

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT  
APPELLATE DIVISION

GEORGE KOUSOULAS

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VS.

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W.C.C. 00-07809

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P & T RESTAURANTS, INC.

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DECISION OF THE APPELLATE DIVISION

SALEM, J. This matter was heard before the Appellate Division upon the petitioner/employee's appeal from the decree of the trial court entered on June 6, 2002. This matter was heard as an employee's Original Petition seeking workers' compensation benefits for an alleged low back injury sustained on September 20, 2000. The petition seeks total disability benefits from September 21, 2000 to the present and continuing. A Pretrial Order was entered on January 26, 2001 denying the petition. From that order, a claim for trial was filed by the employee's counsel.

After trial on the merits of the case, the trial judge denied and dismissed the employee's petition based upon the finding that the employee had failed to prove by a fair preponderance of the credible evidence that he sustained an injury on September 20, 2000, or any other day, arising out of or in the course of his

employment with the respondent. From that decision and decree, the employee's appeal followed.

The petitioner, George Kousoulas, has worked as both a chef and manager in the restaurant business for over forty (40) years. He has also owned restaurants during that time period. In his Original Petition he alleges that on September 20, 2000, he injured his low back while in the course of his employment at Pat Orlando's Restaurant located on Route 44 in Johnston, Rhode Island. Pat Orlando's Restaurant is part of P & T's Restaurants, Inc.

At trial, Mr. Kousoulas testified that on September 20, 2000, he was working at Pat Orlando's Restaurant and injured his back while tenderizing chicken cutlets. According to Mr. Kousoulas' testimony, he was carrying a tray of chicken cutlets weighing approximately thirty (30) to thirty-five (35) pounds and "jarred" his back while walking from the kitchen area to a lower landing that was ". . .like a step." (Tr. pp. 31-33). Mr. Kousoulas further testified that he did not fall to the floor, nor did he drop the tray of chicken cutlets. The petitioner stated that he did not notify anyone that he injured his back on the date of the alleged injury and he left work at 5 p.m. without incident. Mr. Kousoulas' testimony indicated that on the following day, via telephone, he notified Mr. Orlando, the owner of Pat Orlando's Restaurant, that he had injured himself.

The trial also included live courtroom testimony of Mr. Pat Orlando. According to Mr. Orlando's testimony, Mr. Kousoulas did work at his restaurant, but the date was August 20, 2000, and not September 20, 2000. Mr. Orlando

further testified that Mr. Kousoulas did not inform him that he was injured until he saw him several days later when Mr. Kousoulas came in to pick up his pay.

In addition to the courtroom testimony of Mr. Kousoulas and Mr. Orlando, there was live courtroom testimony from two (2) employees of the restaurant - Ms. Michelle Schrenk and Mr. Dennis Varin. Their testimony contradicts that of Mr. Kousoulas. The employer also submitted into evidence, *inter alia*: photographs of the step or landing in question located inside Pat Orlando's Restaurant (Res. Exh. A); *The Echo* newspaper advertisements dated September 14, 2000 (Res. Exh. B); and *Providence Journal Bulletin* help wanted ads dated August 18 & 21, 2000 (Res. Exh. C). In addition, the trial judge viewed the premises of the restaurant and specifically inspected the step/landing in question.

The medical evidence presented to the court consisted of the following: two (2) affidavits from Atmed Treatment Center (Pet. Exhs. 1 & 1B); Dr. Ossama Labib's affidavit (Pet. Exh. 2); Dr. A. Louis Mariorenzi's affidavit (Res. Exh. B); the deposition testimony of Dr. A. Louis Mariorenzi; and the deposition testimony of Dr. Ossama W. Labib.

After a thorough review of all of the evidence presented by the parties, including the medical evidence presented by the employee and the employer, and an on site personal viewing of the work premises by the trial judge, said trial judge found that the employee had not established that he was injured on September 20, 2000, or any other day, while working for the

respondent/employer. Consequently, the employee's petition was denied and dismissed.

The employee filed the following as his Reasons of Appeal from the decree entered by the trial judge on June 6, 2002:

"1. The decision is against the law.

"2. The decision is against the evidence.

"3. The decision is against the law and the evidence and the weight thereof.

"4. The Trial Judge was clearly erroneous to find the employee did not prove he sustained a work related injury on September 20, 2000, based upon the incompetent medical evidence of Dr. Mariorenzi.

"5. The Trial Judge was clearly erroneous to find the employee did not sustain a work related injury, by rejecting the opinion of Dr. Labib as based on an inaccurate history."

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 only when a finding is made that the trial judge was clearly wrong. Id.; 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. For the reasons set forth, we find that the trial judge did not commit clear error and, therefore, find no merit in the

employee's appeal. Consequently, we affirm the trial judge's decision and decree.

The Rhode Island Supreme Court has long held that the Workers' Compensation Appellate Division may decide only those questions of law properly raised before it. Bissonnette v. Federal Dairy Co., Inc., 472 A.2d 1223, 1226 (R.I. 1984); Lamont v. Aetna Bridge Co., 107 R.I. 686, 690, 270 A.2d 515, 518 (1970). 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 party seeking review." 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 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 Court 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 is against the law and the evidence fail to meet the specificity requirements of R.I.G.L. § 28-35-28. Id.

Under the aforementioned binding authority, the employee's first three (3) Reasons of Appeal are denied and dismissed.

The fourth and fifth Reasons of Appeal encompass basically the same issue: that the trial judge erred in rejecting the medical opinions of one (1) doctor and accepting the opposing medical opinions of another doctor. Both reasons of appeal are without merit.

It is well settled that the employee bears the burden of producing credible evidence of probative force to support his or her petition for workers' compensation benefits. Meketsy v. Roger Williams Foods, 526 A.2d 1276 (R.I. 1987); Delage v. Imperial Knife Co., Inc., 121 R.I. 146, 148, 396 A.2d 938, 939 (1979). More precisely, "[t]he employee bears the burden of proving allegations contained in the petition for compensation by a fair preponderance of credible evidence." Blecha v. Wells Fargo Guard-Co. Serv., 610 A.2d 98, 102 (R.I. 1992), (citing Mastronardi v. Zayre Corp., 120 R.I. 859, 862-63, 391 A.2d 112, 115 (1978)).

The trial judge found that the petitioner had not successfully satisfied his burden of proving that he sustained a work-related injury on September 20, 2000. Similarly, the petitioner has failed to persuade the Appellate Division that the trial judge was clearly erroneous for so holding.

It has long been held that when assessing conflicting medical opinions of competent and probative value, it is the prerogative of the trial judge to accept the medical opinions of one (1) healthcare provider over those of another. Parenteau v. Zimmerman Eng'g., Inc., 111 R.I. 68, 78, 299 A.2d 168, 174

(1973). In the present matter, the trial judge explained why he found the opinions of Dr. Marioenzi to be more probative:

“The Court accepts the testimony of Dr. Marioenzi over that of Dr. Labib. His testimony is consistent with the factual history and is based on radiological findings and a paucity of objective findings, as opposed to Dr. Labib, whose testimony was inconsistent with his office notes, and the history given by the patient.” (Tr. decision, pp. 5-6)

The employee argues that because Dr. Marioenzi did not have a detailed description of the employee’s job, his opinions are not competent. Certainly, knowledge of the employee’s normal job duties is relevant to a determination as to the degree of disability or whether the employee is capable of returning to that job. However, lack of knowledge of the job duties does not destroy the probative value of an opinion as to whether the employee actually sustained a work-related injury at all. This was the issue before the trial judge and he chose to rely on the opinions of Dr. Marioenzi to decide this issue.

As noted above, the trial judge explained why he found Dr. Marioenzi’s opinions to be the most probative. His assessment of the medical evidence in this manner is clearly within his authority. Id. He further explained in his decision why he found that the employee was not credible, noting a number of inconsistencies in his testimony. The combination of the lack of credibility of the employee and the well-supported opinions of Dr. Marioenzi led to the conclusion that the evidence preponderated against the employee. We cannot say that this finding is clearly erroneous under the circumstances.

The employee further contends that the trial judge erred in rejecting the opinions of Dr. Labib because they were based upon an inaccurate history. However, it is clear from the decision that the rejection of Dr. Labib's testimony was based upon more than the fact that the history was somewhat inconsistent with the employee's testimony.

"The initial history given to Dr. Labib indicated that the employee tripped and fell. That history was inconsistent with his later history. The issue of spasm on the first visit was also successfully challenged by the respondent. The doctor acknowledged that his opinion as to causality was based on the accuracy of the history given by the patient."

"A review of the medical reports shows that any opinions relating to disability are based on the subjective complaints of the patient and not on any objective findings. That was confirmed by the examination performed by Dr. Mariorenzi in April, 2001 in which he challenged not only the lack of disability but the lack of causality. His diagnosis of osteoarthritis in [sic] consistent with the radiographic findings. Dr. Labib, for whatever reason, did not consider or take into consideration that preexisting condition."  
(Tr. decision, pp. 6-7)

The lack of objective physical findings on examination, the inconsistencies in the employee's version of events, the circumstances of the reporting of the alleged injury, and the delay in obtaining medical treatment all factored into the trial judge's determination that the employee did not establish by a fair preponderance of the credible evidence that he sustained an injury while employed by the respondent. He acted within his scope of authority and discretion in rejecting the opinions of Dr. Labib, and therefore, his findings are not clearly erroneous.

For the foregoing reasons, the employee's Reasons of Appeal are hereby denied and dismissed and we affirm the trial judge's decision and decree.

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

Olsson and Bertness, JJ. concur.

ENTER:

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Olsson, J.

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Bertness, J.

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Salem, 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 June 6, 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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Bertness, J.

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Salem, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq. and  
Berndt W. Anderson, Esq. on

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