

STATE OF RHODE ISLAND

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

ZACK GUNTHER

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VS.

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W.C.C. 2021-06541

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W.C.C. 2021-05648

NORTH ATLANTIC DISTRIBUTION, INC

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FINAL DECREE OF THE APPELLATE DIVISION

This matter came to be heard by the Appellate Division upon the claim of appeal of the petitioner/employee concerning the denial of the employee's motion to amend and reopen, requesting to amend the petition to review and to present additional testimony from the employee. Upon consideration thereof, the claim of appeal is denied and dismissed, and it is

ORDERED, ADJUDGED, AND DECREED:

That the findings of fact and orders contained in the order entered on June 20, 2024, and the order and decree entered on June 28, 2024, be, and they hereby are, affirmed.

Entered as the final decree of this Court this 17th day of October 2025.

PER ORDER:

/s/ Nicholas DiFilippo

Administrator

ENTER:

/s/ Cardoza, J.

/s/ Minicucci, J.

/s/ Lazieh, J.

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DECISION OF THE APPELLATE DIVISION

CARDOZA, J. This matter is before the Appellate Division on the Employee's Appeal from the Trial Judge's decision and decree denying the Employee's Petitions to Review and motion to Amend and Reopen, requesting to amend the petition to review and to present additional testimony from the Employee. After thoroughly reviewing the record and considering the arguments presented by the parties, we deny and dismiss the Employee's appeal and affirm the trial judge's decision and decree.

Pursuant to a Memorandum of Agreement dated March 6, 2019, the Employee began receiving weekly benefits for partial incapacity as of October 23, 2018, for a right elbow strain sustained on October 22, 2018. The Employee signed a Suspension Agreement, discontinuing his weekly benefits as of December 2, 2018. On September 27, 2021, the Employee, Zack Gunther (hereinafter "the Employee"), filed a Petition to Review (W.C.C. 2021-05648) on October 22, 2018, right elbow strain injury alleging a return to partial incapacity from October 29, 2018, and continuing. (Ee's Ex. 1, Petition to Review W.C.C. # 2021-05648). This Petition to Review was heard at the pretrial conference on October 18, 2021. The trial judge entered an order denying the

request for relief, stating that the issues required a trial. (Ee's Ex. 2, Pretrial Order W.C.C. # 2021-05648). On the same day, the Employee, through counsel, timely sought a Claim for Trial. (Ee's Ex. 3, Claim for Trial W.C.C. # 2021-05648). On November 10, 2021, the Employee filed a second Petition to Review (W.C.C. 2021-06541), requesting approval for an orthopedic evaluation as per the report of Mr. Mark Clarke, R.N.P. (Ee's Ex. 4, Amended Petition to Review W.C.C. # 2021-06541). On December 14, 2021, a pretrial conference was held to hear the petition, and the trial judge entered an order denying the request for relief, stating that the issues required a trial to render a proper decision. (Ee's Ex. 5, Pretrial Order W.C.C. # 2021-06541). On the same day, the Employee, through counsel, timely filed a Claim for Trial. (Ee's Ex. 6, Claim for Trial W.C.C. # 2021-06541).

On August 17, 2022, which was the first trial hearing date, the two petitions were consolidated. On June 20, 2024, immediately before the trial judge's bench decision was issued, the Employee, through counsel, moved to reopen the matter for amendment and additional testimony, as he had identified deficiencies after reviewing the Employer's counsel's post-trial memorandum. The Employer's counsel objected to the Motion to Reopen. On June 20, 2024, the trial judge denied the Employee's Motion to Reopen, holding that granting it would cause unfair delay and prejudice to the Employer. Moments later, the trial judge rendered his Bench Decision, finding that the Employee failed to meet his burden of proof to establish a recurrence of disability and that an orthopedic review and physical therapy were necessary. On July 1, 2024, the Employee timely appealed the trial court's decision denying the Motion to Reopen and Amend.

On August 17, 2022, the Employee testified that he worked for North Atlantic Distribution, Inc. (hereinafter "the Employer") in October 2018. The Employee stated that he

worked in the warehouse, where he was tasked with scanning cars, retrieving parts for the vehicles, and then placing them in the trunks. He would work five (5) to seven (7) days a week for at least eight (8) hours, but on some days up to twelve (12) hours; he testified it was dependent upon mandatory overtime hours. The Employee explained that on October 22, 2018, he sustained an injury to his right elbow while repetitively lifting and placing heavy rubber mats in a shipment of Volkswagen Jettas. Furthermore, he explained that at first, he thought the soreness was a natural consequence of aging, but after a week of persistent soreness, he consulted a doctor. The Employee testified that he only missed either four (4) or five (5) days of work following the incident. The Employee stated that he had reported the injury to an office employee, but he had forgotten the person's name. On March 6, 2019, the Employee admitted that he had signed a Suspension Agreement, which stated that weekly compensation began on October 23, 2018, and ended on December 2, 2018.

The Employee articulated that in November 2018, he was released by his Doctor, Dr. DaSilva, to return to work under light duty. He testified that he initially returned as a driver, was reassigned to a spotter role, and then to a van driver role, until he was laid off in June 2020. The Employee stated that the duties of a driver were to drive the cars that were shipped to the Employer to their assigned location, whether that be a parking lot or the warehouse. He explained that most of the driving occurred on the Employer's property, but to access some of the parking lots, he had to drive on a public road.

Next, the Employee moved from a driver to a spotter a few weeks after returning to work. He explained that a spotter's job entailed compiling a list of cars and then locating where they were parked to mark and label them for other workers to retrieve. The Employee testified that the job required lots of walking. However, he admitted that despite all the walking, he never had an

injury or pain in his legs or feet. Nonetheless, the Employee did testify that once it began snowing, it became harder to work with his elbow, as he had to scrape snow and ice off car windows to place the label on them. The Employee worked this job for a few months before switching to a new position.

The Employee testified that the final position that he held with the Employer was a Van Driver. He explained that a Van Driver would take a team of workers to the location of the labeled cars, where they would then load them onto the warehouse for parts. Further, he admitted that the position as a Van Driver paid more than his position as a Warehouse Worker when he injured himself. The Employee continued as a Van Driver until June 2020, when he was laid off due to staffing reasons related to the COVID-19 pandemic.

During cross-examination, the Employee admitted that, for the entire year and a half after returning to work—except for one follow-up appointment in January 2019—he did not seek medical treatment for his elbow. However, the Employee did articulate that his right elbow "[felt] awful for the entire two years."

The Employee testified that immediately after being laid off from the Employer he filed for and received unemployment benefits. During cross-examination, he admitted to receiving unemployment benefits, along with pandemic-related bonuses, from June 2020 to August 2021. The Employee states that he never applied for Temporary Disability Insurance (TDI) after being laid off. Furthermore, the Employee admitted that once his unemployment benefits ended, he attempted to return to the Employer as a Van Driver, but he was unsuccessful. He testified that in August 2021, he felt himself capable of being a Van Driver. However, the Employee withdrew money from his 401(k) to make ends meet until he got another job in March 2022.

On March 24, 2022, the employee secured a position at JFA Security in Newport, Rhode Island. He testified that he works as a gate guard at one of the mansions in Newport, RI, earning sixteen (\$16) dollars an hour working forty-five (45) hours a week. Thus, earning a wage of about \$720 a week.

On cross-examination, the Employee acknowledges the significant time gap of four (4) years between seeking medical treatment. He acknowledged that he did not seek treatment for his Elbow from January 2019 until October 2021, after filing a petition with the Court. Furthermore, he sought treatment with Nurse Practitioner Mark Clarke and Dr. DeLuise, after being referred to them by his attorney following the filing of both petitions for review. However, the Employee has articulated that his elbow has begun to feel slightly better with physical therapy.

Additionally, in support of his petition the Employee submitted an affidavit and the medical reports of Doctor Manuel F. DaSilva. (Ee's Ex. 9, Affidavit and Reports of Dr. DaSilva). Dr. DaSilva's medical reports note that on October 29, 2019, the Employee had tenderness over the lateral epicondyle and antecubital fossa (distal biceps) that was aggravated by resisted muscular testing. (Ee's Ex. 9, pg. 9). Ultimately, Dr. DaSilva declared the Employee partially disabled but may work modified duty. (Ee's Ex. 9, pg. 9). On December 18, 2018, Dr. DaSilva reexamined the Employee, including reviewing an MRI. Dr. DaSilva stated that there was no evidence of a biceps tear or "some tendinosis in the distal biceps" and recommended conservative treatment, as the discomfort should improve over the next several weeks. (Ee's Ex. 9, pg. 7). On January 16, 2019, Dr. DaSilva conducted his final examination of the Employee and stated that his discomfort should continue to improve and that the Employee is not a surgical

candidate. (Ee's Ex. 9, pg. 5). The medical records make no mention of work limitations or restrictions.

Similarly, in support of his petition, the Employee submitted the May 19, 2023, Deposition of Mark Clarke, Nurse Practitioner, along with accompanying reports from Dr. DaSilva, Mark Clarke, N.P., Dr. Paxton, and Dr. DeLuise. (Ee's Ex. 10, Deposition of Mr. Mark Clarke and related medical reports). Nurse Practitioner Mark Clarke (hereinafter "Mr. Clarke") testified that he saw the Employee on October 5, 2021, for an independent medical evaluation (IME), not treatment. Mr. Clarke testified that he was qualified as a board-certified family nurse practitioner in Rhode Island. However, he admitted that he had no formal training or certifications in performing IMEs and had never testified live in Court. Mr. Clarke testified that during his examination, the Employee complained of bilateral elbow pain, which was aggravated by repetitive motions from his warehouse job in October 2018. Mr. Clarke stated that he knew Dr. DaSilva had treated the Employee in the past and that an MRI had been taken. Nonetheless, Mr. Clarke stated that he did not review the MRI when evaluating the Employee. Mr. Clarke testified that his physical exam of the Employee showed tenderness in both elbows, a full range of motion, and normal grip strength. Mr. Clarke testified that his diagnosis of the Employee was bilateral medial epicondylitis and concluded that the Employee was partially incapacitated. He related the bilateral medial epicondylitis to the work-related injury in October 2018. Mr. Clarke articulated that this medical diagnosis and causation opinion was to a reasonable degree of medical certainty. Mr. Clarke's ultimate treatment recommendation was to see an orthopedic and undergo physical therapy.

On cross-examination, Mr. Clarke admitted that he had minimal knowledge of the Employee's job duties at the time of the injury. Mr. Clarke testified that he did not know the

weight or nature of the objects lifted. Additionally, Mr. Clarke had not reviewed the diagnostic imaging and was unaware that the Employee received unemployment benefits. Moreover, Mr. Clarke acknowledged that the first time he examined the patient was three (3) years after the injury had occurred. However, Mr. Clarke stated that he had reviewed Dr. Paxton and Dr. DeLuise's medical records a few days prior to the deposition and that he believes they reaffirm his diagnosis and disability opinion. Mr. Clarke testified that the other two doctor's opinions and diagnoses were similar to his own, which only strengthened his diagnostic opinion.

On January 5, 2022, the Employee visited Dr. Edward Paxton at University Orthopedics at the recommendation of Attorney Stephen Dennis. The medical reports from University Orthopedics, Inc. indicate the patient was seen for bilateral elbow pain. (Ee's Ex. 10, pg. 53). Dr. Paxton conducted a full examination of the Employee and stated that there was tendinosis of the biceps, brachialis, and triceps without a tear. (Ee's Ex. 10, pg. 56). Additionally, Dr. Paxton opined that after reviewing the MRI from 2018 he saw a partial thickness tear of the common extensor, but that it looked "relatively unremarkable." (Ee's Ex. 10, pg. 56). Dr. Paxton stated in the records that he discussed treatment with the patient and indicated he did not "see much evidence of any pathology" nor "any structural injury that requires surgical intervention." (Ee's Ex. 10, pg. 56). Dr. Paxton recommended starting with physical therapy but did not schedule any follow-up appointments. (Ee's Ex. 10, pg. 56). Additionally, Dr. Paxton's report failed to mention an opinion as to current disability or the causation of the injury.

On June 9, 2022, the Employee was examined by Dr. Anthony Michael DeLuise. The medical reports for Ortho Rhode Island indicate that the patient was seen for bilateral elbow pain. (Ee's Ex. 10, pg. 78). Dr. DeLuise's physical examination revealed that the Employee had a full range of motion in all upper extremities, such as shoulders, elbows, wrists, and all digits.

(Ee's Ex. 10, pg. 79). Additionally, the strength test revealed bilateral strength of 5/5 in the deltoid, biceps, triceps, wrist extensors, finger flexors, APB, and interossei. (Ee's Ex. 10, pg. 79). Moreover, Tinel's signs were negative. The medical report also indicates that Dr. DeLuise found no tenderness at the elbow with resisted wrist extension, nor with resisted pronation. Furthermore, there was no tenderness to palpation at the lateral epicondyle, at the radial tunnel, the distal biceps, or at the elbow flexion. (Ee's Ex. 10, pg. 79). Imaging was taken of the right elbow and revealed no fractures or dislocations. (Ee's Ex. 10, pg. 79). The imaging of the left elbow revealed a possible left elbow mild ulnohumeral arthritis. (Ee's Ex. 10, pg. 79). Dr. DeLuise recommended that he start physical therapy for the pain as the "x-rays were completely benign" and as there had been an ache for three to four years, since the initial work-related injury. (Ee's Ex. 10, pg. 79). However, Dr. DeLuise did not mention an opinion as to current disability.

The Employee rested its case on March 4, 2024, after almost two years at the trial level. No other witness testified at trial on behalf of either the Employee or the Employer. However, the Employer submitted additional evidence in opposition to the Employee's Petitions. The Employer submitted the Deposition of the Keeper of Records for the Department of Labor and Training, in relation to the Employee's unemployment benefits. (Er's Ex. A, Deposition of Keeper of Records of DLT). Additionally, the Employer submitted to the Court the Deposition of Dr. DeLuise and accompanying medical records. (Er's Ex. B, Deposition of Dr. DeLuise). Finally, the Employer submitted an affidavit from the Keeper of Records at North Atlantic for the Employee's wage records. (Er's Ex. C, Affidavit and Wage Records from the Keeper of Records at North Atlantic). The Employer rested its case on May 7, 2024, and then submitted its post-trial memorandum to the Court.

The trial judge rendered a bench decision denying the two Employee petitions. The trial judge reasoned that the Employee failed to meet the burden of proving a recurrence of partial incapacity stemming from the accepted October 22, 2018, right elbow strain. Ultimately, the trial judge found the medical evidence to be insufficient and unpersuasive.

The trial judge indicated that the affidavit and reports from Dr. DaSilva were incompetent, as the reports did not clearly support a continuing incapacity related specifically to the accepted injury—especially considering that the employee signed the Suspension Agreement. Furthermore, Mr. Clarke's testimony was found unconvincing, as he diagnosed a condition different from the accepted injury on the MOA, three years after the alleged date of recurrence, or a year and a half after if the Employee was allowed to reopen to amend the date of recurrence. The trial judge also emphasized that Mr. Clarke had no clear understanding of the details of the Employee's job duties at the warehouse, nor did he review the medical imaging. The trial judge gave greater weight to the opinions of Drs. Paxton and DeLuise who both found minimal physical findings and did not establish a link between the Employee's current complaints and the 2018 work injury.

Additionally, the trial judge found that there was no credible evidence submitted by the Employee establishing diminished earnings capacity, which he articulated is a requirement under Rhode Island Workers' Compensation Law to be awarded benefits. The trial judge pointed to payroll records that show the Employee earned in excess of his pre-injury wages from March 2019 to June 2020. Additionally, the Employee collected unemployment benefits from June 2020 to June 2021, which further precluded any concurrent workers' compensation benefits. Thus, the trial judge ultimately denied W.C.C. 2021-05648 for the reasons mentioned above.

The trial judge also denied the Employee's Petition in W.C.C. 2021-06541, requesting physical therapy and an orthopedic referral. The trial judge held that neither Mr. Clarke nor the other doctors provided sufficient evidence that the treatments were necessary to relieve the original right elbow strain injury. Moreover, since two orthopedic physicians, Drs. Paxton and DeLuise, had already evaluated the Employee, the trial judge found the orthopedic referral request moot.

Our Appellate Division standard of review is highly deferential, especially when the trial judge's findings are based on credible determinations. In reviewing a trial judge's decision, the Appellate Division must bear in mind that the findings of fact made at the trial level are final absent a determination that one or more of those findings are clearly erroneous. R.I. Gen. Laws § 28-35-28(b). Only after a finding that the trial judge was clearly erroneous, and/or overlooked or misconceived material evidence, may the appellate panel conduct a *de novo* review of the evidence. *Diocese of Providence v. Vaz*, 679 A.2d 879, 881 (R.I. 1996). After a careful review of the record, we conclude that the trial judge's factual findings are not clearly erroneous; therefore, we deny and dismiss the Employee's appeal.

The Employee stated one (1) reason for appeal in this matter. He contends that the trial judge committed reversible error by denying his motion to amend and reopen, thereby depriving him of the ability to meet his burden. The Employee alleges that the trial judge prioritized issuing a decision over the Employee's request to amend the petition and reopen the matter for additional testimony, solely because the case had been pending for some time. The Employee argues that—as the bench decision had not yet been rendered—he should have been permitted to amend his pleadings pursuant to Rule 2.16, which provides that a trial judge “shall, in his/her discretion, allow amendments to any of the pleadings in a case at any time prior to rendering of a

decision.” R.I. W.C.C. Rule 2.16. Additionally, the Employee claims that granting the motion to amend and reopen “would cause little delay.” He further asserts that the trial judge erred by failing to find any specific prejudice to the Employer.

The Rhode Island Supreme Court has held that a motion to reopen a case to present additional evidence only should be granted when newly discovered evidence is presented that was not available at trial and would likely change the outcome. *See Corrente v. Coventry*, 116 R.I. 145, 147, 352 A.2d 654, 655 (1976) (applying the standard for a motion for a new trial in a jury matter to a motion to reopen for additional testimony in a nonjury trial). The Court has further held that the decision whether to permit a party to reopen its case lies within the sound discretion of the trial justice. *Allen v. Skelding*, 634 A.2d 859, 860 (R.I. 1993). A trial judge’s denial of such a motion may only be disturbed on appeal upon a showing of an abuse of discretion. *Id.* An abuse of discretion will not be found unless the moving party affirmatively shows that substantial prejudice will result. *State v. Mattatall*, 114 R.I. 568, 571, 337 A.2d 229, 232 (R.I. 1975).

In the present case, the Employee is correct that a motion to amend the pleadings may be made at any time prior to the rendering of a decision. However, the trial judge has discretion to deny the motion to amend. The Employee seeks to amend the date of injury to June 6, 2020, in place of the originally alleged date of October 29, 2018. The genesis of this request is the Employee's counsel's review of the Employer's counsel's memorandum, presented after the parties had rested and were appearing in Court to hear the judge’s decision in the pending case. Furthermore, the record demonstrates that this amendment would not alter the outcome of the decision, as the Employee failed to establish any loss of earning capacity, which is a prerequisite for receiving benefits. The Employer submitted evidence that the Employee collected

unemployment benefits immediately after June 6, in amounts exceeding his pre-injury wages. Moreover, the Employee confirmed during his testimony that he was collecting unemployment benefits during that period. Thus, even if the motion to amend had been granted, the employee's change of injury date would not have yielded a different result because no argument is being made that evidence was being sought to be added to reflect a loss of earning capacity beyond what the trial judge had already reviewed and ruled on.

Additionally, the Court has recognized that a motion to amend that is coupled with a motion to reopen for the submission of additional evidence may be treated differently than a motion seeking merely to amend pleadings. *See Hobson v. Fleet Mortgage*, W.C.C. No. 1994-03229 (App. Div. 1996). In this case, the Employee filed a combined motion to amend and to reopen for further testimony. Therefore, the Employee bears the burden of satisfying the legal standard for reopening the matter.

The Employee filed a motion to reopen the matter to allow his own additional testimony regarding disability. However, he has not identified that the motion is based on newly discovered evidence unavailable at the time of trial, nor that the denial constitutes an error of law. Rather, the Employee's counsel stated that the purpose of the motion was to remedy deficiencies in the presentation of the case. Counsel explained that he sought to amend the date of injury and the period of incapacity, and to recall the Employee to testify regarding disability. Nowhere in the written motion or oral arguments before the trial judge did the Employee allege the discovery of new evidence. Instead, counsel stated: "[i]n reviewing my brother's post-trial memo, I saw that the pleadings were somewhat inaccurate, and I was seeking to amend the petition for disability." (Tr. 33:8-12).

In *Vargas v. Corbro Mfg. Co.*, W.C.C. No. 1997-03641 (App. Div. Nov. 1999), the Court upheld the denial of a motion to reopen, where the employee had been provided multiple opportunities to testify regarding his specific job duties. Similarly, in this case, the Employee had the opportunity to present evidence regarding current disability but failed to do so. Furthermore, in workers' compensation matters, a medical opinion is required to establish disability. The Employee's proposed additional testimony alone would be insufficient, and he would also be required to submit new medical evidence from a qualified physician.

The Court in *Vargas* also held that when a motion to reopen would cause further delay, prejudice to the opposing party may exist. *Id.* In that case, the motion to reopen was filed more than eighteen months after the initial testimony, and the delay was deemed prejudicial. Likewise, in *Occupations Unlimited v. Gonzalez*, W.C.C. No. 1993-05222 (App. Div. Nov. 1995), the Court upheld the denial of a motion to reopen because it would have had an unfair impact on the employer. There, the employer proceeded expeditiously, while the employee sought multiple continuances. *Id.*

The present matter closely mirrors those cases. The Employee originally testified on August 17, 2022, and did not file the motion to reopen until June 20, 2024—almost two years later. During that time, the Employee was granted numerous continuances and took nearly three years to complete his presentation of evidence. In contrast, the Employer presented its case within a few months after the Employee rested. Therefore, we cannot conclude that the trial judge abused his discretion in finding that reopening the matter would be prejudicial to the Employer.

Even if we assume that the trial judge erred in denying the motion to amend and reopen, we find that any such error would be harmless. The Employee still failed to demonstrate a loss of earning capacity and lacked a medical opinion to establish current disability.

Based upon the foregoing, we deny and dismiss the Employee's claims of appeal in the petitions and affirm the trial judge's decision and decrees. In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, final decrees, proposed copies of which are enclosed, shall be entered on October 17, 2025.

Lazieh, J. and Minicucci, J. concur

ENTER:

/s/ Cardoza, J.

/s/ Minicucci, J.

/s/ Lazieh, J.