

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

KENNETH PONTE

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VS.

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W.C.C. 2007-06543

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JK GLASS COMPANY, INC.

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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 right shoulder and lower back on July 6, 2007 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.

During the trial of this matter, the employee was represented by counsel. After the decision was rendered, counsel for the employee withdrew and the employee filed his claim of appeal *pro se*. A transcript of the trial was not provided to the appellate panel. As such, for purposes of this decision, we have gleaned the pertinent facts from the decision of the trial judge and the exhibits submitted during the trial.

At the time of the alleged injury, the employee had been working for JK Glass as a carpenter for approximately two (2) months. Mr. Ponte obtained this employment through the hiring hall of Local 94 of the Carpenters' Union. His primary job duties were installing sliding doors and windows at the Westin Residences in Providence. On Friday, July 6, 2007, in the

early afternoon, the employee and two (2) co-workers were notified that they were being laid off effective that day. He received his final paycheck and then collected some tools from another co-worker. The employee then took the elevator to the 25th floor to retrieve the rest of his personal tools from the employer's gang box.

Each subcontractor on the jobsite had its own gang box in which to store tools and equipment. The gang box is a large metal chest, about five (5) feet high and four (4) feet wide, and is usually locked at the end of the work day and also when no one from the company is in the area. Mr. Ponte stated that he had a bucket of tools and a two (2) foot long level in the gang box which he went to get before leaving the premises. He explained that the lid of the gang box folded up and in half to form an inverted "V" with the sides resting on rails. The lid weighs about 25 to 30 pounds. Mr. Ponte testified that the lid did not have any locking mechanism to keep it in place on the rails.

The employee stated that he first retrieved his bucket of tools from the gang box and then, as he reached into get his level, he saw the lid coming down out of the corner of his eye. He twisted to get out of the way, but the lid struck his right shoulder and elbow. Mr. Ponte indicated that he wrenched his back in trying to move away from the falling lid.

The employee asserted that his injury was witnessed by his foreman, Dana Marqus, who was only six (6) feet away. However, the employee further testified he did not speak to Mr. Marqus, he did not report the injury to anyone, nor did he fill out an accident report immediately after the alleged accident even though he was aware of the accident reporting policy.

The employee sought treatment for back and right shoulder pain at Charlton Memorial Hospital in Fall River, Massachusetts later that evening. The medical records indicate a diagnosis of a low back sprain and right shoulder contusion. The following Monday, the

employee called JK Glass to report the injury. Mr. Ponte has not worked since the alleged incident.

The employer presented five (5) witnesses who directly contradicted significant portions of the employee's testimony. They testified that the gang boxes utilized by JK Glass have a non-folding lid with locking side hinges. This type of lid cannot be closed without disengaging the side hinges. The witnesses further stated that JK Glass has never owned a gang box like the one that employee described with a double hinged folding lid. Photographs of the two (2) different types of gang boxes described by the employee and the employer's witnesses were introduced into evidence. In addition, the gang box the employer asserts was used at the jobsite was viewed by the trial judge.

The two (2) co-workers from whom Mr. Ponte collected his tools the day he was laid off testified that he appeared agitated and threw his clamps and his tool bucket at the elevator door. The employee then took the elevator to the 25th floor to retrieve the rest of his tools from the gang box. Mr. Marqus was already there, having taken the stairs. Mr. Marqus stated that he stood about twenty-five (25) feet away, outside the condo unit where the gang box was located, and watched Mr. Ponte leave in order to ensure that none of the company's tools were taken. Mr. Marqus testified that he did not witness any accident or injury, or hear any yelling from employee. He did not observe any blood or cuts on Mr. Ponte's elbow. Mr. Marqus indicated that the employee did not say anything to him as he walked by and got into the elevator.

The trial judge reviewed the testimony of all of the witnesses and found the testimony of the employer's witnesses to be more credible than the testimony of the employee. He noted that the key element of the employee's case was the type of gang box he claimed caused his injury. The trial judge was persuaded by the testimony of the employer's five (5) witnesses who all

stated that the employer utilized a different type of gang box with a locking lid that could not cause the injury in the manner described by the employee. As a result of rejecting the employee's version of how the injury occurred, the trial judge was compelled to reject the medical opinions which were based upon that history. The original petition was denied and the employee filed a claim of appeal.

The standard of review employed by the appellate panel is very deferential to the findings of the trial judge, particularly with regard to credibility determinations. Section 28-35-28(b) of the Rhode Island General Laws states that “[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous.” The Rhode Island Supreme Court addressed the proper method of evaluating credibility determinations on appeal in Mulcahey v. New England Newspapers, Inc., 488 A.2d 681 (R.I. 1985).

“ . . . the commission, before disturbing findings based on credibility determinations, must first find that the trial commissioner was clearly wrong either because the commissioner was obviously mistaken in his or her judgment of the credibility of the witnesses or overlooked or misconceived material evidence in arriving at the conclusion reached.”¹

Id. at 683. After our review of the limited record available to us, we find no such error on the part of the trial judge.

We would take this opportunity to compliment Mr. Ponte on the thoughtfully worded document he submitted as his reasons of appeal and his presentation at oral argument. The document submitted to the court is in the nature of a narrative; however, we will address the following issues which we believe the employee attempted to raise in his appeal.

Initially, the employee takes issue with the trial judge's statement that he alleged injuries to his right shoulder and lower back because he testified that his right shoulder was fine. The

¹ In 1990, the Workers' Compensation Commission was incorporated into the judicial branch and renamed the Workers' Compensation Court and the commissioners became judges. P.L. 1990, ch.332, art 1, § 13.

original petition filed by the employee's attorney does state that he injured his right shoulder and low back and the employee's testimony was that the gang box lid struck his right shoulder.

Therefore, the trial judge's statement is correct.

The primary focus of the appeal is that the trial judge was wrong in his credibility assessment and overlooked material medical evidence. The Rhode Island Supreme Court has noted that the trial judge is "uniquely qualified" to assess the credibility of the witnesses testifying before him. Quintana v. Worcester Textile Co., 511 A.2d 294, 295 (R.I. 1986).

"We believe that the trial commissioner is in the best position to observe the appearance of a witness, his demeanor, and the manner in which he answers questions. These impressions are invaluable in assessing the credibility of witnesses and ultimately in determining what evidence to accept and what evidence to reject."

Davol, Inc. v. Aguiar, 463 A.2d 170, 174 (R.I. 1983)(citing Laganiere v. Bonte Spinning Co.,

103 R.I. 191, 236 A.2d 256 (1967)). The trial judge was clearly persuaded by the five (5) witnesses who testified that the employer has never utilized a gang box with the type of lid described by the employee and the lid on the type of gang box used by the employer had a locking mechanism which prevented it from falling accidentally as described by the employee.

The mere fact that the witnesses currently or previously worked for the employer is not sufficient grounds to automatically reject their testimony. Their testimony directly contradicted the employee's description of how the alleged injury occurred.

In addition, the only individual whom the employee asserted witnessed the incident, Mr. Marqus, denied that he saw or heard anything to indicate that Mr. Ponte was injured while he was at the gang box. Although the employee asserted that he sustained some scrapes or lacerations to his right elbow which were bleeding when he left the jobsite, the hospital record

from that evening makes no mention of any such injury to the right elbow. The cumulative effect of all of these circumstances was to call into question the employee's version of events.

Once the trial judge found that the employee's testimony was lacking in credibility, he properly exercised his discretion in rejecting the medical evidence proffered by the employee in support of his claim.

“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). The opinions expressed by Dr. Ajit Mirani, the employee's treating physician, were based upon the history provided by the employee as to how the alleged incident occurred. When the trial judge rejects the employee's version of events due to a lack of credibility, the foundation for the doctor's opinion as to the cause of the employee's injuries necessarily becomes flawed and the opinion may be rejected. In the present matter, the trial judge rejected the opinion of Dr. Mirani because it was based upon the employee's version of events which the trial judge did not accept.

Based upon the record available to this panel, we cannot conclude that the trial judge was obviously mistaken in his assessment of the credibility of the witnesses or that he overlooked or misconstrued material evidence in determining that the employee had failed to establish that he sustained a work-related injury.

In the document submitted as his reasons of appeal, the employee notes several other subjects, including settlement discussions, his inability to obtain TDI and unemployment benefits, a request for arbitration, a plea for unpaid medical bills, and the amount of time to adjudicate his petition. These concerns are collateral matters which are outside our scope of

review of the trial decision in this case and are not appropriate topics for discussion in the context of this decision.

Accordingly, the employee's reasons of appeal are 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

Hardman and Ferrieri, JJ. concur.

ENTER:

Olsson, J.

Hardman, J.

Ferrieri, 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 12, 2009 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.

Hardman, J.

Ferrieri, J.

I hereby certify that copies of the within Decision and Final Decree of the Appellate Division were mailed to Kenneth Ponte, 342 Bullock St., Fall River, MA 02720, and Vivian B. Dogan, Esq., on