

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

CARLOS DELGADO

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VS.

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W.C.C. 00-06811

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TECH TRANSPORTATION

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DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter came to be heard before the Appellate Division upon a petitioner/employee's appeal of the decision of the trial judge in which he found that the employee was disabled for only a closed period of time as a result of his work-related injury. The employee contends that there was no credible evidence in the record to establish that his incapacity had ended. After review of the record, we affirm the conclusions of the trial judge.

The employee, Carlos Delgado, was employed as a truck driver at Tech Transportation in Pawtucket, Rhode Island. The employee would drive long haul trucking routes, usually to Texas or Florida. In performing his regular job duties, he would occasionally load or unload his trailer. He would also be required to sit for long periods of time while driving long haul routes.

On October 18, 2000, while unloading a delivery in Kissimmee, Florida, Mr. Delgado sustained work-related injuries to his neck, upper back and low back.

His first medical treatment was at Memorial Hospital of Rhode Island on October 23, 2000. The diagnosis was a back strain and right inguinal hernia. No complaints regarding the neck or upper back were recorded at that time. He was referred to the surgery clinic for evaluation of the hernia. On October 25, 2000, in the surgery clinic, no hernia was detected. The employee complained of low back pain radiating down his right leg. He was then referred to the orthopedic clinic.

Mr. Delgado was seen in the orthopedic clinic on November 9, 2000 by a resident doctor and also by Dr. Charles B. Eaton for complaints of neck, middle back and lower back pain. MRI studies of the cervical and thoracic spines were recommended. These studies were done on November 24, 2000. The dorsal spine study was normal and the cervical spine MRI revealed a moderate central and leftward protrusion at C5-6 and smaller protrusions at the other levels. The employee returned to the clinic on December 14, 2000. He complained of low back pain radiating down his right leg with numbness and tingling, as well as upper thoracic pain. He was referred for a neurosurgical consultation.

Dr. Samuel H. Greenblatt, a neurosurgeon, evaluated the employee on January 5, 2001 for complaints of pain at the base of his neck on the right radiating through the right scapula and down the thoracic spine to the low back and down the right leg to his foot. Mr. Delgado indicated that all of these problems had been present since the incident on October 18, 2000 and were getting worse. The doctor noted that the results of the cervical spine MRI were

likely of no clinical significance and he had no explanation for the cervical and thoracic spine complaints. He did recommend a lumbar spine MRI. This MRI was done on January 29, 2001 and revealed only a small disc protrusion bilaterally at L5-S1 with no impingement.

When Mr. Delgado returned to see Dr. Greenblatt on February 21, 2001, he continued to complain of severe back and right leg pain. Based upon the results of the MRI, the doctor advised him that he had nothing to offer him neurosurgically and referred him back to Dr. Eaton.

Dr. Eaton testified that he only saw the employee on November 9, 2000 and then on April 12, 2001. On November 9, 2000, he was of the opinion that the employee's condition was due to the lifting incident on October 18, 2000 and that the employee was unable to work for the next four (4) weeks while they waited for an MRI study of his neck. On April 12, 2001, the employee was complaining of severe right-sided leg pain and low back pain which he rated a nine (9) out of ten (10). Dr. Eaton continued to relate his condition to the work injury in October and maintained that the employee remained unable to work.

The doctor acknowledged that his opinion regarding disability in April was based upon the employee's subjective complaints of pain. He also indicated that the employee had stated that he was in continual pain from November to April and was unable to do any work.

Coleman Holean, a private investigator, testified that he observed the employee on two (2) separate occasions. On December 30, 2000, the employee

was seen leaving his home in Central Falls with a man and a woman and driving to Sebastian Trucking near the Cranston/Warwick line. At Sebastian Trucking, the employee climbed up and opened the hood of a tractor trailer. He then proceeded to lean over it and get up and down and walk around it for a period of twenty (20) to thirty (30) minutes.

Mr. Holean further testified that he saw Mr. Delgado enter a second truck, spend several minutes doing something in the cab, start the truck, and then move it to another spot on the lot. The employee then left in his own vehicle and was followed by Mr. Holean to another location in Cranston where he entered a tractor trailer and drove it back to Sebastian Trucking and parked it in the spot he had moved the other truck from. Mr. Holean indicated that the employee appeared to move freely and without difficulty in walking and getting in and out of the trucks without assistance.

In his testimony, Mr. Delgado denied that he had been working for Sebastian Trucking and explained that he was friendly with the owners and had worked for them years ago. He stated that he would sometimes go there and give verbal advice and assistance to them because one of the mechanics did not speak English.

The trial judge determined that the employee's incapacity for work ended on December 30, 2000, although he acknowledged that there was no medical opinion on that date indicating that the employee was capable of working.

"Now the date I am picking is a date for which I have no specific medical evidence. However, what I do have are actions by Mr.

Delgado which are completely inconsistent with what he has been reporting to Dr. Eaton concerning this supposedly excruciating pain which he has which doesn't allow him to do anything." (Tr. p. 205).

The trial judge further noted that there was not much in the way of objective evidence to support the employee's complaints. The trial judge stated,

"Dr. Greenblatt can't find anything, but what I do have is I have photos at Sebastian Trucking or Sebastian on December 30 and Mr. Holean's testimony that Mr. Delgado can lift the loads of tractor trailers. He can bend over, climb up, put fluid in and that he can drive tractors even only 15-minute rides. That's far in excess of what Mr. Delgado has been telling everybody he feels capable of doing. I think from that as respect to Mr. Delgado's evidence supporting continued disability from Dr. Eaton is based upon a very inaccurate impression on Dr. Eaton's part that Mr. Delgado has such crippling pain that he is almost able [unable] to do anything." (Tr. p. 205-206)

The employee filed a single reason of appeal in which he asserts that there is insufficient credible evidence to conclude that his disability ended on December 30, 2000.

Pursuant to Rhode Island General Laws § 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 only after finding that the trial judge was clearly wrong. Id.; Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986). We have carefully reviewed the entire record of this proceeding and we find no merit in the employee's appeal.

The Rhode Island Supreme Court has consistently held that the trial judge is in the best position to assess the credibility of witnesses and then use those

assessments to accept or reject the evidence presented to the court. Davol, Inc. v. Aguiar, 463 A.2d 170 (R.I. 1983). An appellate panel reviewing such a decision must find that the trial judge was clearly wrong, or overlooked, or misconceived material evidence in arriving at that determination, in order to overturn a trial court's credibility assessment.

Based upon the testimony of Mr. Holean regarding his observations of Mr. Delgado, the trial judge concluded that the employee was not being forthright in his statements to his doctors about his physical condition and complaints. Mr. Holean's testimony called into question Mr. Delgado's credibility, as well as the accuracy and reliability of Dr. Eaton's medical findings.

If the history given to a physician is rejected as lacking in credibility or accuracy, the court is free to reject the medical opinions of the physician as incompetent due to the inadequate or tainted foundation. Mazzarella v. ITT Royal Elec., 120 R.I. 333, 388 A.2d 4 (R.I. 1978); Macomb v. Pride Hyundai, W.C.C. No. 97-02419 (App. Div. 1999). The court may reject uncontradicted medical evidence where it is based upon an "improper foundation or is inherently improbable." Hughes v. Saco Casting Co., 443 A.2d 1264 (R.I. 1982). Here, the medical evidence was not accepted by the trial judge as competent evidence because of the inconsistencies between the employee's activities as described by Mr. Holean and Mr. Delgado's statements to Dr. Eaton as to his physical abilities. Dr. Eaton testified that his opinions in April 2001 were based upon the employee's subjective complaints of pain. The trial judge did not find the

employee's statements about his physical condition to be credible at that point, in light of his activities at Sebastian Trucking. We cannot find that he was clearly erroneous in rejecting the opinions of Dr. Eaton, with regard to disability after December 2000.

The trial judge found that the employee's disability ended as of December 30, 2000, which is the day Mr. Delgado was observed at Sebastian Trucking. This was not simply an arbitrary moment in time. The employee's activities on that day indicated to the trial judge that he was physically capable of more activity than he was leading the court or his doctors to believe. The subsequent medical opinions regarding disability were rejected as lacking foundation and the medical opinions immediately prior were also called into question. Lacking any competent medical evidence to support ongoing disability, the trial judge acted properly in terminating the period of disability as of December 30, 2000.

For the aforesaid reasons, the Employee's Reason of Appeal is hereby denied and dismissed and the trial judge's decision and decree is affirmed.

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

Arrigan, C.J. and Healy, J. concur.

ENTER:

Arrigan, C.J.

Healy, J.

Olsson, 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 November 8, 2001 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

ENTER:

Arrigan, C.J.

Healy, J.

Olsson, J.

I hereby certify that copies were mailed to Jack R. DeGiovanni, Jr., Esq.,
and Tedford Radway, Esq., on
