STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

ROBERT BUELL	)	
	)	
VS.	)	W.C.C. 03-00724
	)	
COCA-COLA ENTERPRISES	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the petitioner/employee's appeal from the decision and decree of the trial judge denying his original petition for workers' compensation benefits for a back injury. After careful review of the record and consideration of the arguments of the parties, we deny the employee's appeal and affirm the findings and orders of the trial judge.

The employee, a forty-eight (48) year old male, testified that he had been working almost seventeen (17) years for the respondent as a full service driver. His duties as a driver involved driving to stops on a specific route, checking what stock was needed for the vending machine at the stop, loading a hand truck with cases of soda and filling the machine. The cases of soda weighed about twenty (20) pounds each and he would load as many as ten (10) cases on the hand truck at a time. Occasionally, he would have to pull the loaded hand truck up or down sets of stairs to get to the machines.

He stated that he did not have any problems with his back prior to starting his employment with Coca-Cola. About fourteen (14) years ago, he injured his back for the first

time when he lifted a case of soda off of the floor and felt his back pull. He was out of work for a few months and then returned to his regular job. The employee recalled that he probably injured his back about six (6) or seven (7) times at work. He explained that usually he was only out of work for about three (3) days and then he would return to a light duty job in the warehouse for a while before returning to his regular job. He also injured his back at least once at home.

The employee testified that throughout the summer of 2002 he experienced back pain that grew progressively worse. On Monday, November 4, 2002, he called his supervisor, David Motta, and informed him he would not be at work because his back was hurting and he was going to see his doctor. He stated that he was not any more specific than that on the telephone and had not suffered any recent specific trauma or injury at work or outside of work.

Mr. Buell had been treating with Dr. John T. Sotis, a chiropractic neurologist, since the early 1990's for his periodic back problems. On November 4, 2002, he saw Dr. Sotis and told him that he was in severe pain. An MRI was done one (1) week later which revealed degenerative disc disease from L2-3 to L5-S1 and possibly a small left lateral disc herniation at L2-3 displacing the exiting left nerve root at that level. The employee continued to treat with Dr. Sotis. At the time of the trial in 2003, he was seeing the doctor once a month. He continued to complain of low back pain and worsening radiation of pain down his right leg. He asserted that he had never had pain down his leg during any of his previous problems with his back.

The employee testified that he contacted Mr. Motta a day or two (2) later and told him he would be out of work for a bit and might need an MRI if it did not improve. He has had no conversation with Mr. Motta regarding his back since then and has not returned to work in any capacity. He collected Temporary Disability Insurance benefits and short term disability benefits from the employer until they ran out in May 2003 and he then applied for and was granted long-

term disability benefits through the employer. Mr. Buell asserted that he cannot perform his duties as a driver because his back pain limits his ability to lift and riding in a vehicle tires him out.

On cross-examination, the employee acknowledged that he had applied for a management position as a route supervisor with the employer in September or October 2002. He admitted that he was upset when he did not make the final cut for the position and had complained to David Motta. He testified that he never told Mr. Motta that his back pain was work-related, nor did he follow established procedures for reporting a work injury. However, he acknowledged that he was familiar with the reporting process, having hurt his back at work in the past.

David Motta is a route supervisor with Coca-Cola and has been employed there for twenty-six (26) years. Mr. Buell was one of the employees under his supervision. Mr. Motta testified that when a work injury occurs, the employee is directed to contact his supervisor to report it. The supervisor then completes a report describing the incident and forwards it to the human resources department. The procedure for reporting a work injury is reviewed with employees at safety meetings which are held about six (6) times a year.

Mr. Motta recounted that Mr. Buell had applied for the position of route supervisor about six (6) weeks before his present injury. He indicated that the employee was very upset and disappointed that he was not a finalist for the position and expressed to Mr. Motta that he felt the company did not appreciate his years of service.

The witness related that on Monday, November 4, 2002, the employee called him in the morning and specifically stated that "he hurt his back at home," and would not be coming to work. (Tr. 37, 47) Mr. Motta reminded him that company policy required a doctor's note if he was going to be out more than three (3) days. The employee told him that he was going to see

his doctor that day. He said he did not ask for details of the injury because he understood it occurred at home and it was not any of his business. He later checked with the human resources department to see if they had received a doctor's note from the employee and they said they had received it. He acknowledged that he had received a similar call from the employee in 2001 when he injured his back while digging a cesspool at home.

Mr. Motta identified a form, which was submitted into evidence, as an employee status document from the human resources department at Coca-Cola. The form indicates that a leave of absence for Mr. Buell began on November 4, 2002, and the reason for the leave was personal medical, although workers' compensation was one of the available categories to check off. The form was not signed by the employee. Mr. Motta stated that he has not spoken to the employee since December 2002 when he called him to pick vacation dates for the year 2003.

The medical evidence consists of the depositions and records of Dr. John D. Sotis and Dr. William F. Brennan, Jr. Dr. Sotis, a chiropractic neurologist, began treating the employee for low back pain in November of 1996 due to a lifting incident at work. At that time, Mr. Buell advised the doctor that he had also strained his back while lifting at work in 1992 and 1994. He underwent therapy for those injuries and eventually returned to his regular job. Dr. Sotis treated the employee with chiropractic manipulation and electric muscle stimulation until about January 1997. The doctor testified that he saw the employee five (5) times in 1997 for episodes of intermittent back pain which were not the result of any specific incident.

On June 21, 2001, the employee sustained another lifting injury to his back at work. In a report from Occupational Health and Rehabilitation on the date of the injury, the history states that Mr. Buell was last seen at that facility in 1999 for low back pain. After the initial evaluation, the employee elected to treat with Dr. Sotis for the June 2001 injury. When he saw

Dr. Sotis on June 25, 2001, he complained of low back pain radiating to his right buttock. The doctor again provided chiropractic manipulation and electric muscle stimulation. He discharged the employee from active care on July 20, 2001, but cautioned him regarding repetitive bending and lifting. He also recommended monthly maintenance treatments.

The doctor's records indicate that he saw Mr. Buell once in August 2001, three (3) times in October 2001 (twice in one day), three (3) times in April 2002 and once in September 2002. There are no reports of these visits, apparently because they did not involve a work-related injury. The doctor's office administrator explained this practice in a letter to the employee's attorney dated May 14, 2002 which is contained in the exhibits submitted during the deposition. In reviewing the doctor's records, there are also no reports of the office visits in November and December 2002. With regard to the employee's previous work-related injuries in 1996 and 2001, Dr. Sotis always generated an initial evaluation report of his first examination and also subsequent typed office notes of each visit related to treatment of that injury.

The first real documentation regarding the office visit on November 4, 2002 is a letter dated January 3, 2003 from the doctor to the employee's attorney, in which he states he is responding to a letter dated December 13, 2002 from the attorney. In this letter, the doctor acknowledges that he is unaware of any specific incident that triggered the employee's complaints of severe pain, which the doctor described as worse than his previous visits in 2002. However, he states that "it is fair to say that his present condition is a result of cumulative stress on his lower back" caused by his work activities at Coca-Cola.

Dr. Sotis completed a form on November 15, 2002 for the employee's application for short term disability benefits from the employer. On the form, the doctor replied that the date the symptoms first appeared was September 25, 2002, the date of the last office visit before

November 4, 2002. In response to the question whether the condition was due to a work injury, the doctor circled "no." He noted that his diagnosis was lumbar disc herniation and radiculitis. When he was questioned about this document, Dr. Sotis testified that he did not recall circling "no" and it was simply human error. He was then asked about the difference in diagnoses between the form and his testimony and he stated that cumulative stress can cause a disc herniation. However, the report of the MRI study states that the disc herniation is to the left side and the employee had right-sided complaints.

Dr. Sotis continued to see Mr. Buell on a monthly basis after December 2002. Unfortunately, the employee's condition has not improved. The doctor maintained that his condition was due to the cumulative stress from constant bending and lifting at work and that the employee remained totally disabled for any type of employment.

Dr. Brennan, an orthopedic surgeon, saw the employee for the first time on January 8, 2003 for complaints of low back and right leg pain. The employee informed the doctor that he has had back pain to some degree for several years and first noticed it while bending and lifting at work and when he sustained back sprains on several occasions. He related that the back pain gradually worsened over the last year and in the last few months he began to experience pain radiating down his right leg. In addition to examining the employee, Dr. Brennan reviewed the MRI films and report. His diagnosis was a chronic lumbar strain with facet joint arthropathy and some degenerative disc disease. The doctor causally related the employee's condition to his activities at work as a driver for Coca-Cola and found that he was disabled from that occupation.

The employee returned to see Dr. Brennan on February 12, 2003 and reported that his back pain was somewhat improved. Despite an objectively normal physical examination, the doctor maintained that Mr. Buell remained disabled.

Dr. Brennan never mentioned the employee's ability to work in any of his reports. In addition, although the employee indicated on the intake forms that he believed his pain was caused by his work activities, he did not complete the section required for a workers' compensation injury.

The trial judge ruled that the petitioner had failed to prove by a fair preponderance of the credible evidence that he suffered an injury arising out of and in the course of his employment. The trial judge stated that she was not persuaded by the employee's testimony and was not impressed with the testimony of Dr. Sotis. She also dismissed the opinions of Dr. Brennan because they were based upon the faulty history provided by the employee. Based on these credibility determinations, the trial judge denied the petition. The employee then filed the present appeal of that decision.

The parameters of appellate review of a decision of a trial judge is set forth in § 28-35-28(b) of the Rhode Island General Laws. Pursuant to that statute, a trial judge's findings on factual matters are deemed to be final unless the 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. See Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996); Grimes Box Co., Inc. v. Miguel, 509 A.2d 1002 (R.I. 1986). Furthermore, findings of fact which are based upon a trial judge's determination that a witness's testimony is not credible are entitled to even greater deference on appeal. Such findings will not be disturbed on appeal so long as there is legally competent evidence to support them. Poisson v. Comtec Information Systems, 713 A.2d 230, 232 (R.I. 1998); Rocha v. State, 705 A.2d 965, 968 (R.I. 1998).

The employee argues on appeal that the record is absent of legally competent evidence to support the trial judge's findings and that the trial judge misconceived or overlooked the medical deposition testimony which established that the employee sustained a work-related injury. We must disagree. It is clear from her detailed decision that the trial judge thoroughly reviewed all of the evidence. She acknowledged that both of the physicians testified that the employee's condition was due to his activities at work, but she rejected those opinions on credibility and competency grounds.

The trial judge stated that she believed Mr. Motta's testimony that the employee told him during their telephone conversation on November 4, 2002 that he injured his back at home. This was a significant decision and goes directly to the issue of causation. This case was not about whether the employee is in fact suffering from a back condition which is disabling him from work. The determinative issue in this matter was what caused the condition. It is quite apparent that Mr. Buell has a bad back. However, the medical records of Dr. Sotis reflect that he has sustained traumatic injuries at work and at home in the past, and has also experienced episodes of significant pain simply from turning or bending at work and at home. In the absence of a traumatic event at work, this prior history becomes very important in determining the cause of his present condition.

Unfortunately, the conduct of Mr. Buell and Dr. Sotis for the initial six (6) weeks following his removal from work on November 4, 2002 does not support the theory that the condition is work-related. When Mr. Motta checked with the human resources department several days after November 4, 2002, he was advised that medical documentation had been submitted by Mr. Buell to justify his absence from work, but there was no indication that the problem was work-related. The human resources office placed Mr. Buell on a personal medical

leave of absence. Dr. Sotis did not produce a typed medical report of his initial evaluation on November 4, 2002, or for any visits subsequent thereto, although it was his practice to do so for a work-related injury. When Dr. Sotis completed the employee's application for short term disability benefits on November 15, 2002, he wrote on the form that the symptoms began September 25, 2002, a date he treated the employee but for which there is no report. The doctor also checked off a box indicating the condition was not work-related. Dr. Sotis testified that his diagnosis was cumulative stress to the low back resulting in chronic lower back pain and instability. However, on the short term disability insurance application, he noted that his diagnosis was lumbar disc herniation and radiculitis.

It was not until the employee's attorney sent a letter to Dr. Sotis dated December 13, 2002 that the question whether the employee's condition was work-related was brought forth. Apparently, it was not until this petition was filed on January 29, 2003 that the employer was informed that the employee believed his condition was related to his work activities. The cumulative effect of all of these facts is to cast doubt upon the employee's claim that his present condition is work-related. Dr. Sotis' attempt to explain away the discrepancies in the short term disability insurance application was not persuasive at all. When all of this is combined with the trial judge's acceptance of the testimony of Mr. Motta, the result is that the employee has failed to satisfy the burden of proving his claim by a fair preponderance of the evidence.

The trial judge also rejected Dr. Brennan's testimony due to a faulty foundation. In a case alleging that the condition is due to the cumulative effect of the work activities without a specific trauma, the employee's medical history regarding any prior injuries or treatment of his low back is extremely important in rendering an opinion as to causation. Dr. Brennan was unaware of the back injury the employee sustained at home in June 2001. Although his report

indicates that the employee told him he may have had back pain for several years, in fact, Mr. Buell first injured his back in 1992, over ten (10) years ago. He also had a number of intervening episodes not caused by any trauma, for which he sought chiropractic treatment. Dr. Brennan's testimony alone was not sufficient to establish the cause of the employee's condition, particularly in light of the spotty history he recorded as the basis for his opinion.

A trial judge who rejects testimony on credibility grounds is not free to do so unchecked. They must clearly state their reasons for the rejection, though this statement may be brief. Laganiere v. Bonte Spinning Co., 103 R.I. 191, 195, 236 A.2d 256, 258 (1967); Jackowitz v. Deslauriers, 91 R.I. 269, 276, 162 A.2d 528, 531 (1960). The trial judge in the present matter explained quite clearly why she was rejecting the testimony of the employee and the two (2) physicians. We find no evidence to conclude that the trial judge was clearly wrong in her assessment of the credibility of the witnesses, or misconceived or overlooked material evidence.

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

Bertness and Salem, 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 employee's 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 April 14, 2004 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Interim Administrator

ENTER:

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Olsson, J.

_____
Bertness, J.

_____
Salem, J.

I hereby certify that copies were mailed to Michael A. St. Pierre, Esq., Lawrence J. Signore, Esq. and Lauren Motola-Davis, Esq., on

_____