STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

MICHAEL FINNEGAN	)	
	)	
VS.	)	W.C.C. 04-01288
	)	
THOMAS L. BEATTIE	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the petitioner's appeal from the decision of the trial judge denying his original petition on the grounds that the Workers' Compensation Court lacked jurisdiction to hear his claim. We have thoroughly reviewed the record in this case and carefully considered the arguments of the respective parties and conclude that the trial judge's decision must be affirmed.

The petitioner, Michael Finnegan (hereinafter, "Finnegan,") alleges that he sustained a severe injury to his left hand on April 23, 2002 when he cut across all five (5) fingers with a table saw. At the time, he asserted that he was working for Michael McCue on a job in Charlestown, Rhode Island. The respondent, Thomas L. Beattie, was the general contractor on the job.

The trial judge requested that the parties initially address the jurisdictional question of where the last act of hiring the petitioner took place. Mr. Finnegan testified that sometime in February 2000, David Connel (hereinafter, "Connel") spoke with his wife on the telephone regarding some of his belongings which were in the possession of a person to whom the

Finnegans rented a room in their house. Connel was a partner of Michael McCue (hereinafter, "McCue") in a company called Emerald Incorporated (hereinafter, "Emerald") which was based in Connecticut. Mrs. Finnegan advised Connel that her husband was looking for construction work. Shortly after this conversation, Connel came to the Finnegans' home and during the course of socializing for several hours, he allegedly offered the petitioner a job and told him to report the next day to a location in Groton, Long Point, Connecticut. The petitioner asserted that Connel told him he had the authority to hire him. He stated that he worked for Emerald on various jobs in Connecticut and Rhode Island until approximately August 2002, except for a twelve (12) week period immediately following his injury.

Despite his assertions that he was an employee of Emerald, the petitioner admitted that he had an arrangement with McCue that he would claim to be a subcontractor so McCue would pay him more money and McCue would not have to have workers' compensation insurance. Finnegan was paid by check or cash from Emerald but no taxes were deducted. Finnegan testified that at the time of his injury he actually was the foreman on the jobs he worked on for Emerald.

On cross-examination, the petitioner admitted that he previously testified at a deposition on May 4, 2004 that he had been hired by Connel at Connel's house in Stonington, Connecticut. Finnegan claimed that his memory was bad and that pain-killers may have affected his ability to testify accurately at that time. He testified that he had believed he was correct at the time, but it was brought to his attention later that he was mistaken as to the location of the meeting during which he was hired. Consequently, his testimony changed from the time of the deposition in May 2004 to the date of his trial testimony one (1) month later.

Thomas Beattie (hereinafter "Beattie") testified that in April 2002, he was the owner of

Tom Beattie Construction which was the general contractor for the construction of a house in Charlestown, Rhode Island where the petitioner was injured. Beattie entered into a contract with McCue's company to install hardwood flooring. Beattie denied that he ever had any type of business relationship with Finnegan, although he knew Finnegan was working for McCue. He also testified that he did ask McCue if he had workers' compensation insurance and McCue stated that he did not. Beattie acknowledged that he had McCue sign a form entitled Notice of Designation as Independent Contractor which Beattie forwarded to the Rhode Island Department of Labor and Training.

The trial judge concluded that the last act of hire occurred in Connecticut and, as such, the Rhode Island Workers' Compensation Court did not have jurisdiction to hear the matter. He expressed concerns regarding Finnegan's credibility, particularly in light of the inconsistencies between his trial and deposition testimony, his false arrangement with McCue as to his employment status, and his general reluctance and evasiveness in responding to questions regarding his hiring. The trial judge also cited the lack of any corroborating testimony in denying the petition.

The scope of review of the Appellate Division is very limited, particularly in a situation where the decision of the trial judge is based upon his determination as to the credibility of the employee. 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 concludes that any of those findings are clearly erroneous. The Appellate Division is prohibited from engaging in a *de novo* review of the evidence absent a determination that the trial judge is clearly wrong because he overlooked or misconceived material evidence. 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). In the present matter, we

cannot say that the trial judge's conclusions were clearly erroneous.

The petitioner has put forth six (6) reasons of appeal. In the first three (3) reasons, Finnegan argues that the trial judge erroneously focused on the last act consummating the employment contract between Finnegan and McCue/Connel, rather than concluding that Finnegan should be deemed an employee of Beattie for purposes of his workers' compensation claim based upon R.I.G.L. § 28-29-6.1(a) and the decision of the Rhode Island Supreme Court in Brogno v. W & J Associates, Ltd., 698 A.2d 191 (R.I. 1997), without regard to where his employment contract with McCue/Connel was finalized. We find no merit in this argument.

At the time of the petitioner's injury in April 2002, the Workers' Compensation Act did not specifically address jurisdictional issues which arose when an injury occurred outside the state or the employer was located outside the state.[1] The guidelines for determining jurisdiction have been developed by several significant cases. In Grinnell v. Wilkinson, 39 R.I. 447, 98 A. 103 (1916), the Rhode Island Supreme Court, after a lengthy discussion of decisions in nearby states, concluded that, under the Rhode Island Workers' Compensation Act, the relationship between an employer and an employee is contractual and that the provisions of the Act are deemed a part of every employment contract between employers and employees who are subject to the Act. Consequently, the Court held that the Act must be construed to apply to injuries which are sustained outside of the state as well as those occurring within it.

In Miles v. Bendix Corp., 492 A.2d 1218 (R.I. 1985), the Court had occasion to address the situation in which a truck driver's contract of hire was completed in Indiana, but he lived in Rhode Island and his trips began and ended in Rhode Island. The Court reasoned that because the employment relationship is contractual and the contract was not made in Rhode Island, the

[1] In 2002, the Legislature enacted R.I.G.L. §28-29-1.3 which specifically provides that the Act shall apply to all employees injured or hired in Rhode Island. However, this Act took effect on January 1, 2004 and is of no assistance in Finnegan's case.

Workers' Compensation Commission in Rhode Island lacked jurisdiction over the employee's claim. Id. at 1219. *See* Silva v. James Ursini Co., 475 A.2d 205 (R.I. 1984).

In the present matter, Finnegan did not enter into any employment contract with Beattie. In order to establish jurisdiction of this court over his claim, Finnegan must establish that the only employment contract he entered into, the contract with McCue/Connel, was made in Rhode Island. Establishing the jurisdiction of the court is a condition precedent to the application of any provisions of the Rhode Island Workers' Compensation Act, including R.I.G.L. § 28-29-6.1(a).

Section 28-29-6.1 of the Rhode Island General Laws provides as follows:

> "(a) Whenever a general contractor or a construction manager enters into a contract with a subcontractor for work to be performed in Rhode Island, the general contractor or construction manager shall at all times require written documentation evidencing that the subcontractor carries workers' compensation insurance with no indebtedness for its employees for the term of the contract or is an independent contractor pursuant to the provisions of § 28-29-17.1. In the event that the general contractor or construction manager fails to obtain the written documentation from the subcontractor, the general contractor or construction manager is deemed to be the employer pursuant to provisions of § 28-29-2."

This section confers liability upon a general contractor who fails to ensure that a subcontractor has workers' compensation insurance to cover his employees. In such a case, the general contractor is deemed to be the "statutory employer" of the injured employee of the subcontractor. *See* Brogno v. W & J Associates, Ltd., 698 A.2d 191 (R.I. 1997). This statute does not, however, confer jurisdiction over the employee's claim on the Workers' Compensation Court. Jurisdiction over the underlying claim must first be established before the provisions of R.I.G.L. § 28-29-6.1 would come into play. This statute and the Brogno case are irrelevant to the inquiry as to whether this court has jurisdiction. Finnegan must demonstrate that Connel or

McCue finalized his employment contract in Rhode Island in order to apply the laws of Rhode Island to his claim. Accordingly, the trial judge was correct to focus on the relationship between Finnegan, Connel and McCue and where the last act of hiring Finnegan took place.

In his fourth reason of appeal, the petitioner argues that the form filed with the Rhode Island Department of Labor and Training by Beattie stating that McCue was an independent contractor was irrelevant in determining the relationship between Finnegan and Beattie. However, the trial judge never even refers to the filing. It may have become relevant if jurisdiction had been established and we needed to address the application of R.I.G.L. § 28-29-6.1, but that is not the case.

In the fifth reason of appeal, the petitioner contends that the trial judge committed an abuse of discretion by relying on and referencing evidence, specifically page nineteen (19) of the petitioner's deposition, which neither party introduced as a trial exhibit or elicited during his trial testimony. Although we agree that the trial judge improperly referenced a portion of the deposition, we deem such error to be harmless.

The respondent took the deposition of the petitioner on May 4, 2004, about one (1) month prior to his trial testimony. On direct examination, Finnegan related that Connel came to his home in Rhode Island after Finnegan's wife spoke with him on the telephone and Connel hired Finnegan at that point. On cross-examination, counsel confronted Finnegan with his deposition testimony in which he stated that he was hired by Connel at the house Connel was staying at in Connecticut. *See* Tr. 16-18. The trial judge quoted some of the petitioner's testimony from the deposition which was referred to by the respondent's counsel. *See* Tr. decision pp. 3-4. The trial judge also quoted a question and an answer from a page of the deposition (page 19) which was not mentioned by counsel during the questioning of Finnegan. However, this quoted question

and response simply repeats information already provided – that Finnegan was hired at Connel's house in Stonington, Connecticut.

We acknowledge that the trial judge improperly quoted sections of the deposition which had not been introduced into evidence, as well as referring to a portion of the deposition which was not utilized during the trial testimony. However, we find this error to be harmless because the fact that Finnegan's deposition testimony contradicted his trial testimony was clearly brought out during the trial. The quoted testimony did not add any additional information which influenced the trial judge.

The trial judge rendered his decision on credibility grounds, a position more than adequately buttressed even without the improper reference to specific pages of the employee's deposition. It is well-settled that credibility determinations are duly reserved for the trial judge. The trial judge is uniquely qualified to determine what evidence to accept and what evidence to reject because he has the opportunity to personally observe the witness who appears before him, to evaluate his demeanor, his attitude, and the manner in which he testifies. Davol, Inc. v. Aguiar, 463 A.2d 170, 174 (R.I. 1983). Credibility determinations made at the trial level are given great deference on appeal and will not be overturned absent a finding of clear error. Laganiere v. Bonte Spinning Co., 103 R.I. 191, 195, 236 A.2d 256, 258 (1967).

In this case, the trial judge wove a tapestry of reasons to justify his credibility determination. First, the judge cited the blatant inconsistency between Finnegan's trial and deposition testimony when describing the last act of hire. Tr. decision p. 5. Next, the trial judge determined that both the employee's assertion that his medication intake triggered memory loss (which was contradicted by the treating physician) and his confession about an illicit arrangement with his employer regarding both compensation and employment status damaged

his credibility. Tr. decision p. 5. The trial judge also noted the employee's evasive responses when questioned regarding the specifics of the meeting at which he was hired as further providing the impetus for an unfavorable credibility determination. Tr. decision p. 6. The trial judge concluded that he did not believe the employee's trial testimony concerning the place of hire. Based upon our review of the record, we find no basis to overturn that credibility determination.

In the final reason of appeal, the petitioner suggests that the trial judge committed error in placing significance on the fact that Finnegan failed to produce any corroborating witnesses regarding where the meeting at which he was hired took place, after the trial judge stated that "[b]ringing in people won't help you with his testimony." Tr. 18. After reviewing the complete record, we find no merit in this argument.

During cross-examination regarding the inconsistency between Finnegan's trial testimony and his deposition testimony, Finnegan's counsel requested a continuance to bring in other individuals who were allegedly present at the meeting in Rhode Island or Connecticut. The trial judge then stated:

> "Bringing in people won't help you with his testimony. I am concerned with what he said. I am concerned as to why after when he was asked this question point blank that he was hired in Connecticut and then after the deposition he reverts back to Rhode Island." Tr. 18.

Finnegan was caught contradicting himself; this was not a case of another witness contradicting him and his version of events needed bolstering. The trial judge was concerned about why Finnegan changed his version of events. He certainly did not preclude counsel from presenting any witnesses who might assist in verifying where Finnegan was hired. In fact, the trial judge continued the matter in order to accommodate counsel's request to bring in other witnesses to

testify. Tr. 20-21.

In his decision, the trial judge noted that although Finnegan testified that a number of people were present at the meeting at which he was allegedly hired in Rhode Island, none of those witnesses were presented. Tr. decision p. 6. In reading the decision in its entirety, we cannot say that the trial judge placed "great significance" on this fact, as the petitioner contends. The trial judge found the employee's inconsistencies dispositive, not the lack of bolstering recounts of the events. Regardless, the trial judge granted a continuance to allow counsel to bring forth such witnesses; however, he declined to even present Finnegan's wife, who was allegedly at the meeting and present in the courtroom. (Tr. 20). Considering all of the circumstances surrounding this situation, we find no abuse of discretion on the part of the trial judge.

Based upon the foregoing discussion, the petitioner's appeal is denied and dismissed and the decision and decree of the trial judge 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

Sowa and Connor, JJ., concur.

ENTER:

_____
Olsson, J.

_____
Sowa, J.

_____
Connor, J.

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THOMAS L. BEATTIE)

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 August 5, 2005, be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

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Olsson, J.

_____
Sowa, J.

_____
Connor, J.

I hereby certify that copies were mailed to Charles J. Vucci, Esq., and Bruce J. Balon, Esq., on

_____