STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

PAULETTE FEDEROWICZ	)	
	)	
VS.	)	W.C.C. 05-03035
	)	
K B TOY WORKS	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the petitioner/employee's appeal from a trial decision and decree which denied her weekly compensation benefits on the basis that her physician's testimony regarding causal relationship did not amount to an opinion to a reasonable degree of medical certainty. After a careful review of the record in this matter and consideration of the parties' respective arguments, we find no merit in the employee's appeal and affirm the decision of the trial judge.

The employee filed two (2) original petitions with the court which were consolidated for hearing before one (1) judge. In W.C.C. No. 05-03034, the employee alleged that she sustained an aggravation of a left shoulder problem on February 2, 2005 resulting in incapacity from February 7, 2005 and continuing. The petition was granted at the pretrial conference and the employer was ordered to pay weekly benefits for partial incapacity from April 6, 2005 and continuing. The employee claimed a trial. After a full hearing on the merits, the trial judge found that the employee had sustained a tear of a prior rotator cuff repair and a left labrum partial tear at work on February 2, 2005. He also determined that she developed a cervical strain due to

the effects of this injury and required additional surgery on her shoulder. The employer was ordered to pay weekly benefits for total incapacity from April 6, 2005 through December 12, 2005 and benefits for partial incapacity continuing thereafter. The employee did not claim an appeal from the decision and decree regarding this petition.

The second original petition, W.C.C. No. 05-05035, alleged that the employee became disabled as of March 1, 2004 due to a problem with her left shoulder which was caused by repetitive activities at work. She claimed that she was disabled from March 1, 2004 to August 27, 2004 and then again from February 7, 2005 and continuing. At the pretrial conference, the petition was denied and the employee claimed a trial. After the completion of the trial, the judge found that the employee had failed to prove the allegations of her petition. The employee's claim of appeal from the decision and decree regarding this petition is now before us.

Ms. Federowicz began her employment as a sales associate at KB Toy Works in approximately August 1998. She worked four (4) to five (5) days per week at an average of twenty (20) hours per week. The employee left KB Toy Works in September or October 2000 and worked as a cashier for Family Dollar and then as a lunch lady in the Pawtucket School Department. The employee returned to work at KB Toy Works shortly after September 11, 2001. Ms. Federowicz's testimony regarding her job duties was uncontradicted. Her main responsibilities involved cashier duties and stocking merchandise. The employee stated it was necessary to stock merchandise on shelves at shoulder level and above, to re-arrange shelving to accommodate new merchandise, to assemble bicycles and playground sets each season and arrange those items on the store floor. The employee was always scheduled to work when trucks delivered merchandise to the store and either assisted in unloading the truck or watched the store

while other employees unloaded the truck. Her schedule and duties changed with each week. Some weeks, she engaged in cashiering duties, and other weeks, in stocking responsibilities. Ms. Federowicz worked an average of fifteen (15) to twenty (20) hours per week, usually in the mornings or afternoons. The hours increased to as many as thirty-eight (38) hours per week during busier seasons. The busiest time of the year was the Christmas season, which ran from the second week of November through the first week of January.

In the spring of 2003, her primary care physician referred the employee to Dr. Richard E. Murphy for evaluation of pain and discomfort in both shoulders. Dr. Murphy's report of the May 14, 2003 office visit states that the employee has a long history of problems with her shoulders, but the discomfort had increased recently. On that particular day, her left shoulder felt worse than the right. An injection into the left shoulder alleviated the problem for several months, but in August, the employee returned to the doctor with complaints of discomfort in the left shoulder again. Dr. Murphy injected the shoulder again on that date and then again on November 20, 2003. Due to the continued complaints, an MRI was done in January 2004 and Dr. Murphy referred Ms. Federowicz to Dr. Geret DuBois for evaluation.

The employee began treatment with Dr. DuBois in February 2004, and he operated on her left shoulder on March 1, 2004. Ms. Federowicz stated that although she believed that the condition may have been due to her work activities, she was under the impression that her only option was to make a claim for Temporary Disability Insurance benefits because she could not pinpoint a specific injury date. Consequently, the employer did not receive any notice that this was a work-related injury until the petition was filed in 2005.

After the surgery, the employee underwent physical therapy until August 2004, at which time she was released to work full-duty. A month after her return to work, the employee was

promoted from a part-time sales associate to a full-time assistant manager. The employee testified regarding the second injury that occurred to her left shoulder on February 2, 2005 while she was employed as a full-time assistant manager. The employee left work on April 6, 2005 due to the effects of that injury. As noted above, the employee was awarded weekly workers' compensation benefits for the disability related to this second injury and that decision was not appealed.

On cross-examination, the employee acknowledged that she made complaints regarding both shoulders as early as 1995 to her primary care physician.

The medical evidence consists of the deposition and records of Dr. Geret A. DuBois, a board certified orthopedic surgeon. Dr. DuBois evaluated the employee for the first time on February 4, 2004. The employee informed him she had problems with her left shoulder for a couple of years, but was unable to point to a specific history of injury. She did indicate that the pain in her shoulders increased during the holiday season at the toy store. Dr. DuBois conducted a physical examination and reviewed the results of an MRI done on January 20, 2004. His diagnosis was a paralabral cyst, degenerative changes within the labrum, a partial rotator cuff tear, and evidence of bursitis in her left shoulder. Dr. DuBois was aware that the employee worked for a toy store as an associate and the work required the use of her upper extremities, but he lacked knowledge of her specific job duties.

In attempting to elicit an opinion as to the cause of the employee's condition, counsel for the employee posed a hypothetical question incorporating portions of the employee's testimony regarding her job duties. Dr. DuBois answered that, based on the hypothetical and his knowledge that the employee's work increased during the holiday season, the employee "sustained an aggravation of the underlying condition of problems within her shoulder. . . ." Pet.

Exh. 3, p. 8. The doctor also testified that the employee was not capable of performing all of her job duties at that time.

On cross-examination, the doctor agreed that the employee did not indicate on the intake form that her complaints were work-related. Dr. DuBois completed paperwork for her claim for TDI benefits which indicated that the condition was not work-related. He did not request approval for the surgery from the workers' compensation insurer because the condition was not treated as a workers' compensation injury. The doctor testified that he did not know how many hours the employee worked or what type of weights she typically lifted at work. He explained that a rotator cuff tear can be caused by frequently lifting or raising objects from below shoulder level to shoulder level or above.

The trial judge determined that the statements of Dr. DuBois regarding causal relationship did not amount to testimony to a reasonable degree of medical certainty.

> "Dr. DuBois talked around the issue but never commented directly on the issue. He never made a definitive statement regarding causal relationship for that particular problem."

Tr. p. 79. Consequently, the trial judge denied and dismissed the petition.

Rhode Island General Laws § 28-35-28(b) governs the Appellate Division's review of the decision of a trial justice of the Workers' Compensation Court. That section states in relevant part:

> "The findings of the trial judge on factual matters are final unless an appellate panel finds them to be clearly erroneous."

Therefore, this panel may 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) (citing Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986)). Bearing in mind this

deferential standard of review, we have carefully reviewed the entire record of this proceeding and find no merit in the employee's reasons of appeal.

The employee has filed three (3) reasons of appeal alleging that the trial judge erred in determining that the testimony of Dr. DuBois regarding causal relationship did not constitute an opinion to a reasonable degree of medical certainty. The trial judge noted that he reviewed the deposition of the doctor several times looking for a definitive statement relating the employee's left shoulder problem to her job duties as a sales associate at K B Toy Works. In his decision, he quoted the only statement he found on the issue, which was made in response to a hypothetical question.

> "Q. I'm going to ask you to assume, Doctor, that she had worked for K B Toy Works from 1998. She had been out of work for a period of time in 2000-2001 but had returned to work in September 2001, that he job was that of an Assistant Manager which included bending, stooping, lifting, pulling, pushing, receiving deliveries, scrubbing the floor, lifting a pound or two up to activities of lifting adult bikes in boxes, putting them up on shelves up to and above shoulder level, putting together large plastic sandboxes, turtles, crabs, frogs and things of that nature that you find in toy stores, that she'd also be required to assemble five swing sets and shelving within the store and that the work she did required her to work both above and below shoulder level.
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> With that job description in mind, taking into account the history you received from her and your findings on physical examination, the MRI that you had access to, were you able to formulate an opinion which you can state to a reasonable degree of medical certainty and probability in you area of expertise as to the cause of the condition that you diagnosed?
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> "A. To a degree and based upon the fact that she had had symptoms for a prolonged period of time, had been seen by a number of people and treated, that she had had problems associated with her shoulder. Based upon the fact that she stated that during the holiday season that she had to increase the amount that she did, that she sustained an aggravation of the underlying condition of problems within her shoulder and that no definitive

> diagnosis had been made prior to the time when she had the MRI and examination."

Pet. Exh. 3, pp. 7-8. We must agree with the trial judge that this answer hardly qualifies as a definitive statement relating the condition diagnosed by the doctor to the employee's work activities.

The employee alleged in her petition that she became disabled due to a problem with her left shoulder which was caused by repetitive use at work. The question of whether certain repetitive activities may cause a particular condition is sufficiently complex so as to require expert medical testimony to establish that connection. In commenting on the standard for such testimony, the Rhode Island Supreme Court has stated:

> ". . . such testimony must speak in terms of 'probabilities' rather than 'possibilities.' Expert testimony, if it is to have any evidentiary value, must state with some degree of certainty that a given state of affairs is the result of a given cause. Although absolute certainty is not required, a medical expert must report that the injuries incurred 'most probably' resulted from one specific cause rather than several potential causes." (Citations omitted.)

Parrillo v. F.W. Woolworth Co., 518 A.2d 354, 355-356 (R.I. 1986).

Applying this standard to the opinion stated by Dr. DuBois quoted above, we cannot say that the trial judge was clearly wrong in concluding that the opinion regarding the causal relationship between the doctor's diagnosis of the left shoulder problem and the employee's work activities was stated with the requisite degree of certainty.

Furthermore, the foundation for the doctor's statement was faulty. The Rhode Island Supreme Court has discussed the requirements for a valid hypothetical question and stated, ". . . a hypothetical question to an expert witness must embrace all the essential elements of the situation as they appeared in evidence." Tavernier v. McBurney, 112 R.I. 159, 161, 308 A.2d 518, 520 (1973). In the present matter, the hypothetical question regarding the employee' job

duties posed to the doctor was neither complete nor accurate. At the time of this alleged injury, the employee was employed as a sales associate, not an assistant manager. She was working part-time, usually between fifteen (15) to twenty (20) hours per week. On occasion during the Christmas season, she might work up to thirty-eight (38) hours in a week. The hypothetical mentioned the employee's duties involved lifting activities, but made no mention of the frequency of this activity compared to her other job duties or how much was above shoulder height. Counsel also failed to include that the employee did work as a cashier while she was a sales associate. Furthermore, the fact that the employee had a long history of shoulder complaints dating back to at least 1999, by her own admission, was not included in the question posed to the doctor. In reliance upon this inaccurate and incomplete hypothetical, the doctor rendered his only opinion regarding causal relationship.

In rendering the opinion, Dr. DuBois only stated that based upon the employee's statement that her work activities increased during the holiday season, he believed that she aggravated an underlying condition in her shoulder. However, the medical records of Dr. Richard Murphy, the physician who referred the employee to Dr. DuBois, contradict this reasoning.

Dr. Murphy's records were submitted as an exhibit during the deposition of Dr. DuBois. Ms. Federowicz's personal physician had treated her periodically over several years for shoulder complaints and then referred her to Dr. Murphy in the spring of 2003. The report of the first office visit with Dr. Murphy on May 14, 2003 states that the employee has recently been experiencing increased problems with both shoulders. Obviously, this was not during the holiday season. An injection in the left shoulder worked until August, when the doctor injected the shoulder again. This alleviated the problem until the end of September. When Ms.

Federowicz saw Dr. Murphy on November 20, 2003, she employee reported that her shoulder felt worse than any time in the past. The busy holiday season had barely begun. Dr. DuBois relied on the employee's statement that her shoulder problems increased during the holiday season, but it is clear from Dr. Murphy's reports that the increase in her complaints which prompted referral to Dr. Murphy and then Dr. DuBois predated the holiday season in 2003. Therefore, the connection between increased work activities during the holiday season and the aggravation of an underlying left shoulder problem cited by Dr. DuBois in his opinion regarding causal relationship is clearly contradicted by the medical reports of Dr. Murphy.

We have thoroughly reviewed the deposition testimony and reports of Dr. DuBois and the testimony of the employee. For the reasons set forth above, we conclude that the findings of fact made by the trial judge in this matter are not clearly erroneous. Consequently, the appeal of the employee is denied and dismissed and the decision and decree denying the employee's original petition is 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 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 August 4, 2006 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

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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 Gregory L. Boyer, Esq., and Susan Pepin Fay, Esq., on

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