STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

DANIEL FERRO	)	
	)	
VS.	)	W.C.C. 04-07627
	)	
BLUE FIN YACHTS, LTD., INC.	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's appeal from the denial of his original petition in which he alleged that he sustained an injury to his back on October 5, 2004 during the course of his employment. After a thorough review of the record and consideration of the arguments of the respective parties, we deny the employee's appeal and affirm the decision and decree of the trial judge.

The employee testified on July 18, 2005 that he was initially hired by the employer to do carpentry in its boat building business; however, over the few months he worked, he did mostly assembly work and also some odd jobs. On October 6, 2004, he stated that he felt his back "crunch" as he was climbing a steep ladder at the rear of a boat while carrying a 100 pound lead bar on his right shoulder. He experienced some pain but continued to work. Mr. Ferro indicated that he asked a co-worker, Max, for assistance in carrying the remaining bars because he thought he had hurt his back. The employee asserted that he also told his supervisor, Dave Gouveia, that he injured his back that day, but he was not asked to fill out a report of the incident.

The next day, the employee went to Metacom Medical Center for treatment due to increased pain in his back. He then took the note advising him to stay out of work for a week and the report of his visit to the employer and gave the documents to John, an employee in the office. Mr. Ferro stayed out of work and then was terminated by the employer the following Monday. About two (2) weeks later, he began working as a machine operator for Horner Millworks in Massachusetts, earning more wages than he had at Blue Fin Yachts.

On cross-examination, the employee was uncertain whether the injury occurred on October 5th o r October 6th, although he indicated that he thought it was on a Wednesday. A copy of a fax sent by the employee to Jill at Blue Fin Yachts on October 7, 2004 was introduced into evidence. In the fax message, the employee states that he went to Metacom Medical Center that day for evaluation of his back after injuring it on Tuesday lifting the lead bars. October 5, 2004 was a Tuesday.

Mr. Ferro denied that Mr. Gouveia told him on October 6, 2004 that he was terminated due to an incident with T.J., a more senior employee. Mr. Ferro denied that he "blew snots" in T.J.'s face that day. He admitted only that Mr. Gouveia told him to go home and cool off and come back on Monday. Monday was Columbus Day and the company was closed so the employee called on Tuesday. He was informed that no decision had been made yet on whether he could come back to work.

Two other documents were admitted into evidence. The first is a printout of an e-mail sent to Blue Fin Yachts from the employee's e-mail address on October 31, 2004 stating "Down load [sic] this and Eat Snot." A photograph is included of a man with his finger stuck up his nose and protruding from his eye. The second is a fax message sent on October 31, 2004 allegedly by the employee to T.J. at Blue Fin Yachts stating "Eat Snot U Runt." Attached to the

fax is a copy of the e-mail and photograph previously mentioned. Mr. Ferro testified that he did not recall sending either of these messages.

The employee testified that in February 2005, he slipped and fell in the parking lot of Horner Millworks and reinjured his back. He was out of work for several weeks and received disability insurance benefits through his new employer.

David Gouveia, the production manager at Blue Fin Yachts, hired Mr. Ferro on July 15, 2004 and was his supervisor. He testified that on October 6, 2004, he was called to the office by his general manager just before noon. The general manager informed him that Mr. Ferro had blown his nose at T.J. and the mucus hit him in the eye. T.J. was in the office at the time and his eye was red. Mr. Gouveia then talked to Mr. Ferro about the incident and told him that he had to let him go. He denied simply telling him to cool off and come back the following week. Mr. Gouveia stated that he had no knowledge of any injury Mr. Ferro allegedly sustained at work until the fax with the medical report was received on October 7, 2004.

Tryce Nunnelly, nicknamed T.J., described the incident that occurred on October 6, 2004 involving Mr. Ferro. He also stated that a few weeks prior to the incident, Mr. Ferro had dipped his timecard in resin and on another occasion had taunted him to punch his timecard and step outside to fight.

Max Galvao, an employee at Blue Fin Yachts, testified that he recalled Mr. Ferro asking for help with the last few remaining lead bars in October 2004. He stated that Mr. Ferro was in the boat and he handed the bars up to the employee. Mr. Galvao stated that Mr. Ferro never mentioned that he had injured his back when he asked for assistance.

The employee submitted the deposition and reports of Dr. Prakash Sampath, a neurosurgeon. The records from Metacom Medical Center and Dr. David J. Van Amberg, a chiropractor, were introduced as exhibits during that deposition.

Mr. Ferro was seen at the walk-in clinic at Metacom Medical Center on October 7, 2004. The patient information form he filled out indicates that he was injured lifting lead bars at Blue Fin Yachts on October 5, 2004 and last worked on October 6, 2004. The history recorded at the clinic states that the employee injured his back the previous month but the pain went away with some over-the-counter medication. He then injured his back again on Monday or Tuesday when he heard his back crack while lifting the lead bars. One of the documents also indicates that the employee has not had any previous injury to his back. The diagnosis was a back strain and he was given a note to remain out of work for two (2) weeks and to see an orthopedic surgeon or return in a week.

There is no record of any further medical treatment until the employee saw Dr. Sampath on March 10, 2005, which was after the slip and fall in the parking lot. The history contained in the doctor's report of that date states that his present low back complaints date back to the October 2004 incident at Blue Fin Yachts. There is no mention of an incident in February 2005. Despite an objectively normal examination, an MRI was recommended to assess his complaints of left-sided sciatica. The MRI revealed degenerative disc disease at multiple levels and a very large disc fragment/herniation at L4-5 obliterating the L5 nerve root. At the second office visit on April 7, 2005, Dr. Sampath recommended surgery based upon the MRI results and increased complaints of left leg pain by the employee.

Dr. Sampath initially testified that, based upon the history provided by the employee, the back pain and left-sided sciatica was due to the incident at work in October 2004. On cross-

examination, it was brought out that an attorney in Massachusetts sent a letter dated January 6, 2006 to the doctor advising him that the attorney was representing Mr. Ferro regarding an injury sustained in an industrial accident on February 24, 2005. Dr. Sampath acknowledged that he had no details as to Mr. Ferro's job duties with Blue Fin Yachts or Horner Millworks, and was uncertain whether the employee was working during the time the doctor treated him. The doctor denied any knowledge of an injury sustained by the employee in August 2005 while working for a third employer, Heritage Kayaks.

Dr. Van Amberg initially evaluated the employee on April 11, 2005 for severe low back and left leg pain which he attributed to an injury on October 5, 2004 while working at Blue Fin Yachts. There is no mention in any of the doctor's notes regarding the slip and fall in February 2005. Chiropractic treatment was initiated three (3) times a week. Apparently, Mr. Ferro was out of work at the time and on or about April 20, 2005, he returned to work. He only lasted a week and stopped working again on or about April 27, 2005. On May 16, 2005, Mr. Ferro had improved sufficiently that Dr. Van Amberg stated he had returned to his pre-accident status and needed only weekly maintenance treatment.

The office notes reflect that Mr. Ferro began working full-time at North Atlantic Corporation sometime in May 2005. In mid-July, the employee requested a note from Dr. Van Amberg to stay out work due to a flare-up of his back complaints. On July 20, 2005, the doctor noted that the employee may have been let go or quit his job. On August 18, 2005, Mr. Ferro complained that he had increased pain after performing a task at work at Heritage Kayaks, another new employer.

The employee's original petition was filed on November 18, 2004 by attorney Robert P. Audette. Prior to the pretrial conference on January 31, 2005, attorney Denise Lombardo-Myers

entered her appearance for Mr. Ferro. At the pretrial conference, the petition was amended to allege a closed period of disability from October 7, 2004 to October 31, 2004 as a result of an injury sustained on October 5, 2004. The employee claimed a trial and engaged another attorney, Stephen J. Dennis, to represent him.

The trial judge reviewed the testimony and medical evidence in detail and found the testimony of the employer's witnesses to be more credible than that of the employee. She specifically noted that the employee made fraudulent statements to the court and to those providing him medical treatment. Consequently, the employee's original petition was denied and dismissed. Mr. Ferro filed a claim of appeal *pro se*. Subsequently, attorney Thomas More Dickinson entered his appearance on behalf of the employee and represented him during the appeal.

The employee makes three (3) arguments on appeal. First, he contends that the trial judge committed error in finding that he failed to prove he sustained a work-related injury in light of the uncontradicted testimony that Mr. Ferro did lift heavy lead bars, that he sought assistance in completing that task, that he saw a physician at Metacom Medical Center who diagnosed a back strain, and that he sent documentation of that visit to the employer. He also argues that, in the face of this evidence, the trial judge erred in finding that the employee made fraudulent statements to the court and to the medical providers. Unfortunately, the employee conveniently glosses over the testimony in the record which clearly calls into question his credibility and casts significant doubt upon his assertion that he was injured at Blue Fin Yachts.

The records of Metacom Medical Center were admitted as an exhibit in the deposition of Dr. Sampath. The records contain the history and complaints provided by the employee, documentation of a limited physical examination, a diagnosis, and instructions for treatment.

They do not contain any opinion rendered by a physician affirmatively stating that the employee's condition was caused by the incident he described in the history. Establishing a causal relationship between an alleged injury and an alleged incident at work requires the presentation of expert medical testimony by a physician provided in court, in a deposition, or in a report supported by the doctor's affidavit. Hicks v. Vennerbeck & Clase Co., 525 A.2d 37, 42 (R.I. 1987). A back strain, the condition with which the employee was diagnosed, is not manifested by obvious objective symptoms that would be recognizable by a layperson. Consequently, without a specific opinion regarding causal relationship by the physician who examined Mr. Ferro at Metacom Medical Center, these records do not establish that he sustained a work-related injury.

The statements of Dr. Sampath and Dr. Van Amberg, who only saw the employee five (5) and six (6) months after the alleged incident, were clearly rendered incompetent on the issue of causation due to the inaccurate history provided by Mr. Ferro. He never informed either physician of the February 2005 slip and fall which reinjured his back and caused him to stop working for a period of time. They were also unaware of how long he was out of work and what type of work he did thereafter. It is also interesting to note that in the Metacom Medical Center records, the employee denied any previous injury to his back, yet he testified that he declined to have surgery on his back and opted for chiropractic treatment, which he had tried before with success. *See* Tr. at 12.

The employee also overlooks the inconsistencies regarding the dates of the events occurring around this alleged injury. On the patient information form for Metacom Medical Center completed by Mr. Ferro, he states that the injury occurred on October 5, 2004, and the last day he worked was October 6, 2004. He went to the center on October 7, 2004. The

employee testified that he was injured one day, finished work that day, and then went to Metacom Medical Center the next morning. It is difficult to believe that when he was sitting at the center filling out the form, he would mistakenly write that he was injured two (2) days earlier on October 5th rather than just twenty-four (24) hours earlier on October 6th, particularly since lifting the heavy lead bars was a very rare task, and this was the first time the employee had done it since he began working for the employer. In addition, in the fax he sent on October 7, 2004 to Blue Fin Yachts with the reports from Metacom Medical Center, the employee wrote that he injured his back on Tuesday while lifting the lead bars. October 5, 2004 was a Tuesday.

The employee's own testimony as to the sequence of events cannot be reconciled. Mr. Ferro admitted that he was confronted by Mr. Gouveia at work on October 6, 2004 regarding the incident with T.J., and he was told to go home. If the employee was injured lifting the lead bars on October 5, 2004, then he must have been at work for at least half a day on October 6, 2004, and then went to Metacom Medical Center on October 7, 2004. This sequence does not match up with the employee's testimony that he was injured one day and went for medical treatment the next morning. On October 6, 2004, Mr. Ferro was either terminated or told to leave the premises just before noon. There is no testimony that he was injured on the same day that the alleged incident involving T.J. occurred. Although Mr. Ferro acknowledged having a conversation with his supervisor, Mr. Gouveia, on October 6, 2004, he never indicated in his testimony that he mentioned to Mr. Gouveia that he injured his back that day or the day before. The first documentation of the alleged injury is dated October 7, 2004, after the dispute over the incident with T.J.

These inconsistencies in the employee's statements alone provide more than adequate foundation for the trial judge's determination that the employee failed to establish by a fair

preponderance of the credible evidence that he sustained a work-related injury. In combination with the testimony of the employer's witnesses directly contradicting that of the employee regarding the events occurring between October 5th and October 7th, they also support the finding that Mr. Ferro made fraudulent statements to the court and to the medical providers. Our review of the record leads us to conclude that the trial judge was not clearly erroneous in her findings.

The employee also contends that the trial judge erred in ordering him to pay the expert witness fee of Dr. Sampath. The employee sought to introduce into evidence the affidavit and reports of the doctor. The employer objected and apparently requested cross-examination. The trial judge conducted a hearing pursuant to Rule 2.13(B)(3) of the Rules of Practice of the Workers' Compensation Court and in accordance with the principles set out in Gerstein v. Scotti, 626 A.2d 236 (R.I. 1993) and Martinez v. Kurdziel, 612 A.2d 669 (R.I. 1992). At the conclusion of the hearing, after considering the employee's statement of assets and liabilities and his testimony on the subject, the trial judge, citing the fact that he had been working since the end of October until his testimony in July 2005, found that he had the ability to pay an expert witness fee in the amount of Four Hundred Fifty and 00/100 ($450.00) Dollars to Dr. Sampath for his deposition testimony. The employee paid the expert witness fee, and the deposition went forward.

Mr. Ferro alleges that the trial judge's determination that he had sufficient resources to pay the expert witness fee "was apparently motivated by the trial judge's erroneous findings regarding Mr. Ferro's claim." In light of the fact that the decision ordering him to pay the expert witness fee was made prior to the parties resting in this matter and prior to the trial judge rendering a decision on the merits of the petition, the employee's contention has no merit or foundation.

Subsequent to the filing of the reasons of appeal, counsel for the employee filed a motion for remand ". . . in order to permit the Trial Justice to make such disclosures as are necessary and appropriate and, if necessary, to permit the Employee-Appellant to file a motion for disqualification." The employee alleged that Judge Dianne M. Connor may have a conflict of interest due to the fact that her husband, attorney Francis T. Connor, represents employers insured by Beacon Mutual Insurance Company at times. Blue Fin Yachts was insured by Beacon at the time of the employee's injury. However, Attorney Connor had no involvement or direct interest in the litigation before Judge Connor. Beacon Mutual was not a named party in the case and Attorney Connor did not represent Blue Fin Yachts.

It should also be noted that Judge Connor has been hearing cases on a regular basis on the court for over six (6) years. Her husband and Attorney Dennis, who represented Mr. Ferro during the course of the trial, have both been practicing before the court closer to ten (10) years. Attorney Connor primarily represents employers, while Attorney Dennis focuses his practice on representing injured workers. We have no doubt whatsoever that Attorney Dennis was well aware of the fact that Judge Connor is the spouse of Attorney Connor and that Attorney Connor represents some employers who are insured by Beacon. The issue of any potential conflict of interest on the part of Judge Connor was never raised during the course of the trial.

The appellate division granted the relief requested by employee's counsel and remanded the matter in order to allow the trial judge to address the alleged conflict. Her five (5) page response, which was sent to the parties, more than adequately addresses any concerns raised by the employee under the Code of Judicial Conduct and R.I.G.L. § 36-14-7, the Rhode Island Code of Ethics. No further motions, memoranda, or amendments to the reasons of appeal were filed by employee's counsel. We see no need to address this subject in any further detail.

Based upon the foregoing discussion, we deny and dismiss the employee's appeal and affirm the findings and orders 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

Sowa and Hardman, JJ. concur.

ENTER:

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Olsson, J.

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Sowa, J.

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Hardman, J.

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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 February 17, 2006 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

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Olsson, J.

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Sowa, J.

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Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Thomas More Dickinson, Esq., and Bruce J. Balon, Esq., on

_____