

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT  
APPELLATE DIVISION

LARRY POLLACK

)

)

VS.

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W.C.C. 00-01031

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ARDEN ENGINEERING  
CONSTRUCTORS, INC.

)

DECISION OF THE APPELLATE DIVISION

ROTONDI, J. This matter came on to be heard before the Appellate Division upon the petitioner/employee's appeal from the decision and decree of the trial court entered on December 17, 2001. This matter was heard on an Employee's Petition to Review alleging that his incapacity had returned as of October 25, 1999 due to the effects of the work-related injury he sustained on January 11, 1994. During the litigation on this petition, the employee filed a motion to recuse and disqualify the trial judge, which was denied. After the conclusion of the trial, the employee's petition to review was also denied and this appeal ensued.

The employee initially received weekly indemnity benefits pursuant to a Memorandum of Agreement for a January 11, 1994 work-related injury. He received partial incapacity benefits from January 12, 1994, until August 23, 1995, when his benefits were suspended by way of a pretrial order in W.C.C. No.

95-05704, which found that the employee was no longer incapacitated.

Subsequently, in W.C.C. No. 95-08127, the employee was again found partially disabled as of September 18, 1995.

The employer then filed a request for an Anniversary Review pursuant to R.I.G.L. § 28-33-46. A decree was entered on September 24, 1998 ordering the suspension of weekly benefits based upon a finding that the employee was no longer disabled in whole or in part. An appeal from this decree was filed by the employee. Associate Judge George Healy sat on the appellate panel and authored the appellate decision upholding the decree suspending the employee's benefits. The appellate decree was entered on September 5, 2001.

On February 18, 2000, the employee filed the instant petition to review alleging a return of incapacity, which was assigned for hearing to Judge Healy. The petition was denied at a pretrial conference on March 6, 2000 and the employee filed a timely claim for trial. Counsel for the employee filed a motion requesting that Judge Healy recuse himself from hearing the pending petition based upon his participation in the employee's case pending at the Appellate Division. Judge Healy denied the motion and after a full hearing on the merits, he affirmed the pretrial order denying the employee's claim of a return of incapacity. The employee then filed a claim of appeal to the Appellate Division.

The employee filed the following as his Reasons of Appeal from the decree entered on December 17, 2001:

"1. The Decree is against the law.

“2. The Decree is against the law because the appointment of trial judge to hear Petitioner’s claims after he had reviewed and written a decision against the Petitioner pertaining to the same injuries while sitting on the appellate panel was unconstitutional, violating Petitioner’s due process and equal protection rights.

“3. The Decree is against the law to the extent that R.I. Gen. Laws § 28-35-28 is unconstitutional, in that it violates Petitioner’s right to equal protection and due process under the United States Constitution and Rhode Island Constitutions and it violates Petitioner’s right to equal access to the courts under the Rhode Island Constitution in that the statute permits a trial judge to hear a petitioner’s claim after previously reviewing the same facts and evidence on the appellate panel.

“4. The Decree is against the law because the trial judge failed recuse himself as required by the judicial canons mandating that a trial judge avoid the appearance of impropriety.”

Pursuant to R.I.G.L. § 28-35-28(b), a trial judge’s findings on factual matters are final unless found to be clearly erroneous. See Diocese of Providence v. Vaz, 679 A.2d 879 (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.; Grimes Box Co., Inc. v. Miguel, 509 A.2d 1002 (R.I. 1986). Such review, however, is limited to the record made before the trial judge. Vaz, supra, citing Whittaker v. Health-Tex, Inc., 440 A.2d 122 (R.I. 1982).

Cognizant of this legal duty imposed upon us, we have carefully reviewed the entire record of this proceeding. For the reasons set forth, we find no merit in the employee’s appeal, and we therefore affirm the trial judge’s decision and decree.

The Rhode Island Supreme Court has long held that the Workers’ Compensation Appellate Division may decide only those questions of law properly

raised on appeal before it. Bissonnette v. Federal Dairy Co., Inc., 472 A.2d 1223, 1226 (R.I. 1984); Lamont v. Aetna Bridge Co., 107 R.I. 686, 690, 270 A.2d 515, 518 (1970). The Workers' Compensation Appellate Division "generally may not consider an issue unless that issue is properly raised on appeal by the party seeking review." State v. Hurley, 490 A.2d 979, 981 (R.I. 1985).

In order for issues to be properly before the Appellate Division, the statutory requirements of R.I.G.L. § 28-35-28 must be satisfied. The pertinent language of that statute mandates, ". . . the appellant shall file with the administrator of the court reasons of appeal stating specifically all matters determined adversely to him or her which he or she desires to appeal. . . ." This tribunal is without authority to consider reasons of appeal that fail to meet the statutorily required level of specificity. Bissonnette, 472 A.2d at 1226. General recitations that a trial judge's decree is against the law and the evidence fail to meet the specificity requirements of R.I.G.L. § 28-35-28. Id.

Based upon the aforementioned authority, it is clear that the employee's first reason of appeal, which merely states that the decree is against the law, fails to meet the required standard of specificity. Accordingly, we deny and dismiss the employee's first reason of appeal.

The employee is challenging the constitutionality of R.I.G.L. § 28-35-28 under the equal protection clauses of the Rhode Island and United States Constitutions. Article 1, section 2, of the Rhode Island Constitution provides that "No person shall be deprived of life, liberty or property without due process of

law, nor shall any person be denied equal protection of the laws.” The Fourteenth Amendment of the United States Constitution states “. . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. Amend. XIV, § 1.

Rhode Island General Laws § 28-35-28 reads in pertinent part:

“The chief judge appoints appellate panels of three (3) members of the court to hear any claim of appeal and the decision of the appellate panel is binding on the court.

\* \* \* \*

“Any member of the appellate panel may, for cause, disqualify himself or herself from hearing any appeal that may come before the appellate panel.”

State government in Rhode Island functioned under the royal charter granted in 1663 by Charles II until the State Constitution was adopted in 1843. City of Pawtucket v. Sundlun, 662 A.2d 40, 44 (R.I. 1995). Since the adoption of the constitution, the Rhode Island Supreme Court has consistently stated that the Legislature is vested with the powers of both the Crown and Parliament, except those powers which have been subsumed by the Constitution of the United States or have been removed from the General Assembly by the State Constitution. In re Advisory Opinion To The Governor (Rhode Island Ethics Commission--Separation of Powers), 732 A.2d 55, 62 (R.I. 1999); City of Pawtucket, 662 A.2d at 44; Kennedy v. State, 654 A.2d 708, 710 (R.I. 1995); Payne & Butler v. Providence Gas Co., 31 R.I. 295, 315, 77 A. 145, 153 (1910).

The Rhode Island Supreme Court has held that the power of the General Assembly is therefore plenary and unlimited, except for those limitations which are spelled out in the United States and the Rhode Island Constitutions. In re Advisory Opinion To The Governor (Rhode Island Ethics Commission--Separation of Powers), 732 A.2d at 62; City of Pawtucket, 662 A.2d at 44; Kass v. Retirement Bd. of Emp. Ret. Sys., 567 A.2d 358, 360 (R.I. 1989). The Rhode Island Constitution defines the powers granted to the executive and judicial branches of government, leaving all other powers to the Legislature, unless prohibited by the constitution. Because the General Assembly does not look to the State Constitution for grants of power, the Rhode Island Supreme Court has consistently taken the position that the General Assembly possesses all those powers inherent to the sovereign, except those that the constitution confers upon the other branches of state government. In re Advisory Opinion To The Governor (Rhode Island Ethics Commission--Separation of Powers), 732 A.2d at 63; City of Pawtucket, 662 A.2d at 44; Nugent v. City of East Providence, 103 R.I. 518, 525-26, 238 A.2d 758, 762 (1968). Any powers not specifically committed to the other branches are powers reserved to the General Assembly. Nugent, 103 R.I. at 525-26, 238 A.2d at 762.

Because of the broad plenary power of the General Assembly, legislative enactments are evaluated with great deference by the court and will not be declared invalid unless it is established beyond a reasonable doubt that the

statute violates a provision of the constitution. City of Pawtucket, 622 A.2d at 45; Gorham v. Robinson, 57 R.I. 1, 7, 186 A. 832, 837 (1936).

Thus, all statutes are presumed to be constitutional and valid. Any analysis of the constitutionality of a statute begins with the presumption that the legislative enactment is valid and constitutional. Rhode Island Depositors Economic Protection Corp. v. Brown, 659 A.2d 95, 100 ( R.I. 1995).

In determining whether an enactment violates the equal protection guarantees of the Rhode Island and United States Constitutions, the Court “must examine both the nature of the classification established by the act and the individual rights that may be violated by the act.” Brown, 659 A.2d at 100 (citing Boucher v. Sayeed, 459 A.2d 87, 91 (R.I. 1983)). “If a statute either infringes upon fundamental rights or results in the creation of a suspect classification, the statute must be examined with strict scrutiny.” Id. Conversely, “legislation that neither implicates a suspect class nor infringes upon a fundamental right is subject to rational-basis review.” Id. (citing City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313, 320 (1985)).

In the instant petition, the employee is challenging the constitutionality of R.I.G.L. § 28-35-28 under principles of equal protection. However, the employee has failed to demonstrate that he is a member of a recognized suspect class.

A suspect class is one “saddled with such disabilities, subjected to such a history of purposeful unequal treatment, or relegated to such a position of

political powerlessness as to command extraordinary protection from the majoritarian political process.” San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28, 93 S.Ct. 1278, 1294, 36 L.Ed.2d 16, 40 (1973). Employees with hearing loss are not recognized as a suspect class. More broadly, it is well-settled that the disabled in general do not constitute a suspect class. Heller v. Doe By Doe, 509 U.S. 312, 321, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993); accord City of Cleburne, 473 U.S. 432, 442-447, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (mental retardation was held not to be a “quasi-suspect classification”). The employee has failed to establish that he is a member of a suspect class and therefore R.I.G.L. § 28-35-28 will be analyzed under a rational basis review. See Kleczek v. Rhode Island Interscholastic League, 612 A.2d 734, 736-737 (R.I. 1992)

The employee also raises a constitutional challenge to R.I.G.L. § 28-35-28 under a claim that the afore-mentioned statute denies his right to equal access to the courts under the Rhode Island Constitution. Article 1, § 5 of the Rhode Island Constitution provides that “[e]very person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which may be received in one’s person, property, or character.” However, the right to bring a claim before the courts of the State of Rhode Island is not absolute.

It is well-settled that legislatures may enact reasonable limits on parties’ rights to have their claims adjudicated by the courts. See United States v. Kubrick, 444 U.S. 111, 125, 100 S.Ct. 352, 361, 62 L.Ed.2d 259, 271 (1979);

Johnson v. Railway Exp. Agency, Inc., 421 U.S. 454, 463-64, 95 S.Ct. 1716, 1722, 44 L.Ed.2d 295, 303 (1975); see Young v. Park, 116 R.I. 568, 573, 359 A.2d 697, 700 (1976). The Rhode Island Supreme Court has held that article 1, section 5 of the Rhode Island Constitution “should not be interpreted to bar the General Assembly from enacting laws that limit or place a burden upon a party’s right to bring a claim in our courts.” Walsh v. Gowing, 494 A.2d 543, 547 (R.I. 1985); Kennedy v. Cumberland Engineering Co., 471 A.2d 195, 198 (R.I. 1984). “Such limits or burdens violate the constitutional protection mandated by article 1, section 5, only when statutes ‘prohibit court access *absolutely* for a generally recognized claim to a class of plaintiffs.” Dowd v. Rayner, 655 A.2d 679, 683 (R.I. 1995) (quoting, Kennedy, 471 A.2d at 198). “Except for an absolute prohibition, however, the Legislature may place ‘permissibly \* \* \* reasonable limits or burdens on the parties’ right to have their claims adjudicated by the courts.’” Id.

In the instant petition, R.I.G.L. § 28-35-28 grants the chief judge of the Workers’ Compensation Court the authority to assign three (3) members of the court to the Appellate Division. The General Assembly did not place any specific mandates or restrictions on how the chief judge is to assign workers’ compensation judges to the Appellate Division. The only requirement is that the judges that are to be appointed must be members of the Workers’ Compensation Court. In addition, the statute provides that any member of the appellate panel may, for cause, disqualify himself or herself from hearing any appeal that may come before the appellate panel.

A reasonable interpretation of the latter portion of the statute indicates the General Assembly's legislative intent to impose a duty on a member of the appellate panel to remain on the panel and serve the needs of the State of Rhode Island and its citizens, injured workers, their employers and insurance carriers, as well as the Workers' Compensation Court and the judiciary. A *prima facie* interpretation of the statute exemplifies the proposition that a member of the appellate panel is not free to disqualify him or herself without cause. Furthermore, it can reasonably be inferred from the statute that a judge may only be disqualified from serving on the panel "for cause."

The legislative intent of the statute is fundamentally clear. The chief judge is granted broad discretion in assigning members of the Workers' Compensation Court to the Appellate Division. In addition, members of the Workers' Compensation Court selected to serve on the Appellate Division must fulfill their obligations to the Appellate Division and may only be disqualified from serving "for cause." It is not the role of this tribunal to determine whether the statute is wise or unwise. The Rhode Island Supreme Court has held:

"The policy questions raised by the state, and the question whether this statute is wise or unwise, are not for this court to determine. Those questions would better be addressed to the General Assembly which, under our system of government, is charged with the duty and responsibility of passing on the wisdom of such legislation." Hazard v. Howard, 110 R.I. 107, 111-112, 290 A.2d 603, 606 (1972).

We are compelled to disagree with the employee's contention that R.I.G.L. § 28-35-28 denies him either equal protection of the laws or access to the courts

as guaranteed by our State Constitution and we thus conclude that § 28-35-28 is constitutional. The employee has not satisfied the burden of proof to overcome the presumption that statutes passed by the General Assembly are valid and constitutional. He has failed to demonstrate to this tribunal that R.I.G.L. § 28-35-28 can plainly and unmistakably be characterized as an excess of legislative power. The General Assembly had a rational reason for passing the aforementioned statute and thus, it cannot be found to be unconstitutional under the United States or Rhode Island Constitutions.

Finally, we cannot hold that the trial judge was clearly erroneous for refusing to recuse himself upon motion of the employee's counsel. When dealing with the issue of judges recusing themselves, the Rhode Island Supreme Court has held, "It is axiomatic that judges are obligated to recuse themselves in the event that they are unable to render fair and impartial decisions in their cases." In re Antonio, 612 A.2d 650, 653 (R.I. 1992). The standard for disqualification on a motion for recusal was set forth in State v. Clark, 423 A.2d 1151, 1158 (R.I. 1981):

"We are reminded that a judge has as great an obligation not to disqualify himself when there is no occasion to do so as he has to do so when the occasion does arise. \* \* \* Before a judge is required to recuse in order to avoid the appearance of impropriety, facts must be elicited indicating that it is reasonable for members of the public or a litigant or counsel to question the trial justice's impartiality. However, recusal is not in order by a mere accusation that is totally unsupported by substantial fact."

The party requesting recusal must put forth facts showing that the trial judge has a “personal bias or prejudice by reason of a preconceived or settled opinion of a character calculated to impair his impartiality seriously and to sway his judgment.” Cavanagh v. Cavanagh, 118 R.I. 608, 621, 375 A.2d 911, 917 (1977). “Moreover, the moving party must prove that this alleged bias and prejudice stemmed from an extrajudicial source and that the judge based his decision on facts and events not pertinent before the court.” Antonio, 612 A.2d at 653; see In re Kean, 520 A.2d 1271, 1277 (R.I. 1987); State v. Nidever, 120 R.I. 767, 390 A.2d 368 (1978). In addition, the Rhode Island Supreme Court has held that adverse rulings alone are not sufficient to show bias or prejudice on the part of the trial justice. Antonio, 612 A.2d at 654.

The employee in the instant petition failed to demonstrate that the trial judge had a personal bias or prejudice against him stemming from an extrajudicial source. Nor has he shown that the trial judge had based his decision on facts and events not pertinent before the court which would impair the trial judge’s impartiality. Therefore, we cannot hold that the trial judge was clearly erroneous in denying the motion to recuse.

For the aforesaid reasons, the employee’s reasons of appeal are hereby denied and dismissed and we, therefore, affirm the trial judge’s decision and decree.

In accordance with Sec. 2.20 of the Rules of Practice of the Workers’ Compensation Court, a decree, a copy of which is enclosed, shall be entered on

Bertness and Salem, JJ. concur.

ENTER:

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Rotondi, J.

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Bertness, J.

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Salem, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT  
APPELLATE DIVISION

LARRY POLLACK

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VS.

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W.C.C. 00-01031

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ARDEN ENGINEERING  
CONSTRUCTORS, INC.

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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 December 17, 2001 be, and they hereby are, affirmed.

Entered as the final decree of this Court this                      day of

BY ORDER:

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ENTER:

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Rotondi, J.

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Bertness, J.

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Salem, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq., and  
Christine D'Orsi Fitta, Esq., on

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