STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

JOSE FREITAS)
)
VS.)
W.C.C. 00-05340
)
TECH INDUSTRIES

DECISION OF THE APPELLATE DIVISION

BERTNESS, J. This matter came to be heard before the Appellate Division upon an petitioner/employee's appeal from the decision and decree of the trial court entered on June 20, 2002. This matter was heard as an Employee's Petition to Review alleging a returned incapacity to work beginning July 18, 2000 and continuing. The employee alleges that his lay off from Tech Industries on July 18, 2000 constitutes a return of incapacity from a work-related injury he sustained on December 1, 1997.

The employee, Jose Freitas, testified he was employed at Tech Industries located in Woonsocket, Rhode Island in excess of thirty (30) years. (Tr. p. 5-6). The employee testified regarding his employment duties. Early in his career at Tech Industries, he was employed as a "regular worker" in the manufacturing of plastic caps. Later, he held a job as a supervisor and in December of 1997 he was working as the supervisor on the second shift. (Tr. pp. 6-12, & 41). Also testifying regarding the

employee's job duties was Charles Studebaker, the department manager for the fourth floor at Tech Industries. (Tr. pp. 38-66).

On December 1, 1997, Mr. Freitas sustained a work-related low back strain after falling off of a ladder. Mr. Freitas was out of work for a short period of time after his injury and returned to work after approximately one month in early 1998 according to the employee's testimony. (Tr. pp. 17-18). Mr. Freitas' testified further that he left work a second time around October or November of 1998 and returned approximately three months later in early 1999 as a result of his December 1, 1997 injury. (Tr. pp. 18-20).

Mr. Freitas received workers' compensation benefits according to a Memorandum of Agreement dated December 31, 1998 for a date of injury of December 7, 1997 described as a low back sprain. Mr. Freitas received weekly compensation benefits beginning on December 21, 1998 until February 21, 1999 when benefits were terminated pursuant to a Suspension Agreement and receipt dated March 20, 1999. Mr. Freitas testified that upon his return to work to Tech Industries in 1998 and 1999 he was returned to his pre-injury position as the fourth floor supervisor. (Tr. pp. 28-32). Mr. Studebaker testified that prior to the December 1, 1997 injury, Mr. Freitas was the forth floor supervisor for the second shift (Tr. pp. 41) and upon returning to Tech Industries, Mr. Freitas was the forth floor supervisor during the first shift (Tr. p. 50). Mr. Studebaker

testified that upon returning to work for Tech Industries, Mr. Freitas' duties as the first shift and second shift supervisor were essentially identical. (Tr. pp. 48-49, 54-56).

The trial court denied and dismissed the Employee's Petition to Review finding:

1. "That the employee has failed to prove by a fair preponderance of the probative and credible evidence that he sustained an increase or return of incapacity on July 18, 2000, as a result of the December 1, 1997 low back sprain."

The employee filed the instant appeal.

The employee, Jose Freitas, Jr., filed the following as his Reasons of Appeal from the decision and decree entered by the trial judge on June 20, 2002:

> "1. The Trial Judge erroneously concluded that the employee did not sustain a (sic) increase and return of incapacity on July 18, 2000, as a result of a December 1, 1997, low back sprain.
>
> "2. The Trial Court erroneously concluded that the employee did not sustain a return of incapacity on July 18, 2000, when the employee was laid off from a 'light-work' position which had been created for him.
>
> "3. Having concluded that the employee had returned to work in February 1999, at a position where he 'avoided helping the employees under his supervision with the heavier aspects of the job' which was an aspect of his pre-injury employment, the Trial Judge was bound to conclude that when the employer terminated this modified duty employment, and offered him a position 'which paid less money and was of a more physical nature,' that his incapacity had returned.
> "4. The Trial Court erroneously concluded that the employee was laid off on July 18, 2000, 'performing the same job that he held for many years, and the same job that he had performed before and after his work-related injury of December 19997

> (sic),' where the Trial Court had previously concluded that after his injury, the employee 'avoided helping [fellow] employees under his supervision with the heavier aspects of their jobs,' which he had done prior to his injury."

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. 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, 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 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 that are before the Appellate Division. Bissonnette *v.* General Dairy Co., 472 A.2d 1223, 1226 (R.I. 1984); Lamont v. Aetna Bridge Co.,107 R.I. 686, 690, 270 A.2d 515, 518 (R.I. 1970); Peloso v. Peloso, Inc., 107 R.I. 365, 372, 267 A.2d 717, 722 (R.I. 1970). The Rhode Island Supreme Court has frequently stated that the Workers' Compensation Appellate Division, "generally may not consider an

issue unless the issue is properly raised on appeal by the party seeking review." Falvey v. Women and Infants Hosp., 584 A.2d 417, 419 (R.I. 1991); *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 R.I.G.L. § 28-35-28 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 1223 (R.I. 1984). General recitations that a trial judges' decree was against the law and the evidence fail to meet the specificity requirements of R.I.G.L. § 28-35-28. Falvey, 584 A.2d 417 (R.I. 1991).

Under the aforementioned, binding authority, this Tribunal holds that the employees' reasons of appeal number one (1) and number two (2) fail to meet the required standard of specificity. Accordingly, we deny and dismiss employee's reasons of appeal number one (1) and number two (2).

In his third reason of appeal the employee asserts that because the employee returned to his regular job but did not perform all of his regular job duties that when he was laid off he returned to incapacity. The employee cites no authority for this premise and the court knows of none except where the employee has returned to suitable alternative

employment which was not established in this case. R.I.G.L. § 28-33-18.2. For this reason, the employee's third reason of appeal must fail.

The employee's fourth reason of appeal alleges that the trial court erred in concluding that the employee returned to work performing the same job that he performed before his work injury of December 1997 because the Court previously concluded that the employee avoided helping other employees with the heavier aspects of their jobs. We find that if any error was committed in this regard it was harmless error because the employee did not have the protection afforded by suitable alternative employment. Pion v. Bess Eaton Donuts Flour Co. Inc., 637 A.2d 367 (R.I. 1994).

Finally, the employee, through his counsel, raised the issue of suitable alternative employment at the Appellate Division oral arguments for the first time. An issue raised for the first time at oral argument will not be considered where the employee failed to raise same at the trial level or in his reasons of appeal. See R.I.G.L. § 28-35-28; Yates v. Dr. J.H. Ladd School, 120 R.I. 294, 387 A.2d 1043 (R.I. 1978). The Appellate Commission's review is limited to the record made before the trial judge and the Appellate Commission lacks the authority to enlarge or amend the record. Whittaker, 440 A.2d 122 (R.I. 1982). In the instant petition, the issue of suitable alternative employment was neither raised at the trial level nor in the reasons of appeal and the trial record does not establish a

finding of suitable alternative employment. Therefore, the Appellate Commission will not consider it now.

For the aforesaid reasons, the employee's reasons of appeal are hereby denied and dismissed and, 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, copy of which is enclosed, shall be entered on

Healy and Morin, JJ. concur.

ENTER:

_____
Healy, J.

_____
Morin, J.

_____
Bertness, 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 June 20, 2002 be, and they hereby are affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Healy, J.

_____
Morin, J.

_____
Bertness, J.

I hereby certify that copies were mailed to Marc Gursky, Esquire and Ronald Izzo, Esquire on _____