STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

RICHARD KOLOGY	)	
	)	
VS.	)	W.C.C. 02-01255
	)	
UNITED BUILDERS SUPPLY CO., INC.	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the petitioner/employee's claim of appeal from the decision and decree of the trial judge denying his request to amend the description of his work-related injury and denying his request that the employer pay for surgery to his right shoulder. After careful review of the record and consideration of the arguments of counsel, we deny and dismiss the employee's appeal and affirm the findings and orders of the trial judge.

The employee received weekly benefits pursuant to a Memorandum of Agreement dated May 11, 2001 which indicates that the employee injured his left shoulder on February 21, 2001 resulting in partial incapacity beginning May 2, 2001 and continuing. He signed a Suspension Agreement and Receipt on July 12, 2001 in which he agreed that his weekly benefits would be stopped as of July

8, 2001. The employee then filed a petition to review seeking to amend the description of the injury to read "bilateral shoulder impingement" and alleging that the employer has refused to grant permission to have and to pay for surgery to his right shoulder. At the pretrial conference, the trial judge denied both allegations and the employee claimed a trial in a timely manner.

The employee testified that he began working for the employer in April 1999, initially in the hardware department and after about two (2) months, in the masonry yard. He did order picking and customer service work. His job involved a significant amount of heavy lifting, particularly during the first four (4) hours of the work day.

He stated that he developed pain in his shoulders around February 2001 which eventually interfered with his sleep. He acknowledged that the pain was not due to any specific incident. Mr. Kology admitted that he had a previous problem with his shoulders in 1995, but he described it as insignificant. He did see a physician and after receiving a cortisone injection, the pain subsided in about two (2) to three (3) weeks. He did not recall undergoing any diagnostic tests in 1995 or discussing with his physician that he should limit his overhead lifting activities.

The medical evidence in this case consisted of the records of South County Orthopedics and Physical Therapy, Inc., the deposition and records of Dr. David B. Burns, and the deposition and records of Dr. Andrew Green.

Dr. Burns began treating the employee in March 2001 and has performed two (2) surgeries on his right shoulder. At that time, the employee informed him that he has had pain in his right shoulder for at least five (5) to six (6) years and in his left shoulder for about one (1) month. He also ruptured his right biceps tendon about five (5) to six (6) years ago. Dr. Burns testified that although the arthritic changes and degenerative changes in the shoulders were likely present years ago, the employee's work activities, particularly repetitive heavy overhead lifting, aggravated his condition to the point where surgery was necessary.

Dr. Green evaluated the employee on April 2, 2002 at the request of the insurer. After reviewing medical records regarding treatment of the employee's shoulders from 1995 and 1997, and considering the records of Dr. Burns, the doctor concluded that the employee's current condition was simply a result of the natural progression of the glenohumeral osteoarthritis which was present years ago.

The trial judge, citing the long history of shoulder problems prior to employment with the respondent, chose to rely upon the opinions expressed by Dr. Green. She, therefore, found that the employee had failed to prove that the right shoulder should be added to the description of the injury and denied his request for payment of the right shoulder surgery. The employee is contesting this decision and has filed four (4) reasons of appeal.

The scope of review at the appellate level is very limited. Rhode Island General Laws § 28-35-28(b) states that the findings of fact made by a trial judge

are final unless the appellate panel finds them to be clearly erroneous. The Appellate Division can only conduct a *de novo* review of the evidence after a finding is made that the trial judge was clearly wrong.

The first three (3) reasons of appeal filed by the employee are simply general recitations of error on the part of the trial judge and specify in what manner or where in the record the trial judge committed error. Rhode Island General Laws § 28-35-28(a) requires that the appellant shall file reasons of appeal ". . . stating specifically all matters determined adversely to him or her which he or she desires to appeal, . . ." The employee's first three (3) reasons of appeal respectively allege simply that the trial judge committed error, overlooked and or misconceived material evidence, and was clearly wrong in finding that the employee failed to prove his allegations. Such general recitations of error lack the specificity required by statute and are therefore summarily denied. See Bissonnette v. Federal Dairy Co., 472 A.2d 1223, 1226 (R.I. 1984).

The fourth reason of appeal provides only slightly more direction as to how the employee believes the trial judge erred. The employee contends that the trial judge improperly relied upon the opinions of Dr. Green because Dr. Burns had a better understanding of the employee's job duties and had seen inside the shoulder when he did the surgery. A review of Dr. Green's deposition reveals that he had a sufficient understanding of the employee's job duties.

In his report dated April 2, 2002, the doctor notes that the employee worked in a brickyard which involved a lot of heavy work. He testified that this

would include lifting. In addition, Dr. Green had all of Dr. Burns' records at the time of his evaluation. In the report of Dr. Burns dated March 21, 2001, the doctor notes that the employee works for a brickyard and "does quite a bit of overhead lifting." This is the only job description that Dr. Burns had available to him, which would seem about the equivalent of what Dr. Green had.

The fact that Dr. Green did not perform the surgery is irrelevant to the weight or foundation of his opinion. Dr. Burns did not find anything more during the surgery than was revealed in the diagnostic tests, which were reviewed by Dr. Green.

This matter presents the classic case of the trial judge choosing between conflicting medical opinions. Such a choice is squarely within the discretion of the trial judge. See Parenteau v. Zimmerman Eng., Inc., 111 R.I. 68, 299 A.2d 168 (1973). The trial judge provided a clear explanation of why she found the opinions of Dr. Green to be more probative and more persuasive on the issue of the cause of the employee's right shoulder problem. She was not clearly wrong in her reasoning in making that determination. Consequently, we will not disturb her findings and orders.

The employee's claim of appeal is denied and dismissed and the decision and decree of the trial court 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 Sowa, JJ. concur.

ENTER:

_____
Healy, J.

_____
Olsson, J.

_____
Sowa, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

RICHARD KOLOGY	)	
	)	
VS.	)	W.C.C. 02-01255
	)	
UNITED BUILDERS SUPPLY CO., INC.	)	

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 7, 2002 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

_____

ENTER:

_____
Healy, J.

_____
Olsson, J.

_____
Sowa, J.

I hereby certify that copies were mailed to James A. Currier, Esq., and Bruce Balon, Esq., on _____