STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

LINDA FORTE	)	
	)	
VS.	)	W.C.C. 97-05663
	)	
STATE OF RHODE ISLAND	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the appeal of the petitioner/employee from a decision in which the trial judge found that the employee's request to add the left shoulder to the description of her work-related injury was not filed within the three (3) year time limit set forth in R.I.G.L. § 28-35-57. Former Chief Judge Robert F. Arrigan was a member of the original appellate panel which heard the oral arguments in this matter. Prior to a decision being issued by the Appellate Division, Chief Judge Arrigan retired. Consequently, the author was substituted for Chief Judge Arrigan on the panel and it was agreed that no further oral argument was required. We have thoroughly reviewed the record and carefully considered the parties' respective arguments in this matter and we affirm the decree of the trial judge.

The employee received workers' compensation benefits pursuant to a decree entered in W.C.C. No. 90-06860 on July 30, 1992. In that decree, it was found that Ms. Forte had sustained work-related injuries on January 13, 1990 which were described as "left arm, low back and stress disorder." She was awarded weekly benefits for total incapacity from January 14, 1990 through June 27, 1990.

In late 1995, the employee filed a petition alleging that the employer had failed to pay for an MRI of the left shoulder which was done on May 3, 1994. Pursuant to a consent decree entered in W.C.C. No. 95-08134 on January 16, 1996, the employer agreed to pay one-half (1/2) of the bill for the test. This is the last payment of any type made by the employer regarding the employee's work injury. The consent decree also contains findings, agreed to by the parties, which reiterate that on January 13, 1990, the employee sustained injuries to her left arm and low back and suffered from a stress disorder arising out of her employment, and that the MRI was necessary to cure, rehabilitate or relieve the employee from the effects of her injuries.

The employee testified that she injured her left shoulder, as well as other parts of her body, on January 13, 1990 when she attempted to prevent a juvenile from escaping from the Rhode Island Training School. She stated that she has suffered with continuous pain in the left shoulder since that time despite undergoing physical therapy and several cortisone shots.

The medical evidence consists of reports of various medical facilities and physicians dating from 1990 to 1997. An emergency room report from Rhode Island Hospital dated January 14, 1990 states that the employee was seen for complaints of pain and decreased range of motion in her left arm after twisting her arm at work the day before. The physical examination of the left shoulder noted only a mildly tender deltoid area and there was no diagnosis regarding the shoulder.

The employer provided a report of Dr. Theodore K. Gibson, an orthopedic surgeon who evaluated the employee on June 27, 1990 at the request of the employer. Based upon the history provided by the employee, the doctor diagnosed a left shoulder strain, neck strain, and back strain. He also noted that the physical examination was unremarkable and the employee was capable of returning to her regular occupation.

The employee underwent EMG and nerve conduction studies on two (2) occasions which were done by Dr. Petro Karanasias. On December 21, 1990, she complained to the doctor of pain in her left arm and shoulder. The study results were normal and the employer paid the bill for the test on January 29, 1991. The second EMG and nerve conduction study was done on February 12, 1993. At that time, Ms. Forte complained of pain and numbness in her left arm including her shoulder and hand. Again, the test did not reveal any abnormalities.

Drs. Frank H. Fallon and John F.X. Horan, family practitioners, treated the employee for many years, even prior to the work injury in 1990. Notes from office visits in 1993 do not indicate any shoulder complaints, however, on April 8, 1994, the left shoulder was examined and the doctor noted symptoms of impingement syndrome. An MRI of the left shoulder was done on May 3, 1994 which revealed degenerative changes in the left acromioclavicular joint, a small spur causing some compression of the left supraspinatous tendon, and some other findings consistent with possible tendonitis.

The doctor injected the shoulder on May 20, 1994; however, the employee was involved in a motor vehicle accident on the same day. She went to Rhode Island Hospital emergency room on May 24, 1994 complaining of low back pain radiating up to her left shoulder. She informed the hospital personnel that she had chronic tendonitis in her left shoulder. However, x-rays of the shoulder done on June 12, 1991, December 28, 1992, June 20, 1994, and January 25, 1996 were all normal.

Dr. Horan completed a form dated June 3, 1994. He noted that the employee had abnormal range of motion of the left shoulder. He further stated that she suffered from chronic anxiety and depression due to chronic pain and her perceived medical problems. In a letter dated June 22, 1995 addressed to the employee's attorney, the doctor stated that he last saw the

employee on March 23, 1995. He indicated that he was aware of her work injury in 1990 and noted that since that time she has had multiple complaints, primarily regarding her low back and entire left side of her body, as well as occasionally her left shoulder. Dr. Horan further wrote:

> "The majority of her conditions as well as her continued pain since 1990 are due to her morbid obesity. Unfortunately her subjective complaints of pain and disability are not supported by objective findings either physically, radiographically, or by blood test." (Resp. Exh. 4, letter 6/22/95)

The employee began treating with Dr. Jonathan Gastel at the orthopedic clinic at Rhode Island Hospital after the motor vehicle accident. About one (1) month after the accident, the doctor noted that she had chronic pain in her left shoulder and spasm in the left side of her body. X-rays of the left shoulder revealed some mild AC joint arthritis and he noted that she may have impingement syndrome. He prescribed physical therapy and medication.

Subsequently, Ms. Forte began seeing Dr. Michael Barnum at the clinic at the hospital. In a report dated January 25, 1996, the history states that the employee complained of left shoulder pain of a few months duration and noted that she has a history of such pain in the past. There is no mention of the 1990 work injury. The diagnosis was impingement of the left shoulder. The employee was referred for physical therapy which she began on February 5, 1996. She was discharged from therapy on March 4, 1996 after making little or no progress.

The employee treated periodically with Dr. Barnum. In a report dated September 8, 1997, the doctor amended the history to include information regarding the 1990 work injury. The employee dated her shoulder problems to this incident in which the injury was described as a left shoulder traction type of injury. Dr. Barnum's diagnoses were chronic left upper extremity pain syndrome and left shoulder impingement. He stated that the first condition was related to the 1990 work injury, but he could not relate the impingement syndrome to that incident. He

further noted that the surgery he was proposing would address the impingement syndrome, but would not relieve the left arm pain syndrome.

The trial judge concluded that R.I.G.L. § 28-35-57 applied to the employee's request to include the left shoulder in the description of her injury because the medical evidence indicated that it was a distinct and separate injury from the left arm injury, although both were sustained during the incident at work on January 13, 1990. The evidence further indicated that the employee was aware of the left shoulder injury at the time of the incident. Consequently, her request to add the left shoulder to the description of her injuries was not timely as it was filed more than three (3) years after the date of injury, which is the time limitation provided in R.I.G.L. § 28-35-57. The employee then filed a claim of appeal from the denial of her petition.

The employee has filed three (3) reasons of appeal for our consideration. In the first reason of appeal, she argues that the trial judge erroneously applied R.I.G.L. § 28-35-57 to deny her relief after finding that she injured her left shoulder at work on January 13, 1990. The employee does not elaborate any further as to how or why the trial judge applied the statute improperly. Our review of the record leads to the conclusion that the trial judge properly found that the employee's contention that she sustained an injury to her left shoulder on January 13, 1990 was subject to the three (3) year limitation set forth in R.I.G.L. § 28-35-57 and her petition was not timely.

Neither the employee's testimony nor the medical evidence in the record supports a finding that the shoulder injury "flows from" the documented injuries to her left arm and low back. Rather, the employee asserted that she has had shoulder problems since the date of the incident at work and the 1990 reports of Rhode Island Hospital and Dr. Gibson reflect her shoulder complaints. Consequently, R.I.G.L. § 28-35-45, which allows a ten (10) year period to

review a decree for various reasons, does not apply to the present matter. The Rhode Island Supreme Court has provided guidance with regard to the very situation with which we are confronted in this case.

> "Thus, if an original injury is different from the one specified in the decree or in the MOA and does not "flow from" the original injury—even though this different injury also arises from the same work-related activity or accident—then § 28-35-45 is inapplicable; rather, the petitioner must file an original petition based upon this different, original injury within the limitations period set forth in the applicable version of § 28-35-57." Ponte v. Malina Co., 745 A.2d 127, 135 (R.I. 2000).

Based upon the discussion of this issue in Ponte, as well as in prior cases, we agree with the trial judge that the Ms. Forte was required to comply with the applicable version of § 28-35-57 which mandated that an original petition must be filed within three (3) years after the occurrence or manifestation of the injury or incapacity. *See* Coletta v. Leviton Manufacturing Co., 437 A.2d 1380 (R.I. 1981); Leviton Manufacturing Co. v. Lillibridge, 120 R.I. 283, 387 A.2d 1034 (1978).

The incident at work occurred on January 13, 1990. The employee filed an original petition in 1990 in which she alleged that she sustained injuries to her left arm and low back and also developed a psychological disorder. The matter was fully litigated during a trial which resulted in a decree being entered on July 30, 1992 in W.C.C. No. 90-06860. The employee was awarded weekly benefits for total incapacity from January 14, 1990 to June 27, 1990 as a result of injuries to her left arm and low back and a stress disorder. No appeal was taken from this decree and no other efforts were made to amend the description of the injuries until the filing of the present petition in 1997, despite the fact that the employee was aware in 1990 that she injured her left shoulder. Clearly, the petition seeking to add the left shoulder was filed well beyond the three (3) year limitation period. Therefore, we find no error on the part of the trial judge in concluding that the employee's petition was barred under the provisions of R.I.G.L. § 28-35-57.

We would note that based upon the case law cited above, this petition should have been an original petition, rather than an employee's petition to review. In addition, the employee's allegation of a left shoulder injury is also likely barred by the doctrine of *res judicata* as information regarding her left shoulder was available during the trial in W.C.C. No. 90-06860.

In the second reason of appeal, Ms. Forte argues that the left shoulder is part of the left arm and therefore, any injury to the left shoulder is already included in the description of the injury. In support of her argument, the employee quotes a definition of "arm" from Stedman's Medical Dictionary, 25th Edition Illustrated:

> "brachium; the segment of the superior limb between the shoulder and the elbow; commonly used to mean the whole superior limb." (Emphasis added.)

However, this definition states that the "arm" is between the shoulder and the elbow, i.e., the shoulder is a separate and distinct entity, not a part of the arm.

The employee also cites the case of U. S. Rubber Co. v. Curis, 101 R.I. 627, 226 A.2d 410 (1967), in her reasons of appeal to stand for the proposition that "the generic reference to the arm is sufficient to incorporate the specific injury to the shoulder." However, that matter involved the interpretation of wording in R.I.G.L. § 28-33-5 which set a limit on the amount an insurer was required to pay for medical services and medicines which were necessary to treat a work-related injury. The statute also provided that in the event that the amount stated was not sufficient to cover necessary services, the court could order payment of additional costs. This provision allowing the court to order payment in excess of the statutory limit only mentioned services, and did not mention medicines. The Rhode Island Supreme Court held, after considering the purpose of the statute and the language as a whole, that the statute was "sufficiently comprehensive in its scope" to provide the necessary medicines as well as services

to an injured employee. Id. at 635, 226 A.2d at 415. We fail to see how this holding supports the employee's argument in the present matter. The arm and the shoulder are distinct body parts and we have found nothing to persuade us that an injury to the left arm should be deemed to include an injury to the shoulder.

In her third and final reason of appeal, Ms. Forte contends that the trial judge erred in failing to find that the consent decree entered into by the parties in Forte v. State of Rhode Island, W.C.C. 95-08134, on January 16, 1996, operated to toll the running of any time limitation on the filing of her petition to add the left shoulder. We find no merit in this contention.

W.C.C. No. 95-08134 was an employee's petition to review requesting payment for an MRI of the left upper extremity which the employee underwent in 1994. The parties entered into a consent decree containing the following findings and orders:

> "1. The employee suffered an injury arising out of and in the course of employment on January 13, 1990 to her left arm, low back and stress.
>
> "2. The employee sought treatment from Shields Health Care, 265 Westgate Drive, Brockton, Massachusetts, and incurred a bill in the amount of $1,450.00 for professional services, an MRI – Joint, upper extremity.
>
> "3. The services provided by said medical service provider were found to be necessary to cure, relieve, rehabilitate or treat.
>
> "ORDERED, ADJUDGED, AND DECREED
>
> "1. That the employer shall pay said medical service provider the sum of $725.00 in full payment and satisfaction of all services provided to this date.
>
> "2. That the employer shall pay a legal fee in the amount of $450.00 to the Attorney John Harnett."

This consent decree specifically described the injuries sustained by the employee and there is no mention of the left shoulder. There was deposition testimony by Carol Giacobbi, a

claims examiner for the State, stating that the payment of a portion of the bill for the MRI was a compromise. Clearly, such a payment on its own would not translate into the acceptance of a claim for a left shoulder injury. The payment was made after the three (3) year limitation in R.I.G.L. § 28-35-57 for filing an original petition to add the left shoulder had passed and could not revive a claim which had terminated.

The employee appears to be arguing that this payment was made within ten (10) years of the last payment of weekly benefits in 1992 and therefore her petition to review is timely under R.I.G.L. § 28-35-45(a). However, this statute is of no assistance to Ms. Forte. The version of § 28-35-45(a) which was in effect at the time of her injury provided only two (2) very specific grounds on which to file a petition to review an agreement or decree – that the incapacity of the employee has diminished, ended, increased or returned, and that the weekly compensation payments have been based upon an incorrect average weekly wage. Obviously, the employee's request to add the left shoulder to the description of her injury does not fit into either category. The Rhode Island Supreme Court has held that the amendment to R.I.G.L. § 28-35-45 which broadened the subject matter of a petition to review cannot be applied retroactively. Salazar v. Machine Works, Inc., 665 A.2d 567 (R.I. 1995). Therefore, this argument must fail.

We would further note that, based upon the record before this panel, the employee's request for surgery would fail on the merits. The only physician who mentions performing surgery is Dr. Michael Barnum, who treated the employee at the orthopedic clinic at Rhode Island Hospital in 1996 and 1997. The employee initially saw Dr. Barnum in January 1996, but never mentioned the 1990 work injury until September 1987. In a report dated September 8, 1997, Dr. Barnum wrote:

> ". . . She carries at this point a diagnosis of chronic left upper extremity pain syndrome which can be related to her traction

> type injury in 1990. She also carries a diagnosis of impingement syndrome to her left shoulder with some acromioclavicular degenerative disease which I cannot directly relate to an injury sustained in 1990. (Emphasis added.)
>
> * * * *
>
> "At this point we had discussed arthroscopic surgical decompression of her subacromial joint and the problem that the patient is aware of is that this will most likely not relieve all of her symptoms, only relieve a percentage of her symptoms and this would be related directly to her shoulder pain and not her left upper extremity and neck pain. (Emphasis added.)
>
> "She will consider cervical [sic] intervention of her impingement syndrome of her left arm and we will see her back in three months." Er's Exh. 5.

It is clear from Dr. Barnum's report that the surgery he suggested is to address the impingement syndrome, which he states is not related to the 1990 work injury. Therefore, the request for permission for surgery must fail.

Based upon the foregoing discussion, 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 enter on

Healy, C. J. and Morin, J. concur.

ENTER:

_____
Healy, C. J.

_____
Olsson, J.

_____
Morin, 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 May 7, 1998 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Healy, C. J.

_____
Olsson, J.

_____
Morin, J.

I hereby certify that copies were mailed to John Harnett, Esq., and Elaine Wallor, Esq., on

_____