

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

JAMES J. MCALLISTER, JR.)

)

VS.)

W.C.C. 2009-00302

)

WOMEN & INFANTS HOSPITAL)
OF RI (CARE NE)

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's appeal from the decision and decree of the trial judge which found that the employee failed to prove by a fair preponderance of the evidence that he sustained a work-related back injury. In his original petition, the employee alleged he was disabled from January 19, 2007 to June 25, 2007 as a result of a low back injury and left leg pain caused by the repetitive lifting, pulling, and pushing demands of his employment. After conducting a careful review of the record in this matter and considering the arguments of both parties, we affirm the decision and decree of the trial judge as to the substantive allegations of the petition and grant the employee's appeal regarding payment of the stenographer's fee for a physician's deposition cross-examination by the employer.

The employee worked for the employer for more than thirty-three (33) years. He spent the last fifteen (15) years as a maintenance mechanic in the Engineering Department. The employee's unit was responsible for repairs to equipment of all types as well as moving other departments and offices to different parts of the hospital. This entailed transporting boxes, filing

cabinets, beds, chairs, and equipment. The employee testified he was “[c]onstantly pulling, pushing, [and] lifting.” (Tr. at 9.) On a Friday in January of 2007, the employee was cleaning out a storage area at work containing furniture and other items. He completed the work day without difficulty, but that weekend he awoke with severe pain in his back.

The employee had a previously scheduled appointment with his primary care physician, Dr. John Gaines, that Monday and told the doctor that he had been suffering from low back pain radiating down his leg for four (4) days. The employee introduced the affidavit and records of Dr. Gaines into evidence. The doctor’s report states that the pain radiated down the right leg. The employee testified he did not tell Dr. Gaines he believed the injury was work-related. At the conclusion of the visit, Dr. Gaines advised the employee to stay out of work. Mr. McAllister testified that he called his employer after seeing Dr. Gaines and informed them that he would be out of work for a while, but he did not indicate that his condition was work-related.

Mr. McAllister began a course of physical therapy which resulted in some improvement in his condition; however, it did not last. On March 23, 2007, the employee reported to Dr. Gaines that he had difficulty sleeping due to discomfort primarily on the right side. The doctor also noted more tenderness on the right side than the left during his examination. Dr. Gaines referred the employee for an MRI which revealed a small left paracentral disc protrusion at L4-5 with degenerative changes resulting in moderate spinal stenosis and a mild broad based disc bulge at L3-4 with degenerative changes but no significant spinal stenosis. Although his prior reports noted right-sided symptoms, in his March 30, 2007 report, Dr. Gaines stated that the findings of the MRI at the L4-5 level “correlate with his symptoms on the left side.” (Ee’s Ex. 5, 3/30/07 report.)

After reviewing the results of the MRI, Dr. Gaines referred the employee to Dr. William F. Brennan, Jr., an orthopedic surgeon, who saw the employee for the first time on April 2, 2007. The deposition, affidavit, and records of Dr. Brennan were admitted into evidence. The history recorded by the doctor indicates that the employee was experiencing low back pain extending into the left leg which came on gradually without any specific precipitating incident. The employee told the doctor he felt “[i]t may be from a lot of moving he was doing at work around January 23, 2007.” (Ee’s Ex. 8, 4/2/07 report.) The employee also relayed that he had suffered a similar episode with his back years ago, but it had resolved with conservative treatment and he had no significant problems until this injury. The employee failed to complete the section regarding workers’ compensation injuries on the office intake form and only noted high blood pressure under past and present medical conditions.

After conducting a physical examination and reviewing the MRI results, Dr. Brennan’s diagnosis was spinal stenosis with disc herniation at L4-5 and radicular pain. He recommended continued physical therapy. At the next office visit on April 23, 2007, the employee again indicated to Dr. Brennan that he believed the repetitive nature of his job caused his back problem in January. In a letter to the doctor dated April 29, 2007, Mr. McAllister thanked the doctor for “agreeing to send a note to my employer, Women and Infants Hospital of Rhode Island, indicating the relationship between my job and my back injury due to repetitive work.” (Er’s Ex. B.) In his letter dated May 4, 2007, written at the employee’s request, Dr. Brennan wrote that it was his “opinion that the repetitive nature of this patient’s job at Women & Infants Hospital has contributed to his current lower back condition.” (Er’s Ex. C.) The doctor never stated in any of his reports that it was his opinion that the employee’s condition was work-related.

Subsequent to the May 4, 2007 letter, the doctor seemingly contradicted his opinion regarding causal relationship. On July 5, 2007, Dr. Brennan provided a Statement of Attending Qualified Healthcare Provider to the Rhode Island Department of Labor and Training's Temporary Disability Insurance (hereinafter "TDI") Division indicating that the disability was not related to work.¹ Then on August 20, 2007, he was asked to fill out a similar form on behalf of the employee for Sun Life Assurance Company of Canada, a long term disability insurer. On this form, the doctor again denied that the condition was due to an injury arising out of the employee's work. When confronted with these inconsistencies on cross-examination, the doctor responded: "I felt that the work injury was a contributing factor. I don't think it was the sole cause of the condition, and I don't think it had been fully established yet which way he was going to go." (Ee's Ex. 8 at 30.) Dr. Brennan had previously indicated that the employee's condition was partly degenerative in nature and he noted subsequently that he was of the opinion that the employee had some pre-existing findings in his spine.

Dr. Brennan testified that it was his understanding that the employee was a mechanic at the hospital and there was "a repetitive nature to his work, a lot of lifting, bending, twisting-type activities." (Ee's Ex. 8 at 8-9.) Dr. Brennan opined that Mr. McAllister was unable to perform those duties from January 19, 2007 to June 25, 2007 due to his back condition. On cross-examination, the doctor acknowledged that he was unaware of the employee's specific job duties, including the amount of weight, or with what frequency, he was required to lift.

Prior to the injury at issue, the employee had experienced problems with his back and had missed some time from work for various injuries. He testified that he was involved in more than one (1) car accident in the early 1990's, but could not recall exactly when they occurred. He

¹ Dr. Brennan initially provided an incomplete form on July 5, 2007 to the Department of Labor and Training which omitted an answer to this question, among others, but provided the Department with a completed form on or about July 9, 2007, with that question answered.

indicated that he was out of work due to those accidents but he returned to his regular job and never had problems thereafter until this recent episode.

The records of Dr. Joseph A. Izzi and the TDI Division provided more detail regarding Mr. McAllister's previous back problems. The TDI records indicate that he was out of work due to a back injury for about three (3) months in 1994. The employee began treating with Dr. Izzi on December 10, 1998 for complaints of low back pain radiating to both legs after doing heavy work, including moving furniture. An MRI was conducted on January 5, 1999 which revealed spinal stenosis with disc protrusions at L4-5 and L5-S1. Dr. Izzi referred him to Dr. Curtis E. Doberstein for neurosurgical evaluation and surgery was discussed as an option if conservative treatment failed. The employee received TDI benefits for several months during this period and resumed his regular job duties on March 15, 1999. On May 25, 1999, the employee returned to see Dr. Doberstein when he suffered a severe setback after shoveling mulch and moving a Jacuzzi. He complained of low back pain radiating down his left leg into his ankle. The doctor discussed possible surgical intervention again, but Mr. McAllister declined.

The next episode occurred in June of 2003 when Mr. McAllister experienced a pull in his low back as he stood up after putting on his shoes. He complained to Dr. Izzi of low back pain radiating down his left leg. An MRI was performed on June 25, 2003 which revealed evidence of a degenerative disc at L4-5 and a disc bulge with mild central stenosis at L4-5. The employee returned to work on July 14, 2003. There is no evidence of any reported back problems from July of 2003 until the recent episode in 2007.

Prior to filing this petition for workers' compensation benefits in 2009, the employee applied for and received TDI benefits. After those benefits were exhausted, he received benefits under a long term disability insurance policy through his employer. Mr. McAllister was

examined on April 6, 2007 by Dr. William S. Buonanno, who specializes in orthopedics, at the request of the TDI Division and was found to be disabled. The employee could not recall whether he told Dr. Buonanno that the injury was work-related. The doctor's report states that there was no particular injury and makes no mention of any connection to work activities.

Lastly, in July of 2007, the employee was treating with a chiropractor who detected a mass in his left thigh. An MRI revealed a tumor, which was removed within two (2) weeks, requiring a continued absence from work. This tumor, and the subsequent missed time from work, is not related to this workers' compensation claim. The employee only seeks benefits up to June 25, 2007.

After considering the evidence, the trial judge found that the employee failed to demonstrate the incapacitating back injury was causally related to his employment. The trial judge rejected the testimony and records of Dr. Brennan based on his lack of knowledge regarding the employee's prior history of back problems, any precipitating cause which may have contributed to the disability, and the employee's specific job duties. The trial judge also found the employee's testimony lacked credibility due to his failure to provide a complete medical history regarding his previous back problems to the physicians he saw for this claim.

The employee presents six (6) reasons of appeal which can be reduced to three (3) basic issues. First, the employee asserts that the trial judge failed to consider the employee's injury as an occupational disease, and thus applied the incorrect standard of proof to the facts. The employee argues further that the trial judge impermissibly discredited and disregarded both Dr. Brennan's opinion and the employee's testimony. Finally, the employee alleges the trial judge erroneously denied the employee's motion for reimbursement for the cost of the stenographer's services in the deposition of Dr. Brennan.

In reviewing the trial judge's decision, we are bound by the provisions of R.I.G.L. § 28-35-28(b), which dictate that "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." We are precluded from undertaking a *de novo* review of the evidence and substituting our judgment for that of the trial judge without first determining that the trial judge was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). Bearing this standard in mind, we have thoroughly reviewed the record in this matter and we find no error in the trial judge's reasoning and ultimate determination regarding the substantive allegations of the original petition, but we do find that the trial judge incorrectly denied the employee's request that the court order the employer to pay the stenographer's bill for Dr. Brennan's deposition.

It is axiomatic that the petitioning party in a workers' compensation case bears the burden of proving by competent evidence the essential elements of their claim. C.D. Burnes Co. v. Guilbault, 559 A.2d 637, 639 (R.I. 1989). In this case, the employee has filed a petition alleging that his work activities caused his disabling condition. Accordingly, the employer is not required to offer evidence disproving the employee's allegations if the employee fails to present competent evidence establishing the essential elements of his claim.

On appeal, Mr. McAllister argues that the trial judge impermissibly failed to categorize his injury as an occupational disease under R.I.G.L. § 28-34-1. An occupational disease is defined as "a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment." R.I.G.L. § 28-34-1. The Legislature identified more than thirty (30) accepted occupational diseases and provided a catch-all provision for any "[d]isability arising from any cause connected with or arising from the peculiar characteristics of the employment." R.I.G.L. § 28-34-2(33). In the present matter, Mr.

McAllister did not allege that he developed any of the diseases or conditions listed in § 28-34-2, nor can it be shown that his back injury is due to conditions which “are characteristic of and peculiar to a particular trade, occupation, process, or employment.” R.I.G.L. § 28-34-1. The mere fact that he engaged in some repetitive activities at times in his job does not warrant the characterization of his condition as an occupational disease under this section of the Act.

Rhode Island General Laws § 28-33-1 has been construed to encompass injuries caused by repetitive activity. In 1949, this provision of the Act was amended such that the requirement of a “personal injury *by accident* arising out of and in the course of his employment” was modified to read “personal injury arising out of and in the course of his employment . . .” (emphasis added). Gartner v. Jackson’s, Inc., 95 R.I. 489, 494, 188 A.2d 85, 88 (1963). The Rhode Island Supreme Court in Shoren v. United States Rubber Co., 87 R.I. 319, 140 A.2d 768 (1958), while addressing a petition alleging injury to the hand caused by constant grasping, noted the change in the statute and concluded that the definition of “personal injury” had been broadened significantly by the deletion of the requirement that an accident cause the injury. Id. at 323-324, 140 A.2d at 770; *see also* Gartner, 95 R.I. at 494-495, 188 A.2d at 88. A compensable personal injury under § 28-33-1, therefore, need not be the result of a single specific incident, but may develop gradually over a period of time.

Regardless of whether the “injury” falls under the occupational disease provisions or under § 28-33-1, the employee must establish a causal connection to his employment. The standard of proof is the same. The employee incorrectly cites the case of Tavares v. Aramark Corp., 841 A.2d 1124 (R.I. 2004), for the proposition that there is a lesser standard of proof of causal relationship in an occupational disease case than other types of work-related injuries. (Reasons of Appeal, p. 2-3.) Tavares did not involve an occupational disease and makes no such

distinction. In distinguishing proof of causal relationship in a workers' compensation matter from proximate cause in a negligence case, the Rhode Island Supreme Court merely noted that "[t]he 'causal relationship' standard is less exacting than what is required for proximate cause," and may be established "if the conditions and nature of the employment merely contribute to the injury." Tavares, 841 A.2d at 1128 (citations omitted).

Our review of the trial judge's decision in the present matter leads to the conclusion that he properly applied the correct legal standard to the evidence before him. His reference to an incident at work reflects the employee's own testimony which attributed his back problem to lifting and moving items at work on a Friday in January 2007. The trial judge concluded that the employee had failed to establish a causal relationship between his condition and his work activities. In evaluating this determination, we must address the trial judge's rejection of Dr. Brennan's opinion regarding causation and, to a lesser extent, the rejection of the employee's testimony.

In rejecting Dr. Brennan's opinion, the trial judge opined that his testimony "exhibited a failure to understand the patient's prior and ongoing medical condition prior to January, 2007, as well as the employee's specific job duties, and how, if at all, they impacted on the disability that he diagnosed." (Decision at 7-8.) We find that the trial judge's rejection of Dr. Brennan's opinion was justified.

Generally, the Appellate Division "may not set aside findings based upon the trial judge's credibility determinations unless the division finds that the trial judge's findings were clearly wrong or that the trial judge misconceived or overlooked material evidence." Garcia v. C.I. Hayes, Inc., 606 A.2d 1322, 1324 (R.I. 1992). However, this deference is not mandated when the testimony is presented to the trial judge in the form of deposition transcripts or medical

records rather than by a live witness in the courtroom. *See id.* at 1325. In these instances, the trial judge is in no better a position than the panel to evaluate the evidence. *Id.* Applying this standard, we find no error in the trial judge's rejection of Dr. Brennan's opinion.

Dr. Brennan testified that the employee's work activities contributed to his diagnosis of spinal stenosis and disc herniation; however, his only information regarding the employee's job was that the employee "had a repetitive nature to his work, a lot of lifting, bending, twisting-type activities." (Ee's Ex. 8 at 8-9.) On cross-examination, the doctor acknowledged he did not know the specifics of these duties, including how much and how frequently the employee was required to lift. Also, his limited understanding of the job duties was gleaned solely from the employee's own statements. Clearly, Dr. Brennan possessed merely a passing knowledge of the employee's work activities which was insufficient to lend significant credence to the doctor's opinions regarding causation.

The same holds true for the doctor's lack of familiarity with the employee's medical history, specifically regarding treatment for prior back complaints. Dr. Brennan did not review any medical records from the referring doctor or from Dr. Izzi. He also lacked a complete understanding of the employee's prior back-related issues, testifying only that the employee "had a similar episode of back pain years ago, but it had resolved, and he had been doing well until January." *Id.* at 7. These deficiencies in the information forming the foundation for the doctor's opinion regarding causation render those opinions incompetent.

Dr. Brennan also contradicted himself regarding his opinion as to causation a number of times while treating the employee. The trial judge noted these inconsistencies and we share his concerns. For one, Dr. Brennan only commented on the cause of the employee's injury after being asked to provide a note to the employer regarding the relationship between the job and the

back injury, which he did on May 4, 2007. Alone, this would be of little import; however, what followed exposed the weaknesses in the doctor's opinion. On July 5, 2007, the doctor was asked by the TDI Division whether the employee's injury was work-related, and he indicated it was not. Then on August 20, 2007, when asked by Sun Life Assurance, the long-term disability insurance carrier, whether the injury was work-related, he again answered in the negative. These seemingly irreconcilable opinions led to the following exchange on cross-examination:

Q: Is there some reason, Doctor, that those two forms both contain a statement that would appear to contradict those statements that you made in your May 4, 2007, letter?

A: I believe that at the time those forms were filled out, he was still not going through Workmen's [sic] Comp., and the claim had not been accepted by Workmen's [sic] Comp.

Q: That may well be true, Doctor, but is there some reason that you would sign a document, or actually two documents, after authoring your May 4, 2007, letter which suggests a causal connection between work and his injury, and then subsequently author two subsequent documents that would appear to give a contrary opinion relative to the causal relationship of this gentleman's injuries?

A: I felt that the work injury was a contributing factor. I don't think it was the sole cause of the condition, and I don't think it had been fully established yet which way he was going to go.

(Ee's Ex. 8 at 29-30.) This rationalization is woefully lacking. Whether or not an injury is work-related is not contingent on who the employee seeks to recover benefits from. Dr. Brennan seemingly tailored his opinion to whichever entity the employee was seeking compensation from, calling into question both the validity and reliability of his opinion.

For these reasons, we find no error in the trial judge's rejection of Dr. Brennan's opinion testimony. This is despite the fact that the employer did not present contradictory evidence, as "[p]ositive, uncontradicted evidence ... may be rejected if it contains inherent improbabilities or

contradictions that alone or in connection with other circumstances tend to contradict it.”

Hughes v. Saco Casting Co., Inc., 443 A.2d 1264, 1266 (R.I. 1982).

Dr. Brennan’s testimony was the only evidence proffered by the employee, aside from his own testimony, to establish a causal relationship between the back injury and the employment. As noted earlier, an employee must establish through competent medical testimony that his alleged injury or condition was the probable result of the conditions of his employment. Furthermore, expert testimony is required to prove causal relationship unless the “physical injury appears reasonably soon after an accident with symptoms observable to the ordinary person in that part of the body where force was applied” Hicks v. Vennerbeck & Clase Co., 525 A.2d 37, 42 (R.I. 1987). With the proper rejection of Dr. Brennan’s opinion regarding causation, the employee’s petition necessarily fails; however, we will briefly address the trial judge’s rejection of the employee’s testimony on credibility grounds.

A trial judge’s evaluation of live testimony is given great deference and will be overturned only if it is determined he was clearly wrong, or misconceived or overlooked material evidence in making his credibility assessment. Garcia, 606 A.2d at 1324 (citing Davol, Inc. v. Aguiar, 463 A.2d 170, 173-174 (R.I. 1983)). The “trial judge is in the best position to view the appearance of a witness, his or her demeanor, and the way in which the witness responds to questions.” Id. at 1324 (citations omitted). “These impressions are invaluable in assessing the credibility of witnesses and ultimately in determining what evidence to accept and what evidence to reject.” Aguiar, 463 A.2d at 174.

The employee testified at trial and the trial judge ultimately found his testimony lacked credibility. He primarily cited the employee’s failure to provide complete and accurate medical

histories to the various treating physicians. We find the trial judge was not clearly wrong nor did he misconceive or overlook any material evidence in reaching this conclusion.

First, the employee acknowledged failing to tell Dr. Gaines he believed the injury was work-related. He did not do so because he was applying for TDI benefits at the time. The employee also could not remember whether he told Dr. Buonanno that the injury was work-related. Dr. Buonanno's report is silent as to the issue of causal relationship. It is fair to infer this subject was not broached during the examination.

The employee also contradicted himself in the course of his testimony. He testified as follows on direct-examination:

Q: Have you had back pain and symptoms during the years of 1990's and the 2000 years?

A: No.

Q: Do you know what I mean? Have you had back pain or problems in your legs from time to time during that time?

A: After I had gone back after the accident?

Q: Yes.

A: No.

Q: All right. Prior to or before January of 2007, when is the last time you recall having back pain or any radiation symptoms in your leg; do you recall?

A: I don't recall.

(Tr. at 19.) However, on cross-examination the employee admitted that he had in fact received treatment for his back during this time. This was corroborated with medical records and TDI records demonstrating he had longstanding problems with his back.

Clearly, the trial judge did not err when he expressed concern regarding the employee's credibility or when he rejected Dr. Brennan's opinion as to causal relationship. Accordingly, the employee fails on his substantive appeal of the trial judge's decision.

There remains the procedural issue of whether the employee was entitled to reimbursement for the cost of the stenographer used in the deposition of Dr. Brennan. On the last day of the trial, counsel for the employee requested a ruling from the trial judge that the employer was responsible for the payment of the stenographer's bill in the amount of Two Hundred Thirty-one and 50/100 (\$231.50) Dollars because the employer requested cross-examination of the doctor after the employee had presented Dr. Brennan's affidavit and reports. The trial judge deferred ruling on the issue and subsequently issued an order on October 27, 2009. In the order, he erroneously characterized the request as a motion for reimbursement of the expert witness fee paid to Dr. Brennan by the employee in the amount of Six Hundred Fifty (\$650.00) Dollars and denied the motion as premature because the expert witness fee was a cost which would only be reimbursed if the decision on his petition was favorable. After reviewing the relevant case law and rule of practice regarding payment of stenographic fees, we grant the employee's appeal regarding this issue.

The employee presented the affidavit and reports of Dr. Brennan pursuant to R.I.G.L. § 9-19-27, which provides in pertinent part:

Nothing contained in this section shall be construed to limit the right of any party to the action to summon or depose, *at his or her own expense*, the physician . . . for the purpose of cross examination with respect to the bill, record, and report

R.I.G.L. § 9-19-27 (emphasis added). The employer requested the opportunity to cross-examine Dr. Brennan in a deposition. The employee paid an expert witness fee to Dr. Brennan, but did not pay the bill presented by the stenographer with the completed transcript of his deposition.

In Gerstein v. Scotti, 626 A.2d 236 (R.I. 1993), the Rhode Island Supreme Court had the opportunity to construe this statute, and specifically the phrase “at his or her own expense,” in addressing the question of which party would be responsible for paying an expert witness fee to the physician for his cross-examination by deposition.

Obviously the Legislature intended by this phrase to require the party who seeks to cross-examine to pay the cost of subpoena, and if that party desires to depose the physician, to pay the cost of the issuance of the notice, any supporting subpoena, and *the fee of the stenographer who would take the deposition*.

Id. at 238 (emphasis added). With regard to payment of the expert witness fee, the Court found that some interstitial rulemaking was called for and concluded that the proponent of the expert witness shall pay for one (1) hour of cross-examination by deposition and the adverse party shall pay for any additional time.

The above-quoted language from Gerstein is controlling in the present situation – the employer requested cross-examination and is responsible for all costs associated with the taking of the doctor’s deposition except the expert witness fee. The employer argued before the trial judge that the Workers’ Compensation Court Rules of Practice have modified the pronouncement of the Court in Gerstein such that the employee is responsible for those costs unless he proves financial inability to pay them or he is successful in his petition and costs are assessed against the employer pursuant to R.I.G.L. § 28-35-32. We disagree with such a broad application of our rules.

The Workers’ Compensation Court Rules of Practice provide that “[t]he court may, in its discretion, upon motion after notice is given of the intention to submit evidence by affidavit pursuant to R.I.G.L. § 9-19-27 ... require the party seeking to take the deposition of the expert witness or other party to pay the costs incurred in the taking of the deposition including a

reasonable expert witness fee or such other conditions as the Court deems appropriate.” W.C.C. – R.P. 2.13(B)(3). As explained in the Reporter’s Notes to the rule, this provision slightly modifies the Gerstein ruling regarding the payment of expert witness fees. If an employer requests cross-examination of a physician after the employee presents the doctor’s affidavit, the employee may file a motion with the court requesting that the court order the employer to pay the expert witness fee of the physician due to the employee’s financial inability to pay such a fee in advance of the taking of the deposition. The employer in this case is still responsible for payment of all other costs associated with the taking of the deposition, including the stenographer’s fee, in accordance with § 9-19-27 and with Gerstein.

If an employee requests cross-examination of a physician after the employer presents the doctor’s affidavit, Rule 2.13(B)(3) also permits the employee to file a motion seeking payment of the costs associated with taking the deposition, including the stenographer’s fee, but excluding the expert witness fee for which the employer is responsible as the proponent of the witness. *See* W.C.C. – R.P. 2.13 Reporter’s Notes.

In the matter presently before the appellate panel, Rule 2.13 is not applicable. The employer requested that Dr. Brennan be made available for cross-examination after Mr. McAllister presented the doctor’s affidavit. In accordance with the specific language of § 9-19-27, as expounded upon by the Rhode Island Supreme Court in Gerstein, the employer is responsible for the costs of taking the deposition cross-examination, except for the expert witness fee. The employee is not seeking to shift to the employer a cost for which he would normally be responsible, as contemplated by Rule 2.13. The employer is responsible in the first instance for the cost of the stenographer’s services.

In accordance with our decision, the employee's appeal is granted in part and denied in part. The order of the trial judge entered on October 27, 2009 is vacated and a new decree shall enter ordering that the employer pay the stenographer's fee in the amount of Two Hundred Thirty-one and 50/100 (\$231.50) Dollars. The decision and decree of the trial judge is affirmed in all other respects.

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.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

JAMES J. MCALLISTER, JR.)

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VS.)

W.C.C. 2009-00302

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WOMEN & INFANTS HOSPITAL)
OF RI (CARE NE)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the claim of appeal of the petitioner/employee and upon consideration thereof, the appeal is granted in part and denied in part. In accordance with the Decision of the Appellate Division, the following findings of fact are made:

1. That the petitioner/employee has failed to prove by a fair preponderance of the credible evidence that he sustained a personal injury on or about January 19, 2007 arising out of and in the course of his employment.

2. That pursuant to the provisions of R.I.G.L. § 9-19-27, the employer is responsible for the payment of the stenographer's bill for services rendered with regard to the taking of the deposition of Dr. William F. Brennan, Jr.

It is, therefore, ORDERED:

1. That the employee's original petition is denied and dismissed.

2. That the order of the trial judge entered on October 27, 2009 is hereby vacated.

3. That the employer shall pay the bill of the stenographer, Allied Court Reporters, in the amount of Two Hundred Thirty-one and 50/100 (\$231.50) Dollars, either directly or by reimbursement of the employee's attorney upon proof of payment, for services rendered in the taking of the deposition of Dr. William F. Brennan, Jr.

4. That the employer shall reimburse Kevin J. McAllister, Esq., the sum of Two Hundred Five (\$205.00) Dollars for the cost of filing the claim of appeal and providing a transcript of the trial proceedings.

5. That since this matter was successfully prosecuted in part, the employer shall pay a counsel fee in the amount of One Thousand One Hundred (\$1,100.00) Dollars to Kevin J. McAllister, Esq., counsel for the employee, for services rendered at the appellate level.

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 Decision and Final Decree of the Appellate Division were mailed to Kevin J. McAllister, Esq., and Jeffrey M. Liptrot, Esq., on
