STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

STEVEN A. MORETTI)
)
VS.) W.C.C. 01-05076
)
CITY OF PAWTUCKET)

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division in connection with an order directing the parties to appear and show cause why the appeal in this matter is not in order for summary disposition. After hearing the arguments of counsel and reviewing the record, this panel finds that good cause has not been shown and that the appeal may be disposed of at this time.

This matter originated as an employee's Original Petition alleging that he developed stress as a result of events which occurred in his workplace which resulted in incapacity from May 25, 2001 and continuing. At the pretrial conference, the employee's petition was denied and the employee claimed a trial. At the conclusion of that proceeding, the trial judge denied and dismissed the employee's petition after finding that the employee failed to establish that the psychological condition he suffered from was the result of "a situation of greater dimensions than the day-to-day emotional strain and tension which all employees encounter daily without serious mental injury." The employee has filed a claim of

appeal from that decision and decree. After careful review of the record in this matter, we deny the employee's appeal and affirm the findings and orders of the trial judge.

The employee had been working as a water meter reader for about three (3) years for the respondent when he allegedly became disabled, although he had been an employee of the City of Pawtucket for about seventeen (17) years. Mr. Moretti contended that when he first began working, he was told that he should read a minimum of 150 meters in a day. However, this number was increased to 200 and then 250 meters a day. He utilized a hand-held computer which read the meters and recorded the times of readings. He acknowledged that he has been diagnosed with cirrhosis of the liver as a result of contracting hepatitis B at a young age. He is on a waiting list for a liver transplant.

The employee testified that he felt that he was unfairly singled out by his supervisor for repeated warnings and counseling sessions regarding his poor work performance, which was attributed to taking too much time on his breaks and lunch periods and starting late in the morning. He also indicated that the requirement to read at least 250 meters in a day was unreasonable. However, he admitted that other meter readers were criticized for spending too much time on breaks and lunch periods. (Tr. 71) In addition, he acknowledged he was not the only one told they had to increase the number of meter readings per day.

Gerald McCaughey, the employee's supervisor, testified that he met frequently with the employee to give him verbal warnings regarding his work

performance. He also met with Mr. Moretti and his union representatives about every six (6) months in counseling sessions which resulted in written warnings. Mr. McCaughey stated that the employee was repeatedly informed that he was not reading a sufficient number of meters in a day and that it was because he was taking too much time on breaks and lunch periods. Records produced from the hand-held computers used by the meter readers reflected the time elapsed between readings and how many were done. After a counseling session in May 2001, the employee left work and never returned.

The employee introduced the deposition, affidavit and reports of Dr. Charles Denby II and Dr. Ethan H. Kisch, two (2) psychiatrists, in support of his petition. Both physicians found that the employee was suffering from a psychological disorder, although their diagnoses were slightly different. They both attributed his condition to circumstances in the workplace as described by the employee. Mr. Moretti indicated to both physicians that his supervisor was requiring him to meet performance quotas beyond his original expectations when he took the job and he felt harassed by his supervisor. He also expressed concern about losing his job as a result of the problems with his supervisor over his work performance.

The role of the Appellate Division in reviewing factual matters is sharply circumscribed by statute. Rhode Island General Laws § 28-35-28(b) states that "The findings of the trial judge on factual matters are final unless an appellate panel finds them to be clearly erroneous." The Appellate Division is entitled to

conduct a *de novo* review of the evidence only after a finding is made that the trial judge was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996); Grimes Box Co., Inc. v. Miguel, 509 A.2d 1002, 1004 (R.I. 1986). Such review, however, is limited to the record made at trial. Whittaker v. Health-Tex, Inc., 440 A.2d 122 (R.I. 1982).

The employee has presented two (2) arguments on appeal. First, he contends that the trial court erred in failing to appoint an impartial medical examiner as mandated by statute, and second, that the trial court erred in failing to allow the employee additional time to conduct further discovery in response to the testimony of the employer's witness. We find no merit in the employee's contentions.

The employee alleges that pursuant to R.I.G.L. § 28-34-5, the trial court was required to appoint an impartial physician to examine the employee and file a report with the court. At the time of the employee's injury, R.I.G.L. § 28-34-5 read as follows:

> "The court shall appoint one or more impartial physicians whose duty it is to examine any claimant under this chapter and to make a report in a form that the court requires." (emphasis added)

Prior to the filing of the employee's petition, the legislature amended the statute by substituting "may" for "shall," thereby, making the appointment of an impartial physician discretionary rather than mandatory.

A review of the relevant authorities on this issue clearly indicates that this amendment must be given retroactive effect. In Romano v. B.B. Greenberg Co.,

108 R.I. 132, 273 A.2d 315 (1971), the Rhode Island Supreme Court discussed how amendments to the compensation law should be applied. There the Court noted:

> "In this jurisdiction, an injured worker's right to compensation and the determination of the rate of compensation to be paid him are controlled by the statutory provisions in effect at the time he becomes incapacitated. Sherry v. Crescent Co., 101 R.I. 703, 226 A.2d 819; Ludovici v. American Screw Co., 99 R.I. 747, 210 A.2d 648. Ordinarily, if a newly enacted statute is substantive law, it will have a prospective effect only and will not affect a pending action. Should the legislation be considered procedural, it will be deemed to operate retroactively and will be applied to a cause of action which arose prior to the passage of the act. . . ."
>
> "While there is no precise definition of either term, it is generally agreed that a substantive law creates, defines and regulates rights while a procedural law prescribes the methods of enforcing such rights or obtaining redress. . . ."
>
> "A procedural statute has been defined as one which neither enlarges nor impairs substantive rights but rather relates to the means and procedures for enforcing these rights."

The statute in question does not address the employee's right to a benefit or the level of benefit to which the employee is entitled. It certainly does not change the employee's burden of proof in any way, nor does it provide any additional benefit to the injured worker in those cases where an entitlement to benefits is proven. Rather, it simply changes the question of whether to appoint an impartial examiner from a mandatory act to an exercise of discretion. We do not perceive how an amendment of this nature could ever be viewed as a substantive right.

The employee argues, however, that pursuant to the holding in Poudrier v. Brown University, 763 A.2d 632 (R.I. 2000), the trial court must appoint an impartial physician in cases of alleged occupational disease, regardless of whether the employee specifically requests the appointment. He contends that the failure to do so constitutes clear error and necessitates reversal of the trial decree and remand to the trial judge.

As noted, this panel believes that the amendment must be given retroactive effect and the decision of whether to appoint an impartial examiner would be discretionary. However, assuming, *arguendo*, that the trial judge was required to appoint an impartial physician in this case, we conclude that his failure to do so in this case constitutes harmless error.

In Poudrier, *supra,* conflicting medical testimony was presented by the parties as to the cause of the employee's occupational disease. The Rhode Island Supreme Court noted that under the circumstances, the trial judge could have clearly benefited from the testimony of an independent medical examiner. However, in the present case, there was no conflicting medical testimony. The trial judge denied the employee's petition because the events which caused the employee's psychological disorder did not exceed the normal stress and tensions encountered by employees every day in the workplace.

In order to recover, the employee needed to prove that his emotional stress resulted "from a situation of greater dimensions than the day-to-day emotional strain and tension which all employees encounter daily without serious mental

injury. . . ." See R.I.G.L. § 28-34-2(36); Seitz v. L & R Industries, Inc., 437 A.2d 1345 (R.I. 1981). The trial judge concluded, in the face of uncontradicted medical testimony as to the cause of the employee's condition, that the events at work did not constitute such "dramatically stressful stimuli that were not ordinarily present and expected in the workplace." Rega v. Kaiser Aluminum & Chemical Corp., 475 A.2d 213 (R.I. 1984). The question whether the events or conditions in the workplace satisfy the statutory standard is a legal question, not a medical question. Therefore, even if an impartial medical examiner had been appointed and agreed with the testimony of the employee's physicians, it would not alter the trial judge's determination that the conditions the employee encountered did not rise to the level required by law to establish a compensable injury. Thus, the trial judge's failure to appoint an impartial medical examiner was harmless error.

The second issue raised by the employee is whether the trial judge erred in failing to grant a continuance in order to conduct additional discovery in response to the testimony of the employer's witness, Gerald McCaughey. During his testimony, Mr. McCaughey, the employee's supervisor, referred to computer printouts obtained from the hand-held computer used by the employee to read meters. The printouts detail the location of the meters read and the time expended between readings. The printouts for the period from January to May 2001 from the employee's hand-held computer were eventually introduced into evidence by the employee's counsel. The employee sought a continuance of the

trial in order to obtain printouts regarding the other meter readers in the department and also any documents regarding discipline of other meter readers. He indicated that he needed these records to attempt to show unequal and unfair treatment by his supervisor as compared to treatment of his co-workers.

The trial judge denied the employee's request on two (2) grounds. First, that the employee had ample opportunity to conduct discovery prior to the trial date, and second, that the records regarding other employees were not relevant.

Rule 26(b)(1) of the Superior Court Rules of Civil Procedure allows the extent of discovery to be limited by the court if it determines that ". . . (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought." In the present matter, the employee's case had been on the trial calendar for almost a year prior to his request; he knew for almost a year that the employer intended to call Gerald McCaughey as a witness; and he never attempted in all that time to depose him. In addition, the employee stated that he was aware of the printouts because they had been presented to him at times as evidence of his abuse of break and lunch periods. The employee also knew that his counseling sessions resulted in written warnings which were placed in his personnel file. Therefore, the trial judge concluded that there was "no legitimate reason that I know of that there could not have been discovery done before today that would have led to those records." (Tr. 124)

In addition, the trial judge determined that records relating to other meter readers had no relevance to the employee's claim before the court. The trial

judge explained that he did not feel that the records of the other employees were relevant to the proceedings because the employer's witness had already testified that he never counseled any of the other employees. (Tr. 126) Furthermore, it should be noted that standard for proving a compensable mental injury is not simply that an individual is treated differently than his co-workers in terms of discipline or criticism of work performance. The standard requires proof of a situation of greater dimensions than the type encountered by all employees everywhere. Consequently, a comparison between the supervisor's treatment of the employee and the treatment of a co-worker is irrelevant. Consequently, the trial judge did not abuse his discretion in denying the request for a continuance in order to conduct additional discovery.

Based upon the foregoing, we find that the employee has failed to demonstrate any error on the part of the trial court. Thus, the employee's reasons of appeal are denied and dismissed and the trial decision and decree are affirmed.

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

Healy and Salem, JJ. concur.

ENTER:

____
Healy, J.

____
Olsson, J.

____
Salem, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

STEVEN A. MORETTI	)	
	)	
VS.	)	W.C.C. 01-05076
	)	
CITY OF PAWTUCKET	)	

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 November 8, 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.

____
Salem, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq., and Francis T. Connor, Esq., on

____