shall file with the administrator of the court reasons of appeal stating specifically all matters determined adversely to him or her which he or she desires to appeal" This tribunal is without authority to consider reasons of appeal that fail to meet the statutorily required level of specificity. Bissonnette v. Federal Dairy Co., Inc., 472 A.2d 1223 (R.I. 1984).

The general recitations in the employer's first three (3) reasons of appeal clearly lack the specificity required by the statute and are therefore denied and dismissed.

In its fourth reason of appeal, the employer contends that the petition should have been denied because the employee failed to give timely notice to the employer that her condition was work related. The Workers' Compensation Act provides that an employee must give notice of an injury to the employer within thirty (30) days of its occurrence or manifestation in order to pursue a claim for benefits. R.I.G.L. § 28-33-30. Failure to give timely notice, however, is not a valid defense to workers' compensation proceedings where it is shown that an agent of the employer had actual knowledge of the injury, or the court determines that good cause exists for failure to give notice in a timely manner. R.I.G.L. § 28-33-33; Leva v. Caron Granite Co., 84 R.I. 360, 124 A.2d 534 (1956); Caspar v. East Providence Artesian Well Co., 49 R.I. 8, 139 A.2d 470 (1927).

In the instant case, the trial judge concluded that the employee had met the statutory burden because she informed her supervisor of her condition and she had good cause for not giving notice because she did not immediately know, and her health care providers did not immediately suggest, that her condition could be work related. We cannot say that the trial judge was clearly wrong in arriving at that conclusion.

The employee testified that she told her supervisor about her condition and showed him her hand in early March 1999. This testimony was uncontradicted.

Admittedly, the employee never stated to her supervisor that the condition was work related, but she was not aware of any connection to her work activities at that time. It was not until early 2000 that the potential connection to work was brought forth.

The employee had good cause for not immediately realizing that the condition was work related. She first started suffering a tingling sensation in her right hand in 1994. The symptoms in her hand had worsened during her 1997 pregnancy. When she first went to Dr. Weiss on March 25, 1999, she utilized her private health insurance. Consequently, Dr. Weiss never raised the subject of the cause of the condition. It was not until April 13, 2000, on the basis of a letter from the employee's lawyer describing her work duties, that Dr. Weiss concluded that the condition was work related.

This is not a case where a traumatic accident occurs at work resulting in an injury. Carpal tunnel syndrome is a condition that gradually develops and the average individual would not automatically realize that certain repetitive activities may cause the condition. In addition, the cause of the condition was not discussed by her physicians. In this situation, we find that the trial judge correctly found that the employee had good cause for failing to give notice to her employer that her condition was work related within the time limits set out in the statute.

The employer also argues on appeal that the trial judge committed error in ordering the employer to pay the employee's medical expenses when the health

care providers failed to adhere to the notice requirements of the Workers' Compensation Act. Under R.I.G.L. § 28-33-8(b), health care providers are required to provide a "notification of compensable injury form" to the employer, as well as periodic reports and bills for services. Furthermore, R.I.G.L. § 28-33-5 mandates that a physician must obtain permission from the employer or insurer before performing surgery on an injured worker. These notice provisions are directed at the medical service providers and establish certain conditions which must be satisfied in order to hold the employer liable for payment of their bills. The failure of the physicians to comply with these provisions does not affect the employee's claim for weekly workers' compensation benefits.

The decree in this case contains a general order to pay all medical bills "in accordance with the Workers' Compensation Act." This general order does not prevent the employer from contesting any specific bill for medical services which may be submitted by the employee's doctors. At that time, the employer may assert the defenses of lack of notice of medical treatment and failure to comply with §§ 28-33-5 and 28-33-8. It should be noted, however, that the physicians were not aware that the employee's condition was work related or that she was asserting a workers' compensation claim until sometime in early 2000, well after the surgery had been performed. It is difficult to fault the physicians for failing to comply with provisions of the Workers' Compensation Act when there was no indication that this was a workers' compensation claim for some eight (8) months or more.

In its sixth reason of appeal, the employer argues that under the doctrine of election of remedies the employee's claim for workers' compensation benefits should be denied because she already collected disability benefits from her employer for the same time period. The employer contends that the court is allowing the employee to "double-dip" by ordering the payment of weekly workers' compensation benefits for the same time period and the same injury for which the employee received disability benefits from the employer. However, the employer confuses the employee's rights under a private contract for disability insurance with the employer and the employee's legal remedies provided under the Workers' Compensation Act.

Under the workers' compensation framework, an employee may elect to retain his or her common law rights at the time of hire and forego the remedies provided under the Workers' Compensation Act. An employee cannot pursue remedies for a work-related injury under both the workers' compensation system and the common law tort system. See Lopes v. G.T.E. Products Corp., 560 A.2d 949 (R.I. 1989). The Rhode Island Supreme Court has held that ". . . once an employee has accepted workers' compensation benefits for a work-related injury, they have forfeited all other rights to relief including a common-law tort action." Id. at 950, citing Iorio v. Chin, 446 A.2d 1021, 1023 (R.I. 1982).

In the present case, the employee filed with the employer for sickness or disability benefits when she stopped working in March 1999. She received these benefits for fifty-two (52) weeks and also received Temporary Disability Insurance

benefits from the state. Shortly before her company disability benefits expired, she filed this petition for workers' compensation benefits.

The employer's sickness/disability policy is not a legal remedy in the same manner as a tort action such that the election of remedies doctrine would apply. It is entirely separate from the employee's rights under the workers' compensation system or the common law. In filing for her benefits under the company disability policy, the employee did not forgo either her common law remedies or a possible workers' compensation claim; she simply availed herself of one of the benefits of her employment. It was not until after receiving the company's sick benefits, did the employee and her lawyer establish a causal link between the employee's condition and her work duties.

The mere receipt of benefits under a disability insurance policy does not preclude the receipt of workers' compensation benefits. The employer has every right to sue in the appropriate forum to enforce whatever provisions of the disability insurance contract may mandate reimbursement of benefits in this type of situation, but this court has no jurisdiction to order such reimbursement or order an offset against workers' compensation benefits. The fact that the employee received these other benefits has no impact on her workers' compensation claim.

The employer also argues that there was no competent medical evidence to support the trial judge's finding that the employee's condition was caused by her work activities. Under the holding in Parenteau v. Zimmerman Eng., Inc., 111 R.I.

68, 299 A.2d 168 (1973), when a trial judge is presented with conflicting medical opinions, the trial judge is entitled to select one (1) expert opinion over the other, in whole or in part. The judge's decision as to which expert to base his or her decision on should not be disturbed, as long as the medical opinion relied upon is competent. The Appellate Division cannot undertake a *de novo* review of conflicting medical evidence and overturn a trial judge's findings without initially concluding that the trial judge was clearly wrong. R.I.G.L. § 28-35-28(b); Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996).

In the instant case, Dr. Weiss testified to a reasonable degree of medical certainty that the employee's carpal tunnel syndrome was caused by her employment with Bell Atlantic. The fact that he never volunteered an opinion as to causal relationship until the employee's attorney specifically inquired is of no moment. The job description provided by the attorney to Dr. Weiss was never contradicted by any testimony or other documentation. It was consistent with the employee's testimony regarding her job duties. Certainly, the doctor had sufficient information and foundation to form a competent opinion as to causation.

Furthermore, the issues of how much the employee actually worked in the three (3) years or more before she left in 1999, and the other potential factors contributing to carpal tunnel syndrome were covered in the second deposition of Dr. Weiss conducted by counsel for the employer. At that time, the doctor was questioned in detail regarding these issues. He steadfastly maintained that these

issues had no impact upon his opinion that the work activities caused the condition. Based upon our review of the record, Dr. Weiss' opinion was certainly competent medical evidence upon which the trial judge could rely in finding that the employee's condition was work related. Consequently, her finding on this issue is not clearly erroneous.

Finally, the employer contends that a counsel fee should not have been awarded, or should have been reduced, because the employee had already received more money from the company disability insurance program than she was entitled to under the workers' compensation system. We find no merit whatsoever in this argument. The amount of the counsel fee awarded in a workers' compensation case is left to the discretion of the trial judge. Drake Bakeries, Inc. v. Butler, 95 R.I. 143, 147-148, 185 A.2d 108, 110 (1962); Gomes v. Bristol Mfg. Corp., 95 R.I. 126, 128, 184 A.2d 787, 789 (1962). The elements to be considered include the amount in issue, the legal questions involved, the time expended, the diligence displayed, the result obtained, and the experience, standing and ability of the attorney rendering the services. Annunziata v. ITT Royal Elec. Co., 479 A.2d 743, 744 (R.I. 1984).

In the instant case, the trial judge reviewed each of these factors in arriving at the amount of the counsel fee. The fact that the employee received money from some outside source regarding the same injury is irrelevant to this determination. The "result obtained," which is considered in the fee setting process, means the result obtained in the workers' compensation proceeding.

The trial judge did, in fact, reduce the amount requested by the attorney in his affidavit. We cannot say that she abused her discretion in determining the amount of the attorney's fee.

We turn now to the employee's appeal. The five (5) reasons of appeal submitted by the employee may be condensed to the issue of whether the trial judge neglected to address if the employee also sustained a neck injury and developed stenosing tenosynovitis, and, if so, was she still disabled as a result of one (1) or both of these conditions. After reviewing the record and decision of the trial judge, we find merit in the employee's appeal.

In her decision, the trial judge specifically stated that there were only two (2) issues before the court—first, whether the employee developed carpal tunnel as a result of her employment with Bell Atlantic and secondly, whether the employee gave timely notice of her injury to the company. (Tr. decision, p. 6) This summary of the issues does overlook the fact that the original petition alleged that the employee developed carpal tunnel syndrome and also sustained a neck injury. The petition was later amended to include the allegation that she also had right stenosing tenosynovitis. There is no mention whatsoever of these other alleged injuries. The failure to mention the neck injury, as well as the stenosing tenosynovitis, is clear error on the part of the trial judge. As such, the appellate panel must review the evidence and render a decision with regard to these allegations.

The medical evidence in this matter consisted of two (2) depositions of Dr. Weiss along with his records, the report of the impartial medical examiner, Dr. Walek, and a package of medical records which were sent to Dr. Walek by agreement of the parties. The package of records was subsequently introduced into evidence without objection. Contained in the package were records of Dr. Jeffrey Reed, a chiropractor. Dr. Reed began treating the employee around 1997 for neck and back complaints. In a letter to the employee's attorney dated April 13, 2000, the doctor stated:

“There is reasonable degree of medical certainty that Ms. Badway's complaints and treating diagnoses (Right Carpal Tunnel Syndrome—unresolved post surgically, and central C4-C5 disc herniation with multiple osteophytes at C5-C6 and C6-C7) are causally related to her twenty year employment of Bell Atlantic.”
(Pet. Exh. 4)

In addition, in his treatment note dated March 3, 2000, the doctor noted that, “There is a reasonable degree of medical certainty that this patient's injury is a result of trauma at work.” Dr. Reed's opinion as to the cause of the employee's neck pain is not contradicted by any other medical evidence. Neither Dr. Weiss nor Dr. Walek addressed any problems with the neck. Dr. Howard S. Hirsch, who examined the employee at the request of the employer, did not discuss the employee's neck complaints or the possibility that her right arm pain emanated from a neck problem. In addition, Dr. Reed indicated that the employee could not return to her regular work duties, but was capable of working with certain restrictions.

Although the evidence as to the origin and extent of the neck injury is somewhat sparse, the Appellate Division is limited to the evidence on the record. Dr. Reed found a causal link between the employee's work duties and both the right carpal tunnel syndrome and the neck pain. The other experts concentrated on the origin of the employee's right carpal tunnel syndrome and pain in the upper extremities, but did not give a cause for the employee's neck pain. Consequently, this panel finds that the employee did sustain an injury to her neck as a result of her employment with Bell Atlantic and is partially disabled as a result of that condition.

With regard to the right stenosing tenosynovitis, we find that there is insufficient evidence to support a finding that this condition was work related. The employee reported problems with her middle finger to Dr. Reed in early 1999. She testified that around this time, her index and middle fingers were getting "stuck." At her initial visit with Dr. Weiss, he injected her right middle finger, which resolved the problem. Dr. Weiss never commented in his reports or deposition as to the cause of the "trigger finger" or right stenosing tenosynovitis. Dr. Walek noted that the employee's stenosing tenosynovitis had been treated and resolved by the time he examined her. He never specifically stated what the cause of that condition was. Based upon our review of the record, we must find that the employee failed to establish that she developed right stenosing tenosynovitis as a result of her employment with Bell Atlantic.

For the aforesaid reasons, the employer's reasons of appeal are denied and dismissed in their entirety. The employee's appeal is hereby denied in part and granted in part. In accordance with our decision, a new decree shall enter containing the following findings and orders:

1. That the petitioner/employee has proven by a fair preponderance of the credible evidence that she developed right carpal tunnel syndrome arising out of and in the course of her employment with the respondent, connected therewith and referable thereto, of which the respondent had knowledge.

2. That the right carpal tunnel syndrome, an occupational disease, resulted in disablement on May 19, 1999.

3. That the petitioner/employee also became disabled on that date due to an aggravation of pre-existing cervical spine osteoarthritis and a herniated disc at C4-5 with multiple osteophytes at C5-6 and C6-7.

4. That the petitioner/employee became totally disabled from May 19, 1999 through May 27, 1999, and partially disabled from May 28, 1999 and continuing.

5. That the petitioner/employee's average weekly wage is Seven Hundred (\$700.00) Dollars.

6. That the petitioner/employee has four (4) dependent children – Kristin (date of birth 6/16/86), Edward (date of birth 9/28/87), Alexander (date of birth 12/6/91), and Andrew (date of birth 7/31/97).

7. That the petitioner/employee received Temporary Disability Insurance benefits.

8. That the petitioner/employee has failed to establish by a fair preponderance of the credible evidence that she developed right stenosing tenosynovitis as a result of her employment with the respondent.

It is, therefore, ordered:

1. That the respondent/employer shall pay to the employee weekly benefits for total incapacity, including dependency benefits, from May 19, 1999 through May 27, 1999, and weekly benefits for partial incapacity from May 28, 1999 and continuing until further order of this court or agreement of the parties.

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

3. That the respondent/employer shall reimburse TDI in accordance with R.I.G.L. § 28-41-6, and take credit in that amount against any weekly benefits due to the employee.

4. That the respondent/employer shall pay a counsel fee in the amount of Five Thousand (\$5,000.00) Dollars to Gregory L. Boyer, Esq., attorney for the employee, for his successful prosecution of this petition plus costs upon presentation of payment for same.

5. That the respondent/employer shall pay an expert witness fee to Arnold-Peter Weiss, M.D., in the amount of Nine Hundred (\$900.00) Dollars for his expert testimony at two (2) depositions.

6. That the respondent/employer shall reimburse Gregory L. Boyer, Esq., the sum of Two Hundred Seventy-Five (\$275.00) Dollars for the cost of filing the employee's appeal and the cost of the transcript.

7. That the respondent/employer shall pay a counsel fee in the amount of One Thousand (\$1,000.00) Dollars to Gregory L. Boyer, Esq., for the partially successful prosecution of the employee's appeal and successful defense of the employer's appeal.

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

Healy and Sowa, JJ. concur.

ENTER:

Healy, J.

Olsson, J.

Sowa, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

ALFREDA BADWAY)

)

VS.)

W.C.C. 00-01198

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BELL ATLANTIC)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the appeals of both the petitioner/employee and the respondent/employer from a decree entered on December 19, 2001.

Upon consideration thereof, the appeal of the respondent/employer is denied and dismissed and the appeal of the petitioner/employee is sustained, and in accordance with the decision of the Appellate Division, the following findings of fact are made:

1. That the petitioner/employee has proven by a fair preponderance of the credible evidence that she developed right carpal tunnel syndrome arising out of and in the course of her employment with the respondent, connected therewith and referable thereto, of which the respondent had knowledge.

2. That the right carpal tunnel syndrome, an occupational disease, resulted in disablement on May 19, 1999.

3. That the petitioner/employee also became disabled on that date due to an aggravation of pre-existing cervical spine osteoarthritis and a herniated disc at C4-5 with multiple osteophytes at C5-6 and C6-7.

4. That the petitioner/employee became totally disabled from May 19, 1999 through May 27, 1999, and partially disabled from May 28, 1999 and continuing.

5. That the petitioner/employee's average weekly wage is Seven Hundred (\$700.00) Dollars.

6. That the petitioner/employee has four (4) dependent children – Kristin (date of birth 6/16/86), Edward (date of birth 9/28/87), Alexander (date of birth 12/6/91), and Andrew (date of birth 7/31/97).

7. That the petitioner/employee received Temporary Disability Insurance benefits.

8. That the petitioner/employee has failed to establish by a fair preponderance of the credible evidence that she developed right stenosing tenosynovitis as a result of her employment with the respondent.

It is, therefore, ordered:

1. That the respondent/employer shall pay to the employee weekly benefits for total incapacity, including dependency benefits, from May 19, 1999 through May 27, 1999, and weekly benefits for partial incapacity from May 28, 1999 and continuing until further order of this court or agreement of the parties.

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

3. That the respondent/employer shall reimburse TDI in accordance with R.I.G.L. § 28-41-6, and take credit in that amount against any weekly benefits due to the employee.

4. That the respondent/employer shall pay a counsel fee in the amount of Five Thousand (\$5,000.00) Dollars to Gregory L. Boyer, Esq., attorney for the employee, for his successful prosecution of this petition plus costs upon presentation of payment for same.

5. That the respondent/employer shall pay an expert witness fee to Arnold-Peter Weiss, M.D., in the amount of Nine Hundred (\$900.00) Dollars for his expert testimony at two (2) depositions.

6. That the respondent/employer shall reimburse Gregory L. Boyer, Esq., the sum of Two Hundred Seventy-Five (\$275.00) Dollars for the cost of filing the employee's appeal and the cost of the transcript.

7. That the respondent/employer shall pay a counsel fee in the amount of One Thousand (\$1,000.00) Dollars to Gregory L. Boyer, Esq., for the partially successful prosecution of the employee's appeal and successful defense of the employer's appeal.

Entered as the final decree of this Court this day of

BY ORDER:

ENTER:

Healy, J.

Olsson, J.

Sowa, J.

I hereby certify that copies were mailed to Gregory L. Boyer, Esq., and
Thomas M. Bruzzese, Esq., on
