STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

HESHMATOLLAH ASHTARI)
)
VS.) W.C.C. 01-03138
)
CARBON TECHNOLOGY, INC.)

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter came on to be heard before the Appellate Division on the petitioner/employee's appeal from the denial of his Original Petition in which he alleged that he developed problems with his neck due to repetitive activities at work which resulted in total disability beginning March 2, 2001. After reviewing the record and considering the arguments of the parties, we grant the employee's appeal and reverse the decision of the trial judge.

The employee had worked at Carbon Technology for about fifteen (15) years prior to the alleged injury.[1] He spent the first thirteen (13) years as a machine operator. His duties included loading and unloading grids and crucibles containing carbon pieces, monitoring the furnace, checking the temperature, maintaining the equipment and fixing any electrical problems. About seventy

[1] A transcript of the trial, including the employee's testimony, was not provided to the Appellate Panel. This summary of the employee's testimony was taken from the trial judge's bench decision, which was transcribed. (Tr. at 4-11).

(70%) percent of his time was spent loading and unloading. The heaviest item he had to lift weighed thirty (30) to forty (40) pounds.

In January of 2000, after a brief lay-off, the employee began working in the machine shop operating a computer controlled machine which milled parts. His duties included programming the machine to the appropriate specifications, placing the parts into the machine where they were automatically milled, removing the finished parts from the machine, sanding them, and finally, placing them in a box. The employee stood throughout his shift and would pick up parts with his right hand to put them in the machine and then take the finished part out with his left hand. He would do this anywhere from 20 to 3,000 times per shift depending on the size of the part and/or order.

Prior to his lay-off on March 5, 2001, the employee stated that he had been having problems with his neck while working. He testified that during the course of his job his left arm would sometimes go numb. At one point, he was unable to turn his neck more than seventy (70) degrees. The employee stated that in October of 2000 he had mentioned these problems to his shift supervisor, Doug Jackson, and then in January 2001 he told Donna Kirtlink about his problems with his neck and arms.

The employee initially sought treatment for these complaints with Dr. Stephen Maguire, his primary care physician, who prescribed exercise and Celebrex. However, when the employee did not improve, Dr. Maguire sent him for

an MRI in February 2001. After his MRI, the employee was referred to Dr. Peter J. Bellafiore, a neurologist.

He continued to work after the MRI until he received a telephone call at his house on March 5, 2001 from Donna Kirtlink advising him that he was being laid off effective that day because the company was downsizing. The employee admitted that he had intended to go to work that day until he was informed of his layoff. The employee acknowledged that there was no particular incident at work which brought on his symptoms. He asserted that he did not feel he could return to work because he could not rotate his neck and he continued to have numbness in his left arm.

The employee testified that prior to his layoff there was an ongoing dispute about the number of parts he was machining during his shift. He stated that his supervisor, Doug Jackson, was changing the number of completed parts he recorded on the ticket for each job. When he questioned Mr. Jackson about the change, Mr. Jackson replied that the employee was entering the wrong numbers. The employee stated that he did not think Mr. Jackson was giving him a fair count.

The medical evidence consisted of the depositions and reports of Drs. Maguire, Bellafiore, and A. Louis Mariorenzi. Dr. Maguire testified that the employee had been treating with him since November of 1991. His records showed that the employee's first complaints of neck and shoulder pain were in June of 2000. When he returned to see the doctor in September that year, the

employee was experiencing "a continuous numbness in the left deltoid area with five or six episodes a day of heavy discomfort in the same area of the deltoid and in the left trapezius muscle." Pet. Exh. #5, p. 6. A month later, the employee was complaining of numbness in his neck, but reduced discomfort in the left arm and neck.

Dr. Maguire diagnosed the employee with left cervical degenerative joint disease and left cervical radiculopathy. When the employee's complaints continued into early 2001, the doctor sent him for an MRI of the cervical spine. Dr. Maguire testified that the employee's MRI showed bone spurs secondary to arthritis causing a pinched nerve in the employee's arm. Id. at 10. As a result of these findings, Dr. Maguire referred the employee to a neurologist, Dr. Bellafiore. He also changed the employee's diagnosis to "left cervical radiculopathy secondary to osteophytes impinging on the cervical spinal nerves exacerbated by repetitive trauma at work." Id. at 13.

Dr. Maguire testified that it was his understanding that the employee's job required him to repeatedly turn from left to right and back and forth again. He stated that the employee's pre-existing osteoarthritis was most likely exacerbated by his job duties and that continued performance of those duties would only worsen the employee's pain. He also opined that the employee sustained a muscular injury due to the repetitive activity because he noted palpable thickening of the muscular tissue on the left side of the neck. He based these opinions in part on the fact that with the employee's departure from work in

March 2001 and physical therapy, the numbness and pain in the employee's left arm were gone and the pain in his neck was much better.

On cross-examination, Dr. Maguire acknowledged that the results of the EMG and nerve conduction study done by Dr. Bellafiore showed no evidence of carpal tunnel syndrome, ulnar nerve entrapment, or cervical radiculopathy. However, Dr. Maguire stated that he still believed that the employee experienced radiculopathy, but it was not severe enough to be detected by an EMG. He admitted that his opinion regarding the impact of the employee's job duties on his condition was based on the information given to him by the employee about his employment, particularly that he had to continuously turn his head back and forth hundreds of times a day. He asserted that repeated rotation of the cervical spine would "tend to cause worsening of arthritis of the neck and muscle injury of the cervical spine musculature and the trapezius muscle." Id. at 34.

Dr. Bellafiore testified that he first saw the employee on March 9, 2001. Mr. Ashtari informed the doctor that he has had neck and left arm pain for the last year, although it was better in the last few days because he was no longer working. The doctor noted muscle spasm in the left trapezius and sternocleidomastoid. He also found an increase in pain with forward flexion of his neck. Dr. Bellafiore performed an EMG that day which did not reveal any evidence of nerve entrapment or loss of nerve input to the muscles of the left arm.

The employee saw Dr. Bellafiore three (3) more times from April to September 2001. He reported an eighty (80%) percent improvement in his pain with physical therapy, medication, and no repetitive activity. Dr. Bellafiore testified that it was his opinion, to a reasonable degree of medical certainty, that the arthritic condition in the employee's cervical spine was aggravated by his repetitive work activities. The doctor also stated that the employee would not be able to return to his previous employment or perform any repetitive activity with his arms and neck. He based this opinion on the history given to him by the employee, the MRI study showing significant arthritis in the neck, the finding of significant muscle spasm on physical examination, and the fact that the employee felt better after he stopped working.

Dr. Mariorenzi examined the employee on September 11, 2001 at the request of the employer. After examining the employee and reviewing the MRI study, the doctor diagnosed Mr. Ashtari's condition as "degenerative arthritis cervical area with associated symptomatology." Res. Exh. A, p.2. He indicated that the significant degenerative changes were simply the result of a normal physiological process. Dr. Mariorenzi stated it was his opinion that "in no way were this arthritic problem and the symptoms he was having related to his occupational injury." Res. Exh. B, p. 13. He testified that the employee's arthritis was neither aggravated nor caused by the activities at work.

Dr. Mariorenzi acknowledged that repetitive use of a part of the body with significant arthritis can produce symptoms, but it would not cause or accelerate

the arthritis itself. He stated that the positive findings in his examination of the employee were consistent with the degree and location of the arthritis in his cervical spine. The doctor explained that the employee's arthritis was degenerative and not traumatic. He maintained that the extent of the arthritis shown on the MRI was not really uncommon for a fifty-four (54) year old man.

The trial judge determined that the only issue to be decided was whether the employee's job activities caused an incapacity or inability to work for which the employee would be entitled to workers' compensation benefits. The essential facts of the case were not in dispute. He noted that all of the doctors agree that a person with the degree of arthritis the employee has, who is repeatedly turning his head back and forth all day, would develop symptoms in his neck and arms. The trial judge further indicated that he accepted the fact that the employee suffered pain in his neck and upper extremity which was caused by the activities of his job. However, he denied the employee's petition, stating his reasoning as follows:

> "What becomes difficult here is that the underlying condition was not caused, attributed, aggravated or accelerated by the work-related activity. I did not see any proof in that regard.
>
> "We have a situation where the employee is presenting with a personal medical issue and because of the activities of his job he is symptomatic. I do not think that that establishes a nexus in this particular situation." (Tr. p. 25)

The role of the Appellate Division in reviewing a decision of a trial judge is strictly circumscribed by statute. 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. The Appellate Division is permitted to conduct a *de novo* review of the record only after finding that the trial judge was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996).

The employee filed three (3) reasons of appeal which basically assert that the trial judge misconstrued and overlooked material evidence, specifically the medical evidence, in failing to find that the employee was entitled to workers' compensation benefits for an aggravation of a pre-existing arthritic condition which resulted in his incapacity to perform his job duties. After a review of the record and the applicable law, we agree and find that the trial judge was clearly wrong in his determination that the employee's disability was not compensable.

It is well-established that an employee does not need to prove that his disability is the result of an accident or some external force in order to receive benefits. Mulcahey v. New England Newspapers, Inc., 488 A.2d 681 (R.I. 1985); Shoren v. United States Rubber Co., 87 R.I. 319, 140 A.2d 768 (1958). The concept of repetitive work activity causing a disabling condition has been accepted for many years. See Shoren, supra. In addition, the Rhode Island Supreme Court established many years ago that an employee who suffers from a pre-existing disease or condition may receive compensation if the disease or condition is aggravated or accelerated by his employment. Palmer v. Friendly Pharmacy, Inc., 84 R.I. 98, 103, 121 A.2d 665, 668 (1956); Carroll v. What Cheer Stables Co., 38 R.I. 421, 96 A. 208 (1916). The employee need only establish

that the nature of his employment, or the conditions under which it must be performed, contributed to his incapacity by aggravating the preexisting condition. Holme v. Carlson Corp., 582 A.2d 905 (R.I. 1990); Mulcahey, supra, at 684.

The trial judge stated that he believed that the employee developed pain in his neck and left arm as a result of his repetitive work activities. The pain prevented him from working as of March 5, 2001. Based upon these facts, the employee has established a compensable work injury and incapacity. The trial judge denied the claim on the basis that the work activities did not cause the arthritis to develop and they did not accelerate the progression of the degenerative condition. However, arthritis, in and of itself, is not disabling. It is the symptoms caused by the arthritis, such as pain and stiffness, which cause disability. In the present case, the doctors were of the opinion that the pain experienced by the employee was caused by the repetitive work activities. Those work activities caused the arthritis to become symptomatic and rendered the employee disabled. This clearly establishes a nexus, or causal relationship, with the employment.

An "aggravation" of a preexisting condition when the work activities cause the condition to become symptomatic has long been compensable under our statute. The employee in Bishop v. Chauvin Spinning Company, 86 R.I. 435, 136 A.2d 616 (1957), had sustained prior back injuries and undergone surgery before his employment with the respondent. He worked in a job requiring repetitive bending for several years while enduring varying degrees of pain until it became

so severe he had to stop working. The Court concluded that the employee had suffered an aggravation of a preexisting condition and was entitled to workers' compensation benefits. We find that the reasoning of the Court in Bishop is applicable to the present case.

It is a basic tenet of workers' compensation law that an employer "takes the employee as it finds him." Carter v. ITT Royal Elec. Div., 503 A.2d 122 (R.I. 1986); Mulcahey v. New England Newspapers, Inc., 488 A.2d 681 (R.I. 1985). The fact that an employee has a preexisting condition or disease, or a predisposition to a certain condition, does not preclude the employee from receiving workers' compensation benefits when the nature of his employment or the conditions under which he performs his job aggravates that condition such that he is unable to work.

Based upon the foregoing, we grant the employee's appeal and reverse the decision and decree of the trial judge. As a result of the reversal, we must address several additional issues. First, the trial judge notes as an aside that if the employee's claim was compensable that it would qualify as an occupational disease and his benefits would be subject to apportionment under R.I.G.L. § 28-34-7. We disagree.

Rhode Island General Laws § 28-34-2 recites a very specific list of the types of conditions and diseases which would be classified as "occupational diseases." The aggravation of a pre-existing arthritic condition is not specifically listed. There is a general catch-all provision stating that any "disability arising from any

cause connected with or arising from the peculiar characteristics of the employment," shall be considered an occupational disease. However, there is nothing to indicate that the repetitive turning of his head which the employee did in his job as a machine operator would be a "peculiar characteristic" of his particular employment. We see no reason to classify Mr. Ashtari's condition as anything other than a compensable personal injury under R.I.G.L. § 28-33-1. Therefore, his benefits would not be subject to apportionment.

The second item is the degree and length of incapacity suffered by the employee, if any. In reviewing the medical evidence, both Drs. Maguire and Bellafiore testified that the employee was not capable of returning to his former employment and that to do so would worsen his condition. It was clear that the employee's condition improved after he had stopped working. Despite his assertion that the employee "should" be able to return to work, Dr. Mariorenzi did state that repetitive activities involving the arthritic area of the body can cause the development of symptoms in that body area. Dr. Mariorenzi was of the opinion that such a flare-up of symptoms was manageable with over-the-counter anti-inflammatories and cervical traction. The employee is not required to subject himself to a situation where he will continue to suffer pain and discomfort. We find the opinions of Drs. Maguire and Bellafiore to be more persuasive and probative on the issue of disability and choose to rely upon their opinions over that of Dr. Mariorenzi.

The third item is the award of a counsel fee to the employee's attorney in light of his success on appeal. The employee's claim had been denied at both the pretrial conference and at the trial level so no fees or costs have previously been awarded. At the close of the trial, counsel submitted a fee affidavit detailing the hours expended and requesting a fee of Eleven Thousand One Hundred Forty-two and 50/100 ($11,142.50) Dollars. The attorney, Michael D. Coleman, has been a member of the Rhode Island Bar since 1975 and has experience in the workers' compensation field. As the trial judge noted, the case involved a difficult issue of causation due to the existence of the preexisting degenerative condition.

The amount of money in question was significant. At the close of the trial, the employee had been out of work for almost two (2) years. In addition, he had incurred the cost of doctors' visits and physical therapy.

We have reviewed the attorney's affidavit detailing the time expended in prosecuting the employee's claim. This case required the depositions of three (3) physicians, two (2) of which were over one (1) hour in length. The employee was deposed prior to trial. The judge and parties went on a view of the employee's job location. The trial involved four (4) days of testimony from five (5) witnesses. After undertaking the analysis of the factors set forth in Annunziata v. ITT Royal Elec. Co., 479 A.2d 743, (R.I. 1984), we find no reason to modify the requested attorney's fee and conclude that the sum of Eleven Thousand One Hundred Forty-two and 50/100 ($11,142.50) Dollars is a fair and reasonable compensation for the services rendered at the pretrial and trial levels.

In addition, we award a counsel fee in the sum of One Thousand Two Hundred Fifty and 00/100 ($1,250.00) Dollars to Michael D. Coleman, Esq., for services rendered at the appellate level.

In accordance with our decision, a new decree shall enter containing the following findings and orders:

1. That the employee has proven by a fair preponderance of the credible evidence that he sustained a personal injury on March 5, 2001, arising out of and in the course of his employment, connected therewith and referable thereto, of which injury the employer had knowledge.

2. That the injury sustained by the employee was an aggravation of pre-existing cervical degenerative joint disease and left cervical radiculopathy.

3. That the employee's average weekly wage is Five Hundred Twenty-four and 00/100 ($524.00) Dollars.

4. That the employee has no dependents.

5. That the employee became partially disabled as of March 5, 2001 and remains partially disabled.

It is, therefore, ordered:

1. That the employer shall pay to the employee worker's compensation benefits for partial incapacity from March 5, 2001 and continuing until further order of the court or agreement of the parties.

2. That the employer shall pay all reasonable charges for medical services rendered to the employee in order to cure, rehabilitate, or relieve the employee from the effects of the work-related injury.

3. That the employer shall reimburse employee's counsel the sum of One Hundred Sixty-five and 00/100 ($165.00) Dollars for the cost of filing the original petition, the cost of filing the appeal, and the cost of the transcript required for the appeal.

4. That the employer shall reimburse the employee the sum of Eight Hundred and 00/100 ($800.00) Dollars for the witness fees paid to Drs. Stephen Maguire and Peter J. Bellafiore.

5. That the employer shall reimburse employee's counsel the sum of Six Hundred One and 15/100 ($601.15) Dollars for the cost of depositions of the employee, and Drs. Stephen Maguire, Peter J. Bellafiore, and A. Louis Mariorenzi.

6. That the employer shall pay a counsel fee in the sum of Eleven Thousand One Hundred Forty-two and 50/100 ($11, 142.50) Dollars to Michael D. Coleman, Esq., attorney for the employee, for the services rendered at the pretrial conference and during the trial.

7. That the employer shall pay a counsel fee in the sum of One Thousand Two Hundred Fifty and 00/100 ($1,250.00) Dollars to Michael D. Coleman, Esq., attorney for the employee, for services rendered at the appellate level.

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

Connor and Salem, JJ. concur.

ENTER:

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Olsson, J.

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Connor, J.

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Salem, J.

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VS.) W.C.C. 01-03138
)
CARBON TECHNOLOGY, INC.)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the appeal of the petitioner/employee from a decree entered on December 11, 2002.

Upon consideration thereof, the appeal of the petitioner/employee is sustained and in accordance with the decision of the Appellate Division, the following findings of fact are made:

1. That the employee has proven by a fair preponderance of the credible evidence that he sustained a personal injury on March 5, 2001, arising out of and in the course of his employment, connected therewith and referable thereto, of which injury the employer had knowledge.

2. That the injury sustained by the employee was an aggravation of pre-existing cervical degenerative joint disease and left cervical radiculopathy.

3. That the employee's average weekly wage is Five Hundred Twenty-four and 00/100 ($524.00) Dollars.

4. That the employee has no dependents.

5. That the employee became partially disabled as of March 5, 2001 and remains partially disabled.

It is, therefore, ordered:

1. That the employer shall pay to the employee worker's compensation benefits for partial incapacity from March 5, 2001 and continuing until further order of the court or agreement of the parties.

2. That the employer shall pay all reasonable charges for medical services rendered to the employee in order to cure, rehabilitate or relieve the employee from the effects of the work-related injury.

3. That the employer shall reimburse employee's counsel the sum of One Hundred Sixty-five and 00/100 ($165.00) Dollars for the cost of filing the original petition, the cost of filing the appeal, and the cost of the transcript required for the appeal.

4. That the employer shall reimburse the employee the sum of Eight Hundred and 00/100 ($800.00) Dollars for the witness fees paid to Drs. Stephen Maguire and Peter J. Bellafiore.

5. That the employer shall reimburse employee's counsel the sum of Six Hundred One and 15/100 ($601.15) Dollars for the cost of depositions of the employee, and Drs. Stephen Maguire, Peter J. Bellafiore, and A. Louis Mariorenzi.

6. That the employer shall pay a counsel fee in the sum of Eleven Thousand One Hundred Forty-two and 50/100 ($11, 142.50) Dollars to Michael

D. Coleman, Esq., attorney for the employee, for the services rendered at the pretrial conference and during the trial.

7. That the employer shall pay a counsel fee in the sum of One Thousand Two Hundred Fifty and 00/100 ($1,250.00) Dollars to Michael D. Coleman, Esq., attorney for the employee, for services rendered at the appellate level.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Olsson, J.

_____
Connor, J.

_____
Salem, J.

I hereby certify that copies were mailed to Michael D. Coleman, Esq., and Peter S. Haydon, Esq., on

_____