

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

PAUL HASTY

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VS.

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W.C.C. 06-08068

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TIM GASKIN a/k/a JOHN DOE

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DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division pursuant to an order issued to the parties to show cause why the case should not be summarily decided on the grounds that the issue on appeal involves the trial judge's determination that the petitioner's testimony was not credible. *See Davol, Inc. v. Aguiar*, 463 A.2d 170 (R.I. 1983). After reviewing the record and considering the arguments of the respective parties, we find that cause has not been shown, and we have proceeded to render our decision denying the petitioner's appeal.

On December 12, 2006, Mr. Hasty filed an original petition alleging that on December 18, 2004, he fell out of a window of an addition to a house he was working on and sustained fractures of both elbows, as well as injuries to his teeth, both knees and his chest. He asserted that he was employed by the respondent, Tim Gaskin (hereinafter "Gaskin"), at the time of this incident. A co-worker, Mike Bianco, drove Mr. Hasty to Rhode Island Hospital where he was initially treated in the emergency room and then admitted.

The petitioner testified that while he and Mr. Bianco were on their way to the hospital, some friends he worked with called Gaskin and told him what had happened. Tr. 14. Later in

his testimony, he stated that only he and Mr. Bianco were working at the site. Gaskin allegedly asked Mr. Hasty not to sue him, apparently because he had no insurance, and he would lose his construction business. The petitioner stated that he therefore told the hospital personnel and physicians that he fell off of a ladder at home while hanging Christmas lights.

Mr. Hasty had a follow-up visit on January 4, 2005 at the Orthopedic Surgery Clinic at Rhode Island Hospital, and he went to the emergency room at Roger Williams Hospital for medication. He stated that he returned to work as a framer about eight (8) months later; although he asserted that he has difficulty regularly working an eight (8) hour day.

The petitioner initially stated that he worked for Gaskin off and on for about six (6) months to a year prior to his injury. On cross-examination, he indicated that he had only worked for Gaskin about three (3) to four (4) months. In addition, he did not work every day, and he did not work at all some weeks. Mr. Hasty related that he was not paid based upon an hourly rate. Gaskin simply paid him in cash what he thought the work he did was worth. The petitioner explained that Gaskin would make him an offer stating that he could pay him a certain amount for a particular job. Tr. 28. Gaskin would provide all the necessary supplies and Mr. Hasty would use his own hand tools. He also stated that he had done some work setting up stages for the Providence Performing Arts Center and the Convention Center during the six (6) months prior to the injury. He explained that he was only in Rhode Island at the time because his mother was ill.

In response to questioning as to why he waited so long to pursue this claim, Mr. Hasty responded:

“Because Mr. Gaskin didn’t help me out like he said he would, and I had done a little job for him and money didn’t come out. So I felt like he was doing me wrong.”

Tr. 18.

The medical evidence consists of the records of Rhode Island Hospital and the deposition and records of Dr. Joseph J. Doerr. The history portions of the hospital records state that Mr. Hasty fell six (6) feet off of a ladder at home landing on his hands, elbows and chin. Of particular interest was a notation regarding a prior visit to the emergency room on November 14, 2004. The notation by a nurse indicates that Mr. Hasty has a positive history for alcohol and marijuana abuse, and in November 2004, he accidentally slit his throat with a new razor while high on drugs and alcohol. When Mr. Hasty was questioned regarding this incident, he stated that he could not recall exactly why he was at the emergency room that day, but it had nothing to do with the injuries he sustained in December 2004.

After his discharge from the hospital on December 20, 2004, the petitioner returned on only one (1) occasion, although he contacted the hospital on three (3) other occasions from December 30, 2004 to January 26, 2005 to obtain additional pain medication.

Dr. Doerr, a physical medicine rehabilitation specialist, testified that he saw Mr. Hasty on one (1) occasion on December 12, 2006. Based upon the history provided to him by the petitioner that he fell about fifteen (15) feet out of a window while working, the doctor testified that the injuries were caused by the fall and resulted in a period of total disability for about eight (8) months and then ongoing partial disability. Mr. Hasty testified that he has never sought any further medical treatment for any of his injuries.

Citing a number of contradictions or inconsistencies in the employee's testimony and the records from the hospital, the trial judge determined that Mr. Hasty was not a credible witness. In making this determination, he also noted some hesitation and evasiveness on the part of the petitioner in answering certain questions. The trial judge rejected the opinion of Dr. Doerr

because it was based entirely upon the history provided by Mr. Hasty. Consequently, the trial judge concluded that Mr. Hasty had failed to prove that he was an employee of Gaskin on December 18, 2004 and failed to prove that he sustained a compensable injury during the course of any employment which would entitle him to the benefits provided by the Workers' Compensation Act. The petitioner then filed the present claim of appeal.

Our review of a trial judge's decision on appeal is very narrow. The findings of fact made by a trial judge are deemed final unless the appellate panel determines that they are clearly erroneous. R.I.G.L. § 28-35-28(b). Factual findings based upon credibility determinations are afforded even greater deference. The Rhode Island Supreme Court has stated on numerous occasions that a trial judge is in the best position to observe the appearance and demeanor of a witness, as well as the manner in which he answers the questions posed to him. Mulcahey v. New England Newspapers, Inc., 488 A.2d 681, 683 (R.I. 1985); Davol, Inc., 463 A.2d at 174; Laganiere v. Bonte Spinning Co., 103 R.I. 191, 196, 236 A.2d 256, 258 (1967). Absent a finding that the trial judge's assessment of the petitioner's credibility was clearly wrong, or that he overlooked or misconceived material evidence in making that assessment, we must affirm his decision to deny the original petition.

The petitioner has filed two (2) reasons of appeal. He argues that the trial judge was clearly wrong to find that he failed to prove that he was an employee of Gaskin and that he failed to prove he sustained a compensable injury, when his testimony that he was employed by Gaskin and was injured on December 18, 2004 was unrebutted. The mere statement by Mr. Hasty that he worked for Gaskin is not sufficient to establish an employee/employer relationship, regardless of whether the respondent presents any evidence. The burden rests with the petitioning party to present credible evidence of probative force which will establish each required element of his

case. Delage v. Imperial Knife Co., Inc., 121 R.I. 146, 148, 396 A.2d 938, 9393 (1979). Mr. Hasty was aware from the outset that the respondent was contesting that he was an employee rather than an independent contractor. Tr. 3. However, the testimony of Mr. Hasty did not support a determination that he was an employee at the time of his injury.

Mr. Hasty stated that he did not have any type of regular work schedule. He was paid cash, with no deductions for taxes of any kind. He was not paid a regular wage based on an hourly or weekly rate. He stated that Gaskin simply told him he would pay him a certain amount to do a particular job. There is no indication that Gaskin supervised Mr. Hasty in any way, and he was not present on the job site on the day of the incident. Although Gaskin provided supplies and some tools, Mr. Hasty utilized his own hand tools. All of these facts tend to refute the assertion that the petitioner was an employee of Gaskin.

The trial judge cited the decision in Quintana v. Worcester Textile Co., 511 A.2d 294 (R.I. 1986) in support of his rejection of the testimony of the petitioner and Dr. Doerr. Similar to the present matter, Quintana involved the testimony of the employee and her treating physician, as well as the report of an impartial medical examiner. The employee argued that her testimony and that of her treating physician that she sustained a work-related injury was un rebutted. The Rhode Island Supreme Court, in upholding the rejection of the testimony, quoted its prior decision in Hughes v. Saco Casting Co., 443 A.2d 1264 (R.I. 1982):

“Positive, uncontradicted evidence, we have said, may be rejected if it contains inherent improbabilities or contradictions that alone or in connection with other circumstances tend to contradict it. Such testimony may also be disregarded on credibility grounds as long as the factfinder clearly but briefly states the reasons for rejecting the witness’s testimony. (Citations omitted.)”

Quintana, 511 A.2d at 296 (quoting Hughes, 443 A.2d at 1266).

In his bench decision, the trial judge in the matter before this panel first pointed out the fact that Mr. Hasty testified that he was injured while working, yet he told the emergency room personnel, as well as the physician in the orthopedic surgery clinic a couple weeks later, that he fell off of a ladder at home. He also cited the failure to even identify the alleged employer to the emergency room personnel and the failure to recall such a significant event as slitting his throat as additional inconsistencies in Mr. Hasty's testimony. Furthermore, the trial judge recited his own observations as to the petitioner's demeanor on the witness stand and the manner in which he answered questions as additional grounds for questioning his credibility. Tr. pp. 46-47. We find that the trial judge's statements as to the basis for his rejection of Mr. Hasty's testimony are amply supported by the record and satisfy the standard set forth in Hughes.

Absent sufficient proof to establish an employee/employer relationship, the testimony of Dr. Doerr regarding causation and disability is of no assistance to the petitioner. The foundation of the doctor's opinions is the information provided by Mr. Hasty, whose credibility is compromised.

“Where medical testimony is based to a large extent on statements of medical history by the employee whose credibility carries little if any weight with the commission, it is open to evaluation, and the commission is justified in not accepting it.”

Mazzarella v. ITT Royal Electric Division, 120 R.I. 333, 339, 388 A.2d 4, 7-8 (1978).

Therefore, the trial judge appropriately disregarded the reports and testimony of Dr. Doerr.

The petitioner contends that the trial judge improperly focused on an irrelevant fact, Mr. Hasty's failure to recall why he went to the emergency room on November 14, 2004, in finding that he was not a credible witness. Counsel for the petitioner submitted a letter which included the bill for this visit and then asked Mr. Hasty about the visit to the emergency room that day, thereby opening the door to the inquiry as to the reason for the visit. Whether Mr. Hasty was

embarrassed about the incident is irrelevant; he was under oath to tell the truth. Instead, he testified that he could not recall exactly why he was there. As the trial judge stated, it is rather difficult to believe that one would forget accidentally slitting one's throat to the extent that he required treatment costing One Thousand Seven Hundred Eighty-Seven and 00/100 (\$1,787.00) Dollars. The petitioner's response to the questioning about this visit, even though it was not directly related to the injuries he sustained on December 18, 2004, did impact the overall assessment of his credibility. It was, however, only one (1) of several factors the trial judge cited as the basis for his credibility determination. We find no error on the part of the trial judge in his consideration of this testimony, which was relevant to his determination as to the credibility of the petitioner.

Based upon the foregoing discussion, we find that the trial judge was not clearly wrong, nor did he overlook or misconceive material evidence in determining that Mr. Hasty was not a credible witness. Therefore, the petitioner's claim of appeal is denied and dismissed, and the decision and decree of the trial judge denying the original petition 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 Hardman, JJ. concur.

ENTER:

Olsson, J.

Sowa, J.

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 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 17, 2007 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

John A. Sabatini, Administrator

ENTER:

Olsson, J.

Sowa, J.

Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Stephen J. Dennis, Esq., and Gregory J. Acciardo, Esq., on
