STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

STANLEY KOZLOWSKI)
)
VS.) W.C.C. 00-06227
)
R.G. WALKER, INC. /MOSSBERG)
REEL AND STAMPING CO., INC.
)

DECISION OF THE APPELLATE DIVISION

CONNOR, J. This matter came to be heard before the Appellate Division upon an appeal of the petitioner/employee from a decision and decree of the trial judge which was entered on September 11, 2002. This matter was heard in the nature of an Original Petition alleging a work-related injury described as an occupational disease injury to the employee's right arm sustained on or about February 10, 1999. The employee seeks total or partial compensation benefits from February 11, 1999 and continuing. The employee also seeks medical benefits for treatment of the work injury.

The decree of the trial judge provided:

> "1. That on February 10, 1999 the employee sustained a rupture to the right biceps muscle arising out of and in the course of his employment.
>
> "2. That the employee continued on his regular job until he voluntarily retired at the end of December, 1999.

"3. That no medical evidence has been introduced to establish that the employee was unable to perform his regular job, or that he sustained any loss of earning capacity prior to his retirement.

"4. That medical services were necessary to care, cure, relieve, and rehabilitate the employee from the effects of his work-related injury.

"5. That after a period of providing for the employee's medical treatment, the employer then refused to provide such treatment.

"It is, therefore, ordered:

"1. That the employee's petition seeking weekly compensation benefits commencing February 11, 1999 is hereby denied and dismissed.

"2. That the Respondent is ordered to pay all reasonable medical, hospital and surgical bills in accordance with the provisions of the Workers' Compensation Act."

From said decree, the petitioner/employee has duly claimed his right of appeal and has filed seven (7) Reasons of Appeal in support thereof.

The employee testified that he was employed by Mossberg Reel and Stamping Company in 1999. The employee began working for the company in 1971. From 1971 through 1999, the business was sold several times and went through several name changes. The employee worked as a maintenance repairman/machinist. He testified that he did heavy labor consisting of a lot of hammer and sledgehammer work. He also worked with pipe wrenches and heavy presses. The employee continued to work for this company until December 31, 1999.

The employee had an average weekly wage of Six Hundred Eighty-five and 45/100 ($685.45) Dollars.

The employee stated that on February 10, 1999 he injured his right bicep. The injury occurred while swinging a sledgehammer. He went to Notre Dame Hospital and then had follow-up treatment with Dr. Mehrdad M. Motamed. He continued to perform his regular work and for a short time Travelers Insurance paid his medical bills.

On October 19, 1999, the employee was performing the same job when he suffered an injury to his left arm. He reported this injury to his foreman. He sought medical treatment with Dr. Richard E. Murphy. The employee was out of work for a few weeks as a result of this incident and he was paid workers' compensation benefits by the Beacon Mutual Insurance Company. He returned to his regular job on November 8, 1999.

The employee stated that when he returned to work in November of 1999, he was performing his regular job and earning the same amount of money that he was earning before he was injured. He continued to work in this capacity through December 31, 1999.

The employee acknowledged that during the period from November 1999 to the time he retired, no one complained to him about the way he was performing his job. He testified that he was supposed to have assistance with his job duties but he was not provided with any help.

The employee testified that on December 31, 1999, he left work "Because I can't work no more. My injury. I got a back injury before, my ribs." (Tr. p. 20). He testified that he could not handle his job anymore because his injury stopped him from working. The employee acknowledged that he left work because his arms, as well as his back and his knees, were bothering him.

The employee retired on December 31, 1999. He completed forms indicating his intention to retire. The employee acknowledged receiving a Five Hundred ($500.00) Dollar retirement bonus from his employer on the date he last worked for the company. He testified that he told people at the company that he was retiring because of his injury.

Prior to the company being owned by Mossberg Reel and Stamping, the company was owned by Mossberg Hubbard and retirement benefits were made available to the employee. The employee participated in, and made contributions to, the plan provided by Mossberg Hubbard. The employee also had some profit sharing benefits available to him pursuant to a 401(k) he started while working for Mossberg Reel and Stamping.

The employee testified that he presently has income from Social Security retirement as well as from a retirement plan that he had while he worked with Mossberg Hubbard. The employee acknowledged that no one told him that he had to retire and that he applied for Social Security retirement benefits and is receiving same. The employee testified that he receives two (2) checks from Social Security - one (1) in the amount of One Thousand ($1,000.00) Dollars for

retirement and another supplement of One Hundred ($100.00) Dollars for disability. The employee stated that he applied for his retirement benefits from Mossberg Hubbard in January 2000 and he began receiving same in March 2000.

The employee stated that he saw Dr. Murphy on December 29, 1999 at which time Dr. Murphy did not tell him that he could no longer work. Dr. Murphy had told him in the past that he should not lift more than twenty-five (25) pounds; however, the doctor gave him no specific instructions with respect to his work on that date.

The employee asserted that when he saw Dr. Murphy he not only complained of problems with his right bicep, but he also complained about problems in his joints including his back, his neck, and his hips. He indicated that he asked Dr. Murphy to perform surgery on his right bicep, but the doctor would not do the surgery. This is the same response he received from Dr. Motamed to the same request.

John K. Chakuroff, the plant manager since 1991, testified that he knew the employee as a former maintenance man for the company. He stated that the employee reported directly to Ken Heckbert, who in turn, reported to him. Mr. Chakuroff testified that the employee told him that he planned on retiring. He never told him he was physically unable to perform his job.

Dr. Richard E. Murphy, an orthopedic surgeon, testified by deposition. He first saw the employee on September 15, 1999, at which time the employee told him that he suffered an injury to his right bicep. The doctor examined the

employee and diagnosed him with a ruptured bicep. The doctor felt that this injury was consistent with the history provided by the employee and that the injury occurred at work. The doctor felt that the employee could do some work because he did not see the employee until seven (7) months after this incident occurred. The doctor opined that he should not perform "heavy, heavy lifting." He would want him to lift thirty (30) pounds or less.

Dr. Murphy subsequently saw the employee for a second injury that occurred on October 28, 1999 to his left arm. The doctor conducted a physical examination and reached a diagnosis of a partial tear in the left bicep. He felt that the tear was related to the incident of October 28, 1999 as described to him by the employee. With regard to this injury, the doctor kept the employee out of work through November 8, 1999.

Dr. Murphy saw the employee on December 29, 1999 at which time the employee was complaining of numbness into his forearm and hand and waking up at night with pain. Dr. Murphy felt that the employee was suffering from cervical radiculitis and ordered an MRI.

Dr. Murphy acknowledged during cross examination that he was uncertain as to whether the employee ever stopped working during the course of his treatment. He stated that he never really treated him with regard to his right arm complaints, other than to give him some anti-inflammatory medication. The doctor further admitted during further cross-examination that he never disabled the employee after he returned him to work on November 8, 1999 with regard to

his left arm. The doctor stated that he continues to treat the employee for cervical problems.

A review of the doctor's report regarding the December 29, 1999 visit with the employee indicates that the employee complained of increasing discomfort in his left arm and numbness into his forearm. The doctor felt that the employee was getting cervical radiculitis. The doctor reviewed x-rays of the employee's cervical spine which revealed a significant degree of cervical spondylolysis. The doctor recommended that he use a cervical pillow and if he continued to have symptoms, the doctor was going to place him in cervical traction and/or send him to physical therapy. The doctor continued to treat the employee on a monthly basis for symptoms involving his cervical area. An MRI on April 6, 2001 revealed significant cervical spondylolysis with osteophyte formation and foraminal narrowing.

Dr. Mehrdad M. Motamed, an orthopedic surgeon, testified by deposition. He examined the employee for the first time on January 18, 1999 for a back injury. He then treated him again on February 12, 1999, at which time he took a history from him of an injury at work involving his right bicep. The doctor conducted a physical exam and following that exam reached a diagnosis that the employee suffered from a rupture of the long head of the biceps. It was his opinion that that rupture occurred as a result of the work incident. The doctor acknowledged that when he saw the employee, the employee was continuing to perform his regular work. The doctor felt that he could continue to perform that

type of work but he should avoid lifting objects of fifty (50) pounds or more. Dr. Motamed stated that based on a reasonable degree of medical certainty his opinion with regard to the employee's restrictions remained the same when he saw him again in July 1999.

The doctor testified that he saw the employee again on August 23, 2000 and at that time the employee was also treating with Dr. Murphy. Dr. Motamed understood that Dr. Murphy was treating him for his back. The doctor indicated that when he saw the employee in August of 2000, his condition was similar to his condition when he last saw him on July 7, 1999. The doctor acknowledged that the limitations he placed on the employee never changed.

Dr. Motamed testified that when he stated that he would allow the employee to perform "moderate activities" in January 1999, he meant the employee could do whatever he was capable of doing in terms of his regular job. The doctor did not want him to lift more than fifty (50) pounds because the employee had a potentially unstable shoulder as a result of his bicep injury. The doctor understood that when he saw the employee in August of 2000, he was continuing to perform moderate activities. The employee did not tell the doctor that he had retired. The doctor felt that with regard to the right bicep rupture, the employee reached maximum medical improvement as of July 1999.

At the conclusion of this matter, the trial judge found that the employee had sustained a right arm injury while in the course of his employment, but had not shown that he suffered any loss of earning capacity due to that injury. The

trial judge acknowledged that both Dr. Motamed and Dr. Murphy prescribed weight limitations regarding the employee's lifting at work, however the trial judge found that it was evident from the testimony presented that between February 1999 and December 1999 the employee was able to perform his regular job.

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)). Cognizant of this legal duty imposed upon us, we have carefully reviewed and examined the entire record and for the reasons hereinafter set forth, we find no merit in the appeal as set forth by the employee and we, consequently, affirm the decree of the trial judge.

With regard to the employee's first three (3) Reasons of Appeal, the Rhode Island Supreme Court has long held that the Workers' Compensation Appellate Division may decide only those questions of law properly raised on appeal. Bissonnette v. Federal Dairy Co., 472 A.2d 1223, 1226 (R.I. 1984); Lamont v. Aetna Bridge Co., 107 R.I. 686, 690, 270 A.2d 515, 518 (1970); Peloso v. Peloso Inc., 107 R.I. 365, 372, 267 A.2d 717, 722 (1970). The Rhode Island Supreme Court has frequently stated that the Workers' Compensation Appellate Division, "generally may not consider an issue unless the 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); State v. Hurley, 490 A.2d 979, 981 (R.I. 1985).

In order for issues to be properly raised 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, ". . . 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, 472 A.2d 1223 (R.I. 1984). General recitations that a trial judge's decree was against the law and the evidence fail to meet the specificity requirements of R.I.G.L. § 28-35-28. Falvey, 584 A.2d 417 (R.I. 1991).

Under the aforementioned binding authority, the employee's first three (3) Reasons of Appeal fail to meet the required standard of specificity. Accordingly, they are denied and dismissed.

With regard to the employee's fourth and fifth Reasons of Appeal, the employee alleges that the trial judge committed error because he failed to assess the medical testimony and the employee's testimony which together established that the employee had not left work voluntarily. The employee alleges that the evidence established that he left work because he could no longer perform the regular duties of his job without pain and he was partially disabled at the time of his retirement. We disagree.

A thorough review of the record indicates that the trial judge carefully reviewed the medical evidence presented by Drs. Motamed and Murphy. He also carefully considered the employee's testimony regarding his retirement. Specifically, the employee acknowledged receiving and applying for retirement benefits both from Social Security and from a private insurance plan. He stated in his testimony that he left work because he had pain. He acknowledged that he not only had pain in his upper extremities, but he also had pain in his back and neck. In fact, he was treating with Dr. Murphy for cervical radiculitis two (2) days before his retirement.

It is clear from the employee's testimony that prior to the time of his retirement on December 31, 1999, he did not miss any time from work as a result of his injury to his right arm, and he also acknowledged that he was able to perform his regular job duties through the date of his retirement. The employee testified that when he retired from his job, his arms, his back, his neck and his knees were bothering him. A witness on behalf of the employer testified that it was his understanding that the employee retired and he did not have any information from him with regard to any disability that he was suffering from at the time of his retirement.

We find that there is substantial evidence in the record to support the trial judge's findings with regard to the employee's lack of disability as a result of this injury and as to the employee's voluntary retirement in December of 1999. Although there was conflicting testimony regarding the voluntary nature of the

employee's retirement, the trial judge is in the best position to address the credibility of witnesses that appear before him. Any witness's credibility is subject to evaluation by the trial judge who may reject all or part of it as unworthy of belief. Buonauito v. Ocean State Dairy Distrib., 509 A.2d 988, 991 (R.I. 1986). Such a finding is not reversible upon appeal, if it is supported by competent evidence. Delage v. Imperial Knife Co., 121 R.I. 146, 148, 396 A.2d 938, 939 (1979). Based upon the record, we cannot say that the trial judge was clearly wrong in concluding that the employee did not suffer any disability from his February 10, 1999 injury to his right bicep and that his retirement on December 31, 1999 was voluntary.

The employee's next two (2) Reasons of Appeal allege that the trial judge committed error because he failed to apply the correct legal standard for establishing impairment of earning capacity and narrowly construed the governing statutes and the case law in assessing whether the employee had left work voluntarily or was prevented from working due to the pain associated with his work-related injuries. Once again, it is clear after a thorough review of the record in this case that the trial judge carefully considered the medical evidence, as well as the employee's testimony with regard to his retirement.

It is clear that at the time of his retirement, the employee had other physical complaints in addition to those involving his right arm. The medical reports establish that he complained of pain in his back and in his joints and was treating with Dr. Murphy for problems with his neck. There is no medical

evidence in the record that specifically states that the employee was unable to continue to perform his regular job as of December 31, 1999 solely due to problems with his right upper extremity. The employer and the employee acknowledge that the employee capably performed his regular job duties following his February 10, 1999 injury to his right bicep and, other than a short period of time that the employee was out for a left bicep injury, the employee continued to perform his regular job until his retirement on December 31, 1999.

It is well established that ". . . weekly workers' compensation benefits are not paid to a worker because of a physical disability but rather because one has, as a result of a work-related condition or injury, suffered a loss of one's earning capacity." Mullaney v. Gilbane Bldg. Co., 520 A.2d 141, 143 (R.I. 1987). There is ample evidence in the record to support the trial judge's conclusions that the employee voluntarily retired and that at the time of his retirement he was performing his regular job and had not suffered a loss of earnings capacity.

In addition, although not addressed by the trial judge in his decision, even if the employee was found to be disabled at the time of his retirement, R.I.G.L. § 28-33-45(c) provides that an employee may not collect any indemnity benefits for any injury sustained less than two (2) years prior to his or her retirement. The word "injury" has been construed to mean the first date of incapacity, not the date of the original injury. See Spencer vs. Triangle Wire & Cable, W.C.C. No. 95-08862 (App. Div. 4/21/01).

In this petition, the employee is alleging that his first date of incapacity occurred when he left the work force on or about January 1, 2000. At that time, the employee had retired and had applied for retirement benefits. He, in fact, began receiving retirement benefits from his private retirement program in March of 2000. Even if the trial judge found the employee to be partially disabled at the time of his retirement on December 31, 1999, the employee would be precluded from receiving benefits pursuant to the mandates of R.I.G.L. § 28-33-45(c).

For the reasons set forth above, we affirm the decision and decree of the trial judge and deny and dismiss the employee's Reasons of Appeal.

In accordance with Sec. 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

Healy and Olsson, JJ. concur.

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Healy, J.

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Olsson, J.

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Connor, J.

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before 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 11, 2002 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Healy, J.

_____
Olsson, J.

_____
Connor, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq. and Gerard S. Lobosco, Esq. on _____