STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

BECHTEL CORPORATION	)	
	)	
VS.	)	W.C.C. 97-01413
	)	
EDWARD LEWIS	)	

DECISION OF THE APPELLATE DIVISION

HEALY, C. J. This matter was heard before the Appellate Division on the respondent/employee's appeal from the decision and decree of the trial court which vacated a determination by the Department of Labor and Training (hereinafter "the Department") approving a rehabilitation plan. The matter came before the trial court when the petitioner/employer filed a Petition to Determine a Controversy to review the approval of the employee's rehabilitation plan by the Assistant Director of the Rehabilitation Unit of the Department. The trial judge vacated the Assistant Director's decision and remanded the matter to the Department for further proceedings. After conducting a *de novo* review, we reverse the trial judge's decision and reinstate the approval of the rehabilitation plan submitted by the employee.

At trial, the employee and the employer submitted a statement of stipulated facts, which provided as follows:

1. The employee was injured on December 26, 1995.

2. The employee's job at the time of the injury was that of an electrician.

3. The average weekly wage is $810.30.

4. The nature and location of injuries is cervical, thoracic and lumbar strains.

5. The treating physician is Anthony Merlino M.D.

6. The employer's examining physician is Stanley Stutz, M.D.

7. As a result of the injury the employee has been partially disabled from December 27, 1995 and continuing.

8. At the time of the injury the employee did not have any supplemental employment.

9. The employee has attended the University of Rhode Island, Community College of Rhode Island and New England Institute of Technology.

10. Roger DeRoy has been, at all relevant times, an employee of the state of Rhode Island, Department of Labor Rehabilitation Unit at the Dr. John E. Donley Rehabilitation Center as a senior vocational counselor.

11. Jean Severence (sic) has been, at all relevant times, an employee of the state of Rhode Island Department of Labor, Rehabilitation Unit at the Dr. John E. Donley Rehabilitation Center, specifically she has been the assistant director of the Rehabilitation Unit.

12. Jeanne McCluskie has been, at all relevant times, am (sic) employee of Crawford and Company, Crawford Disability Management Services, as branch manager and consultant in charge.

13. Roger DeRoy submitted to Jean Severence (sic) a proposed rehabilitation plan on behalf of the employee dated October 28, 1996.

14. Jeanne McCluskie submitted to Jean Severance a proposed rehabilitation plan on behalf of the employer dated August 23, 1996.

15. On February 26, 1997 Jean Severence (sic) decided that she would not approve the proposed rehabilitation plan submitted by Jeanne McClusky (sic).

16. On February 26, 1997 Jean Severence (sic) decided that she would approve the proposed rehabilitation plan submitted by Roger Deroy (sic).

Exhibits

1. Memo of Agreement
2. Dr. Merlino's records
3. Dr. Stutz's records
4. Records of CCRI
5. Records of URI

6. Records of NEIT
7. Records of Department of Labor Rehabilitation Unit
8. Proposed plan submitted by Roger Deroy (sic)
9. Proposed plan submitted by Jean McCluskie (sic)
10. Approval of Jean Severence (sic) of plan of Roger Deroy (sic) and disapproval of plan of Jeanne McCluskie.

Petitioner's Exh. 3. No testimony was given at trial because, as the trial judge noted, the record from below could not be enlarged, but several exhibits were submitted to the court as representative of the record below.

The trial judge found that the employer proved by a fair preponderance of the credible evidence that the Assistant Director of the Rehabilitation Unit of the Department exceeded her authority by approving a rehabilitation plan submitted on behalf of Mr. Lewis by an employee of the Donley Center, Mr. DeRoy. In arriving at that decision, the trial judge relied on the Rhode Island Public Officers and Employees Code of Ethics, R.I.G.L. § 36-14-5, and found that a Donley Center employee "represented" Mr. Lewis in a proceeding before the Assistant Director of the Rehabilitation Unit. The trial judge determined that this was a violation of the Code of Ethics because the Donley Center operates under the purview of the Department, a state agency by which the Donley Center employee was employed. In the instant appeal, Mr. Lewis argues that he was at all times represented by legal counsel and not by Mr. DeRoy, the Donley Center employee. Mr. Lewis further argues that the finding that the Donley Center employee was representing him undermines the goals of the Workers' Compensation Act and the purposes underlying the creation of the Donley Center.

When the appellate division reviews the determination of a trial judge, the decision will stand unless the appellate panel finds that it was clearly erroneous. *See* R.I.G.L. § 28-35-28(b); Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996). Furthermore, the appellate division will not conduct a *de novo* review of the record unless a finding made by the trial judge is

determined to be clearly wrong. Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986). In the present case, the panel will conduct a *de novo* review because the trial judge was clearly wrong in concluding that the Donley Center employee "represented" Mr. Lewis before the Department.

The standard of review that the trial judge was required to apply, and which we now apply, to evaluate the determination of the Department is a deferential standard set forth in the Rhode Island Administrative Procedures Act. The legislature has mandated that,

> *The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.* The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error or law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

R.I.G.L. § 42-35-15(g) (emphasis added). The trial judge applied this standard of review and found that the Assistant Director of the Rehabilitation Unit had exceeded her statutory authority because she relied on the opinion of a Donley Center employee in approving Mr. Lewis' rehabilitation plan in violation of the Code of Ethics. Because we disagree that such a violation occurred, and therefore find that the Assistant Director did not exceed her authority, we are bound by this deferential standard of review to affirm the decision of the Assistant Director.

Although appeals to the Workers' Compensation Court from the Department are specifically exempted from the ambit of R.I.G.L. § 42-35-18(c), this court adopted an extremely similar standard of review when we revised our rules regarding appeals from the Department. *See* W.C.C. – R.P. 2.31 and 2.32. Nevertheless, even if we were to utilize the standard of review

set forth in R.I.G.L. § 28-35-28(b), the conclusions reached would have been similar even if the path followed was somewhat more circuitous.

We find error in the trial judge's determination that the Donley Center employee, Mr. DeRoy, "represented" the employee at a hearing before the Department within the meaning of the Code of Ethics. The Code of Ethics provides that, "[n]o person subject to this code of ethics shall . . . *[r]epresent* any other person before any state or municipal agency of which he or she is a member or by which he or she is employed." R.I.G.L. § 36-14-5(e)(2) (emphasis added). Mr. DeRoy, a Donley Center employee, is subject to the Code of Ethics because he is an employee of a state agency, the Department of Labor and Training. *See* R.I.G.L. § 36-14-4. The Code of Ethics delineates that "[a] person 'represents' another person before a state or municipal agency if he or she is authorized by that other person to act, and does in fact act, as that other person's attorney at law or his or her attorney in fact in the presentation of evidence or arguments before that agency for the purpose of influencing the judgment of the agency in favor of that other person." R.I.G.L. § 36-14-2(13).

It is the opinion of this court that Mr. DeRoy did not "represent" the employee before the Department. Rather, he merely appeared as a witness for the employee in the same way that Ms. McCluskie, the vocational rehabilitation expert for the employer, was merely a witness for the employer. At all times in the proceedings before the Department, the parties were represented by competent counsel, both of whom remain members of the Bar of the State of Rhode Island in good standing. These attorneys were authorized to act on behalf of the parties to advance evidence and arguments favorable to their clients. The vocational experts, specifically Mr. DeRoy, were expert witnesses called by the attorneys to provide substantive evidence to the

Assistant Director in the same way that any witness would be called before a court to provide testimony.

In evidence were several memoranda proffered by the employer from Jean Severance, the Assistant Director of the Rehabilitation Unit for the Department. These documents describe a series of meetings, which demonstrate the process by which the Assistant Director arrived at her decision and illuminate the role played in that process by the employee of the Donley Center, Mr. DeRoy.

Attorney Asprinio, counsel for Mr. Lewis, objected to a rehabilitation plan submitted by Ms. McCluskie. Attorney Asprinio noted that the employee had been working with Mr. DeRoy at the Donley Center since June 1996 and had begun a course of study in Computer Information Systems Technology at New England Institute of Technology. Mr. DeRoy circulated a rehabilitation plan that he had drafted for the purposes of the conference, but he noted that he did not have updated medical information to accurately describe the employee's physical limitations in his report. The employee emphasized that he was earning less than his pre-injury wage and was eager to re-enter the workforce. He also indicated that he was doing well in the course of study he had begun, and he was receiving financial aid to pay for his education. There was discussion that New England Institute of Technology was expensive, and Ms. McCluskie claimed that her rehabilitation plan would allow her to explore less expensive programs for the employee. The result of that conference was that Ms. McCluskie's plan was approved for a brief period pending submission of a complete plan by both Mr. DeRoy and Ms. McCluskie.

At a later conference held to discuss Attorney Asprinio's objections to the rehabilitation plan submitted by Ms. McCluskie, Ms. McCluskie indicated that her rehabilitation plan would provide savings to the insurer, and an associate's degree in computer programming was

appropriate retraining. Ms. McCluskie emphasized that CCRI had multiple computer training tracks, and she suggested that the employee meet with a CCRI counselor to determine transfer of credits and a graduation date.

Mr. DeRoy circulated a rehabilitation plan that required the employee to obtain a four (4) year bachelor's degree from New England Institute of Technology, which would allow him to completely regain his earnings capacity. Attorney Asprinio added that the quality of training correlated to employability, and CCRI had recently been having difficulty with their computer programs. The employee emphasized that there was a considerable difference between the curriculum offered and the technology available at each school. Finally, Mr. DeRoy pointed out that the employee's doctor had approved the employee pursuing a career in computers. At that point, Mr. Clemmey, a representative of the insurer, requested a detailed comparison of the two (2) programs, and the employee offered to supply that information. The result of that conference was that no decision would be made until all parties received a copy of the rehabilitation plan prepared by Mr. DeRoy, and the employee was to provide the comparative information to Ms. Severance to distribute to all parties.

Another conference was held to answer questions of Mr. Clemmey at which Mr. DeRoy distributed a progress report to provide an update on the employee's status. Attorney Feldman, counsel for the employer, noted that a letter from Ms. Severance provided a longer graduation date than was approved, and Mr. DeRoy informed Attorney Feldman that he had based his estimated graduation date on the course catalogues from New England Institute of Technology. Attorney Feldman was provided with contact information for individuals at the school to verify the time frame. The insurer's representative was provided with the course catalogue for New England Institute of Technology, and the employee added that he had been attending job fairs

and investigating co-op programs. Finally, Mr. Clemmey inquired about transfer of the employee's credits for courses that he had taken at URI, and the employee provided a progress advising sheet detailing possible credit transfers. The outcome of the conference was that Mr. DeRoy would confirm graduation dates, and Ms. Severance encouraged the parties to communicate in order to avoid future misunderstandings.

The most significant aspect of these meetings is that legal counsel for both the employer and the employee were zealously representing the interests of their clients. These attorneys were "authorized . . . to act, and [did] in fact act, as that other person's attorney at law or his or her attorney in fact in the presentation of evidence or arguments before that agency for the purpose of influencing the judgment of the agency in favor of that other person." R.I.G.L. § 36-14-2(13). Neither Mr. DeRoy nor Ms. McCluskie was so authorized; they did not represent the employee or the employer in these meetings. Rather, each provided substantive evidence that was presented to the Assistant Director by the actual attorneys. Accordingly, no violation of the Code of Ethics occurred when Mr. DeRoy, an employee of the Donley Center, appeared as a witness before the Assistant Director of the Rehabilitation Unit.

The instant appeal is distinguishable from the situation that the Rhode Island Supreme Court addressed in Treaster v. Rhode Island Mobile and Manufactured Home Commission, 644 A.2d 314 (R.I. 1994). In Treaster, a member of the Rhode Island Mobile and Manufactured Home Commission recused herself from hearing the case before the commission. However, she subsequently appeared before that same commission, of which she was a member, to prosecute the complaint of the tenants' association. Id. at 314. This presented a very clear case of "representation" within the definition of the statute because the commission member acted as the attorney at law for the tenants' association in the hearing before the commission.

Those facts are quite different from the facts presently before this court. In Treaster, the commissioner relinquished her usual position in order to affirmatively advance the position of one party over another party in a hearing before her own commission. Here, Mr. DeRoy simply carried out his normal job duties. He formulated a rehabilitation plan, and he appeared as a witness to explain to the Assistant Director the plan that he believed was appropriate to restore the employee to his previous earnings capacity. Therefore, the Court's determination in Treaster that the decision of the commission was unlawful because a violation of the Code of Ethics had occurred when a commission member acted as the attorney for a party before the commission is inapplicable to the instant case.

The conclusion that Mr. DeRoy did not "represent" the employee is consistent with the goals of the Workers' Compensation Act and the statutory foundation for the Dr. John E. Donley Rehabilitation Center. In enacting the Workers Compensation Act, the legislature recognized that "additional incentives are necessary . . . to motivate return to gainful employment in the work force; (and) to improve the safety of the workplace and the rehabilitation to gainful employment of the injured worker;. . . ." R.I.G.L. § 28-29-1.2(a)(7). Surely, precluding an employee of a statutorily created, state operated rehabilitation center from providing evidence of an appropriate rehabilitation plan for an injured worker would undermine the goal of returning the injured worker to gainful employment.

Additionally, the Dr. John E. Donley Rehabilitation Center was expressly created by statute within the Department of Labor and Training. R.I.G.L. § 28-38-19. The legislature has mandated that, "[t]he treatment rendered at the center shall be considered 'medical treatment' within the meaning of §§ 28-33-5 – 28-33-11." R.I.G.L. § 28-38-21(c). Clearly, by equating treatment at the Donley Center with any other medical treatment that may be ". . . necessary, in

order to cure, rehabilitate or relieve the employee from the effects of his injury . . . ." the legislature contemplated that evidence would be presented that such treatment was reasonable and necessary. R.I.G.L. § 28-33-5; *see e.g.,* Bissonnette v. Federal Dairy Co., 472 A.2d 1223, 1226 (R.I. 1984) (noting that the "employee must prove that the disputed treatment would relieve, rehabilitate, or cure his disability."). Mr. DeRoy was providing evidence in the proceedings that retraining at New England Institute of Technology was reasonable and necessary to fully rehabilitate the employee. Finding a violation of the Code of Ethics for an employee of the Donley Center providing such evidence would wholly undermine the important role played by the Donley Center in the treatment and rehabilitation of injured workers in order to return such workers to gainful employment.

The Assistant Director of the Rehabilitation Unit of the Department of Labor and Training did not exceed her authority when she approved the rehabilitation plan created by Mr. DeRoy, an employee of the Donley Center. Mr. DeRoy appeared as a witness for the employee, and he at no time "represented" the employee within the meaning of the Code of Ethics. In applying the standard of review set forth in R.I.G.L. § 42-35-15(g), we defer to the Assistant Director's determination, "as to the weight of the evidence on questions of fact." Therefore, we affirm her determination that the rehabilitation plan submitted by the employee should be approved.

Based upon the foregoing, the employee's appeal is granted. The decision of the trial judge in this matter is vacated, and the decision of the Assistant Director of the Rehabilitation Unit of the Department of Labor and Training approving the employee's rehabilitation plan is reinstated.

In accordance with our decision, a new decree shall enter containing the following findings and orders:

1. That the employee has demonstrated that the employer has refused to pay or provide rehabilitation expenses pursuant to the provisions of R.I.G.L. § 28-33-41.

2. That the decision of the Assistant Director of the Rehabilitation Unit of the Department of Labor and Training is hereby sustained.

It is, therefore, ordered:

1. That the employer shall reimburse the employee all reasonable expenses incurred in the pursuit of the rehabilitation plan approved by the Department of Labor and Training upon presentation of satisfactory evidence of payment.

2. That the employer shall pay statutory interest on all unpaid amounts from the date the expenses were incurred.

3. That the employer shall be entitled to credit for all sums paid to the employee prior to the time the order of the Department of Labor and Training was reversed by the trial court.

4. That the employer shall reimburse the employee's counsel the sum of One Hundred Fifty-five and 00/100 ($155.00) Dollars for the cost of filing the appeal and obtaining a transcript of the trial proceedings.

5. That the employer shall pay a counsel fee in the amount of Four Thousand Five Hundred and 00/100 ($4,500.00) Dollars to John M. Harnett, Esq., counsel for the employee, for services rendered at all stages of the proceedings.

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

Olsson and Morin, JJ. concur.

ENTER:

_____
Healy, C. J.

_____
Olsson, J.

_____
Morin, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

BECHTEL CORPORATION)
)
VS.) W.C.C. 97-01413
)
EDWARD LEWIS)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the appeal of the respondent/employee from a decree entered on April 6, 1998.

Upon consideration thereof, the appeal of the employee is granted, and in accordance with the decision of the Appellate Division, the following findings of fact are made:

1. That the employee has demonstrated that the employer has refused to pay or provide rehabilitation expenses pursuant to the provisions of R.I.G.L. § 28-33-41.

2. That the decision of the Assistant Director of the Rehabilitation Unit of the Department of Labor and Training is hereby sustained.

It is, therefore, ordered:

1. That the employer shall reimburse the employee all reasonable expenses incurred in the pursuit of the rehabilitation plan approved by the Department of Labor and Training upon presentation of satisfactory evidence of payment.

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5. That the employer shall pay a counsel fee in the amount of Four Thousand Five Hundred and 00/100 ($4,500.00) Dollars to John M. Harnett, Esq., counsel for the employee, for services rendered at all stages of the proceedings.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Healy, C. J.

_____
Olsson, J.

_____
Morin, J.

I hereby certify that copies were mailed to John M. Harnett, Esq., and Howard Feldman, Esq., on

_____