V0396

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

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| TUREX, INC. | ) | |
| | ) | |
| VS. | ) | W.C.C. NO. 94-10404 |
| | ) | |
| MICHAEL FALLON | ) | |

DECISION OF THE APPELLATE DIVISION

MESSORE, J. This matter came on to be heard before the Appellate Division upon an appeal of the respondent/employee from an adverse decision and decree of the trial judge which was entered on August 22, 1995. This matter was before the trial court on an employer's petition to review alleging that the employee was able to return to light selected work. The trial judge found that the petitioner had proved by a fair preponderance of the credible evidence that the employee was capable of returning of light selected work, and as a result of that finding it was ordered:

> "1. That the petitioner may forthwith suspend the payments of weekly workers' compensation benefits for total incapacity to the respondent.
>
> 2. That the petitioner shall forthwith commence the payments of weekly workers' compensation benefits to the respondent for partial incapacity."

From said decree entered on August 22, 1995, the employee has duly claimed his right of appeal and has filed several reasons in support thereof. The

employee alleges the following errors of law and fact:

1. The decision is against the law and the evidence in that the trial judge misapplied the employer's burden of proof which is set out in the Rhode Island Supreme Court's ruling in C.D. Burnes Co. v. Guilbault.

2. The decision is against the law and the evidence in that the trial judge misconceived Dr. Edstrom's testimony.

3. The decision is against the law and the evidence in that the trial judge inappropriately relied upon the testimony of Dr. Edstrom regarding records which were vague, and at no time did the Doctor specifically refer to any change in condition regarding any particular report of Dr. Hubbard, Stutz, Polachek, Barry, or Stoll.

4. The decision is against the law and the evidence in that the trial judge inappropriately relied on the testimony of Dr. Edstrom without sustaining the respondent's objection to the question being asked on page 22, line 21 and on page 24, line 2 of the Doctor's deposition.

5. The decision is against the law and the evidence in that the trial judge abused his discretion in making his own independent medical evaluation as to the employee's condition.

6. The decision is against the law and the evidence in that the trial judge relied on the testimony of Dr. Edstrom who related a change in condition, but only measured by the subjective complaints of the employee.

Pursuant to R.I.G.L. § 28-35-28(b), a trial judge's finding on factual matters are final unless found to be clearly erroneous. The Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). The Appellate Division is entitled to conduct a de novo review only when a finding is made that the trial judge was clearly wrong. Id., citing R.I.G.L. § 28-35-28(b); Grimes Box

Co. v. Miguel, 509 A.2d 1002 (R.I. 1986). Such review however, is limited to the record made at the trial before the trial judge. Vaz, supra, citing Whittacker v. Health-Tex, Inc., 440 A.2d 122 (R.I. 1982).

Cognizant of this legal duty imposed upon us, we have carefully reviewed and examined the entire record in this matter and for the reasons set forth, we find error on the part of the trial judge and therefore we reverse the decree below.

Pursuant to a preliminary agreement dated March 26, 1980, the employee received benefits for total incapacity as of March 9, 1982 for an injury described as "carpal tunnel syndrome - left wrist" sustained on January 2, 1981. These benefits continued until a suspension agreement was signed indicating that the employee returned to work on June 8, 1982, and agreeing that compensation benefits would be discontinued as of June 7, 1982. The dated of the employee's injury was noted to be January 2, 1981. Subsequently, on May 16, 1983, the parties signed another preliminary agreement establishing that the employee would receive benefits for a second period of total incapacity which began as of April 15, 1983, as a result of his January 2, 1981 carpal tunnel syndrome - left wrist injury.

A memorandum of agreement dated August 25, 1989, was marked as an exhibit, and it evidenced payment for specific compensation with respect to the employee's January 2, 1981 injury, and described the nature of injury as left arm and wrist.

The deposition testimony of Dr. Lee Edstrom, a plastic surgeon, was admitted into evidence. Dr. Edstrom testified he examined the employee on two (2) occasions, December 21, 1993 and October 18, 1994. During the first of these examinations the doctor elicited a history of the employee's

work-related injury which occurred while the employee was working as a machine operator for the employer on January 2, 1991, and his left upper extremity was drawn up into a roller up to the shoulder, causing an avulsion and fracture injury to the upper extremity. The employee had, first of all, a left carpal tunnel syndrome shortly after the first accident to the left arm, which was released in 1982, and then he developed a benign tumor of the humerus, for which he also underwent surgery in the mid '80's. Dr. Edstrom noted the employee's other nonwork-related physical problems, which were complicating the picture in December of 1993. Dr. Edstrom conducted a physical examination and found that even though the employee's muscle bulk in the left side of his neck and shoulder was reduced, partly due to radiation therapy and surgery as a result of cancer, the employee was able to lift his shoulder with strength. He noted tenderness over the mid portion of the medial border of the shoulder blade where the employee complained of pain, and he noticed some restriction of his range of motion in the shoulder, but his elbow had good strength and range of motion. The sensation on the left side was noted to be normal, and the strength of his forearms and his grip had strong pronation and supination were complete.

The wrist examinations were normal on both sides. There was no sign of atrophy in the muscles of the hand. His strength was relatively normal in a pinch, about the same on both sides. His grip was a bit weaker on the left than the right, although both sides were weaker than normal. Dr. Edstrom performed a Watson's test, a physical examination that tests for stability of the wrist bones, and found the employee's wrist bones were in good shape. He had intact ligaments, and his scaphoid bone, the navicular was not tender. The grind test, which is another test for the presence of a problem in the

wrist, was also negative. He did not note any muscle wasting in the hand or forearm on the left side. Upon testing the employee had no Tinel's signs. The employee had a negative Phalen's test, and his Finkelstein's test was negative.

Dr. Edstrom testified that he had received a large package of records dating back to 1982, which included records of Drs. Hubbard, Stutz, Polachek, Barry and Stoll. Dr. Edstrom testified that based upon the employee's history, based on the results of his examination and based upon his review of the records which he identified, he formed an impression on December 21, 1993, that the employee continued to have pain in the shoulder and arm that were relatively consistent from the records he has reviewed since early in the employee's history, and he considered that these would be secondary to his accident, and he thought the employee was partially disabled upon that basis alone. He stated

> "There are undoubtedly some types of work he could return to without any problem whatsoever."

He found the employee partially disabled, "unable to do any tasks with his left upper extremity requiring more than ten (10) pounds of lifting or repetitions greater than six (6) per hour". It was Dr. Edstrom's opinion that the employee's residual pain in the left upper extremity was due to his work injury in 1982.

Dr. Edstrom testified, regarding the employee's October 18, 1994 examination, that the employee's condition had changed very little from the previous examination in December 1993. The employee had wasting of his trapezius muscle, but had preserved shoulder shrug strength. He was still

tender over the mid portion of the scapular and the range of motion of his shoulder was significantly restricted. He continued to have complete and strong pronation and supination as well as quite good strength of the wrist and fingers with normal range of motion. Wrist examinations were negative, and as before, the intrinsic muscles were intact. No Tinel's sign was present and the Finkelstein's test was negative bilaterally. He testified that the employee had reached a "permanent import" and that the employee was partially disabled with the same restrictions as before in that he was not able to do any lifting with his left upper extremity requiring more than ten (10) pounds of lifting or repetitions greater than six (6) per minute. The employee would be able to do light selected work without it being unduly injurious to his health with the restrictions that he mentioned. He testified that the employee's impairment in regards to his left upper extremity was unchanged from the previous visit, and he considered his impairment of the left upper extremity to be twenty percent (20%) based on a loss of strength due to his work-related injury. It was his opinion that the employee could use his right hand without undue risk to his health, and he would not put any restrictions on the use of his right hand. He could use his left hand to write, on occasion, and could have answered phones with his left hand without undue risk to his health. On October 18, the employee did not complain of any numbness to his left ring and little fingers on his left side, and he did not recall that the employee complained of any pain in the lower aspect of his forearm, nor did he complain of a burning sensation in the dorsum of his left forearm.

The doctor was then shown a report of Dr. Anthony Merlino dated July 19, 1983 with regards to an examination which took place on July 8, 1983, when the

employee complained of numbness of his left ring and little fingers and of pain in the volar aspect of the forearm and a burning sensation in the dorsum of his left forearm.

Dr. Edstrom was asked, based upon the absence of these symptoms at the time of his October 18, 1994 examination, did he have an opinion to a reasonable degree of medical certainty as to whether or not as to these symptoms the employee's condition had improved, worsened or remained the same between July 8, 1983 and the date of his October 18, 1994 examination. Dr. Edstrom's opinion was that the employee had improved regarding the occupational injury of January 2, 1981. Dr. Edstrom was also shown a report of Dr. David Barry dated June 15, 1983, which referred to severe pain in the employee's left forearm. Dr. Edstrom testified he had not recorded pain in the forearm in either of his examinations of 1993 and 1994. It was also noted that the employee on June 15, 1983, complained to Dr. Barry of numbness of the left fourth and fifth fingers, and Dr. Edstrom testified that at the time of his October 18, 1994 examination the employee did not make these complaints to him. He was asked insofar as these complaints were not made to him did he have an opinion to a reasonable degree of medical certainty as to whether or not the employee's condition had improved, remained the same or worsened since June 15, 1983 to the date of his October 18, 1994 examination. Dr. Edstrom testified the employee had improved from the original 1983 examination to the present with a loss of the severe pain in his forearm as well as numbness in his fourth (4th) and fifth (5th) fingers.

On cross-examination Dr. Edstrom agreed that numbness, pain and a burning sensation would all be considered subjective complaints. Dr. Edstrom agreed

that upon his examination of October 18, 1994, he found the employee to be in no acute distress, and he agreed that Dr. Merlino in his report dated July 19, 1983 also found the employee was in no acute distress.

Dr. Edstrom testified that on October 18, 1994 the employee was tested for range of motion of the shoulders and he was limited to twenty (20) degrees of extension, sixty (60) degrees of flexion and abducted to only forty-five (45) degrees. Referring to Dr. Merlino's July 19, 1983 report, Dr. Merlino, he agrees, makes an indication of good range of motion in both shoulders.

Dr. Edstrom then testified that the employee's overall condition had certainly worsened with regard to the range of motion of the shoulder, but he states: "this range of motion lack was thought by me secondary to a different problem than the one that Dr. Merlino was examining him for." Dr. Edstrom agreed that his findings relative to range of motion of the left hand and wrist were essentially consistent with Dr. Merlino's findings on July 19, 1983.

Dr. Edstrom was asked whether he was able to give an opinion to a reasonable degree of medical certainty as to whether in the area of motor deficit in the left upper extremity the employee's condition had improved from July 19, 1983 until October 18, 1994. Dr. Edstrom replied he was not sure that he could answer that question. Dr. Edstrom agreed that his finding of no Tinel's sign from the distal forearms of either upper extremity was consistent with Dr. Merlino's examination of July 19, 1983.

Dr. Edstrom was then asked:

> "...Comparing Dr. Merlino's findings on physical examination now on July 19th, 1983 do you find on physical examination relative to October 18th, 1994, would it be fair to state that in comparing the two there is not what you would consider, medically speaking, a significant change in Mr. Fallon's findings on physical examination?"

Dr. Edstrom replied, with those conditions that he was just examining regrading the employee's work-related injury, that objectively the employee appeared to have been about the same. He then testified that subjectively the employee was considerably worse in 1983 than he was in 1993 and 1994 when he examined him.

The trial judge, in his decision, stated:

> "As I indicated at the outset, this is an Employer's Petition to Review alleging that the employee is able to return to light selected work. It is clear in such a case that the petitioner under C.D. Burns Co. vs. Gilbo [Guilbault] 559 A.2d 637 (R.I. 1989) must prove a change in condition by medical evidence which compares the employee's present condition to that condition which existed at the time that he was last declared to be totally incapacitated. In this particular case, Petitioner's Exhibit Number Three provides for payments of weekly Workers' Compensation benefits for a recurrence to the petitioner as of April 15, 1983 said Preliminary Agreement as I previously mentioned providing for the payments ever [of] compensation for total incapacity.
>
> The petitioner's burden in this case is to prove by a fair preponderance of the credible evidence that Mr. Fallon's condition has improved from the condition that existed in April of 1983 in order to prevail in this matter. The medical evidence presented in this case is the deposition testimony of Lee Edstrom. The simple issue is whether or not Dr. Edstrom's deposition testimony provides the petitioner with the proof that they need it to show in order to prevail in this matter. I have reviewed Dr. Edstrom's deposition testimony carefully. It is clear that Dr. Edstrom examined the respondent on two separate occasions. Those dates being December 21, 1993 and again on October 18, 1994. In reading the deposition testimony, it is clear that Dr. Edstrom's two examinations yielded approximately similar results. On each of the two occasions that Dr. Edstrom examined Mr. Fallon, he felt him capable of performing light duty work with some restrictions. The restrictions Dr. Edstrom listed were that the respondent should not be engaging in any work where he was required to lift with his left upper extremity more than ten pounds or doing repetitious kind of work in cycles rated at six per minute.

> I looked it [sic.] at the deposition testimony to see whether or not Dr. Edstrom's testimony is sufficient to meet the burden of proof that the petitioner has in this case. In C.D. Burnes which I previously cited, the Supreme Court said in part that when dealing with a claim such as the one made hereby [sic.] this employer, 'such a claim would require knowledge of the prior condition to how much of and approvement [sic.] the employee has I will experienced.' [sic.] As [sic.] page 11 of Dr. Edstrom's deposition testimony, I testified that in connection with the examinations that he conducted he had reviewed to use his words, 'I received a large package of records dating way back to 1982, which included records of Drs' [sic.] Hubbard, Stutz, Policheck [sic.], David Barry and Dr. Julis [sic.] Stole [sic.]. The doctor was asked to put [sic.] the review of those records and he answered that he used them do [to] evaluate Mr. Fallon's past medical history. He then went on to say that he felt that the employee's condition had improved from the condition that he found to exist by reviewing the records and he also said at page 13 of the deposition 'there are undoubtedly some types of work he could return to without any problem whatsoever.' He also went on testified at page 13 ,'I will quote from my records,' [sic.] I will consider Mr. Fallon partially disabled and unable to do any tasks with his left upper extremity requiring more than the ten pounds of lifting or repetitions greater than six per hour.'"

The trial judge noted that Dr. Edstrom then testified that the employee's condition that he found on October 18, 1994 has improved regarding the occupational injury of January 2, 1981. The trial judge then went on to state:

> "...I have thought about what the Supreme Court was saying when they wrote the decision saying that comparative evidence was necessary, and in my view what the Supreme Court has said and continues to say is that a doctor who believes that an employee remains partially incapacitated for work as a result of a work injury must base that statement on a comparison of the condition that existed when the employee was placed on total and the condition that the doctor find [sic.] at the time of his examination. Now, if as in this case, Dr. Edstrom had not had available to him any records concerning the employee's prior condition and has simply testified that on the two occasions when he examined him, he felt Mr. Fallon to be partially incapacity [sic.] and capable of performing some form of light duty work, this employer could not prevail. But that's not the case here. Dr. Edstrom's

> testimony that I pointed to earlier clearly indicates that he had available to him in connection with the examination that he conducted to use Dr. Edstrom's own words a large packet of records and what did those records consist of, they consisted of records that were again rated from several doctors who had seen Mr. Fallon in connection with his 1981 work injury. In one capacity or another those doctors being Hubbard, Stutz, Policheck [sic.], Barry and Stole [sic.]. Dr. Edstrom tells me in his deposition testimony. [sic.] I took a look at the reports of all the doctors that provided to me and I use them in connection with my evaluation to help me find this person's in this case Mr. Fallon's past medical history and on the basis of what I found as compared to what I read in those records going back to 1982 I felt on both occasions that I examined Mr. Fallon that his condition had in fact improved, and in addition to improving that he was capable of doing light duty work, and in addition to that there were a lot of jobs he would probably been able to do without any problem.
>
> I don't think the Supreme Court requirement of the comparison is really anything more than wanting to have some assertions that the doctor's testimony in a claim such as this is based upon a review of the employee's past condition. I'm satisfied that Dr. Edstrom's testimony more than meets the petitioner's burden of proof in this case. since there was not contra medical evidence introduced, the testimony of Dr. Edstrom is uncontradicted, and I am accepting that testimony."

We disagree with the trial judge's interpretation of the Supreme Court's requirement for a comparison opinion in this type of case. The determinative issue in this matter is medical in nature. In the case of C.D. Burnes Co. v. Guilbault 559 A.2d 637 (R.I. 1989), the Court stated at page 639:

> "In Martinez v. Bar-Tan Manufacturing, 521 A.2d 134 (R.I. 1987), in which an employee petitioned to show a recurrence of his work-related injury, we held that to prove a recurrence, the petitioner must document the alleged change by presenting an expert witness who compares the employee's previous condition at the time when benefits were terminated with the employee's present condition and consequently renders an opinion that the incapacity had recurred."

The Court further stated in Burnes, at page 640:

> "Comparative evidence would also be required in a situation in which an employer alleges a decrease in incapacity for the same reasons set out in Martinez.
>
> > '"To make the comparison inherent in rendering an opinion that an employee's present condition represents a change, the expert obviously must possess knowledge of the employee's prior capacity for work.***Accordingly, it is the established rule of this jurisdiction that an expert witness possessing no knowledge of the employee's prior condition and testifying solely to the employee's present condition is not competent to render an opinion that the employee's incapacity for work has recurred." 521 A.2d at 114.

The Supreme Court also stated in the case of Costello v. Narragansett Electric Company, 623 A.2d 440 (R.I. 1993) at Page 444:

> "In only one situation is there no requirement for comparative evidence, and that is when an employer is asserting that an employee's incapacity has ended. The doctor need testify only of the present ability to work." C.D. Burnes Co., 559 A.2d at 640.

After review of the testimony of Dr. Edstrom, it appears that the doctor has found that the employee is able to return to work with restrictions, which he has enumerated; but it is also obvious that the doctor has not stated his opinion is based upon a comparison of the employee's condition at the time that the employee was last declared to be totally incapacitated with his present condition. Dr. Edstrom does not refer to any specific report by any specific doctor which supports the finding of recurrence of the employee's total disability on April 15, 1983.

Insofar as the medical evidence offered on behalf of the petitioner does not compare the present findings of Dr. Edstrom with the employee's condition

at the time his benefits were reinstated for total incapacity, we believe the evidence offered is not competent and probative to support a finding that the employee's condition has changed.

For these reasons we find the trial judge was clearly wrong in relying on the testimony of Dr. Edstrom to establish the employee's condition had changed from the time of the preliminary agreement dated May 16, 1983, which found the employee to have a second period of compensation for total disability as a result of his January 2, 1981 injury, this incapacity commencing on April 15, 1983.

The rule requiring opinion evidence to be in itself sufficiently comparative so as to document the alleged change in the employee's condition is grounded on the general principle that an expert witness may not testify to a conclusion without laying an adequate foundation for that conclusion. An expert who renders an opinion that the employee's incapacity has changed, recurred or decreased must demonstrate that the opinion rests upon medical findings different from those supporting the document or decree which had either suspended or reinstated the employee's benefits. See Faria v. Carol Cable Co., 527 A.2d 641 (R.I. 1987).

As a result, a new decree shall enter with the following findings:

1. That the petitioner/employer has failed to prove by a fair preponderance of the credible evidence that the employee is no longer totally disabled.

2. That the respondent/employee remains totally disabled.

It is, therefore, ordered:

1. That the petition is denied and dismissed.

2. That the petitioner shall reinstate the payment of Workers' Compensation benefits for total incapacity from the date of the trial court decree entered on August 22, 1995.

3. That the employer shall reimburse employee's counsel for the cost of a copy of the deposition of Dr. Lee Edstrom upon presentation of sufficient evidence of the amount of such cost and payment of the same.

4. That the employer shall reimburse employee's counsel the sum of Eighty and 00/100 ($80.00) Dollars for the cost of the transcript and Twenty-five and 00/100 ($25.00) Dollars for the cost of the filing of the claim of appeal.

5. That the employer shall pay a counsel fee in the sum of Seven Hundred Fifty ($750.00) Dollars to John Harnett, Esq. for services rendered through the trial of this matter.

6. That the employer shall pay a counsel fee in the sum of Five Hundred and 00/100 ($500.00) Dollars to John Harnett, Esq. for services rendered at the Appellate level.

We have prepared and submit herewith a new decree in accordance with the decision. The parties may appear on August 1, 1997 at 10:00 AM to show cause, if any they have, why said decree shall not be entered.

Arrigan, CJ. and Olsson, J. concur.

ENTER:

Arrigan, CJ.

Messore, J.

Olsson, J.

V0396

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

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| TUREX, INC. | ) | |
| | ) | |
| VS. | ) | 94-10404 |
| | ) | |
| MICHAEL FALLON | ) | |

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the respondent/employee from a decree entered on August 22, 1995.

Upon consideration thereof, the appeal of the respondent is sustained, and in accordance with the Decision of the Appellate Division, the following findings of fact are made.

1. That the petitioner/employer has failed to prove by a fair preponderance of the credible evidence that the employee is no longer totally disabled.

2. That the respondent/employee remains totally disabled.

It is hereby ORDERED, ADJUDGED AND DECREED:

1. That the petition is denied and dismissed.

2. That the petitioner shall reinstate the payment of Workers' Compensation benefits for total incapacity from the date of the trial court decree entered on August 22, 1995.

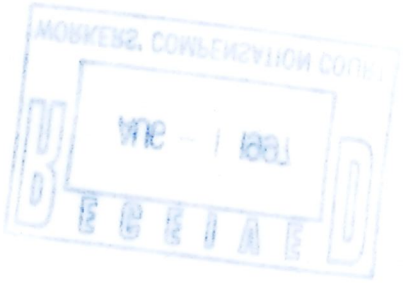
3. That the employer shall reimburse employee's counsel for the cost of a copy of the deposition of Dr. Lee Edstrom upon presentation of sufficient evidence of the amount of such cost and payment of the same.

4. That the employer shall reimburse employee's counsel the sum of Eighty and 00/100 ($80.00) Dollars for the cost of the transcript and Twenty-five and 00/100 ($25.00) Dollars for the cost of the filing of the claim of appeal.

5. That the employer shall pay a counsel fee in the sum of Seven Hundred Fifty ($750.00) Dollars to John Harnett, Esq. for services rendered through the trial of this matter.

6. That the employer shall pay a counsel fee in the sum of Five Hundred and 00/100 ($500.00) Dollars to John Harnett, Esq. for services rendered at the Appellate level.

Entered as the final decree of this Court this 1st day of August, 1997




BY ORDER:

Dennis I. Revens, Administrator

V0396

ENTER:

Arrigan, CJ.

Messore, J.

Olsson, J.

I hereby certify that copies were mailed to John Harnett, Esq., and Brian Burns, Esq., on July 22, 1997