STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
BRIAN HARDY	)	
	)	
VS.	)	W.C.C. 01-03870
	)	
PROVIDENCE JOURNAL CO.	)	
BRIAN HARDY	)	
	)	
VS.	)	W.C.C. 01-00617
	)	
PROVIDENCE JOURNAL CO.	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter came on to be heard before the Appellate Division upon the employee's appeals from the denial of both his Original Petition and an Employee's Petition to Review. In W.C.C. No. 01-00617, the Original Petition, the employee alleged that he sustained injuries to his neck and both shoulders and also developed left carpal tunnel syndrome on July 15, 2000, resulting in incapacity from that date and continuing. The petition was denied at the pretrial conference and the employee claimed a trial. After a full hearing on the merits,

the trial judge found that the employee had failed to prove the allegations of his petition and the matter was denied and dismissed.

W.C.C. No. 01-03870 is an Employee's Petition to Review alleging that the employee experienced a return of incapacity beginning July 15, 2000 due to the effects of a work-related injury he sustained on July 8, 1998 involving his right wrist and right shoulder. This petition was also denied at the pretrial conference and again after trial. The employee has claimed an appeal from the decrees entered in both cases.

The employee worked for the Providence Journal for twenty-one (21) years. As a truck driver, he was responsible for loading and delivering bundles of newspapers. The job required him to lift bundles of newspapers weighing between twenty (20) and twenty-five (25) pounds, as well as move carts filled with the bundled newspapers. The carts weighed between 800 and 1,300 pounds.

The employee sustained an injury in July of 1998 to his right wrist and right shoulder. He received weekly benefits for that injury until they were discontinued at a pretrial conference held on July 13, 2000. The employee had actually returned to his regular job and regular hours sometime in April 2000. He testified that on July 15, 2000, while maneuvering a cart full of bundled newspapers into his truck, he felt a numbing pain in his left shoulder and a tingling sensation extending down his arm. He did not submit an incident report at the time of the injury. He asserted that he delayed reporting the incident until October 2000 because he feared losing his job. He testified that he only notified

his supervisor of the incident and filled out the report when it was clear that the pain would prevent him from fulfilling his work duties. (Tr. pp. 24-25) He stopped working in November 2000 and has not returned to work.

The trial judge denied and dismissed both petitions. He noted that the many inconsistencies and contradictions between the employee's testimony and the doctors' reports led him to conclude that the employee was not credible and therefore, the doctors lacked the necessary foundation to render an opinion as to causation. The employee filed claims of appeal in both cases.

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 a 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 that the trial judge's findings were not clearly erroneous and, therefore, find no merit in the employee's appeal.

The employee makes two (2) arguments on appeal. First, he contends that there was competent medical evidence in the record establishing that his neck, shoulder and left carpal tunnel injuries were caused either by his work activities

on July 8, 1998 or his work activities on July 15, 2000. The employee testified that he advised the physicians who treated him that his present problems were related to an incident at work on July 15, 2000. However, none of the doctors recorded any information about the alleged incident at work in their reports.

The employee saw Dr. Frank Savoretti on August 8, 2000 for a regularly scheduled annual physical examination. At that time, he complained of discomfort in his left arm with constant numbness and tingling as well as numbness and tingling in both arms when he moved his neck backwards. The doctor noted that the employee has had these complaints for a few months. There is no description of what brought these complaints on or any incident at work that may have caused his condition. In a later report, Dr. Savoretti stated that he thought the employee's problems were likely caused by the work-related motor vehicle accident he was involved in in July 1998. In his deposition, he never gave a definitive opinion as to the cause of the employee's condition.

Dr. Savoretti referred the employee to Dr. Cyril O. Burke, III, a neurologist. The employee testified that he believed he had told Dr. Burke that his condition was caused by an incident at work. However, Dr. Burke testified that he never recorded any information about any incident at work as the cause of the employee's condition.

The employee was also referred to Dr. Melvyn M. Gelch, a neurosurgeon, who evaluated him for the first time on September 18, 2000. Mr. Hardy indicated that he told Dr. Gelch that he sustained an injury at work on July 15,

2000, however, the doctor did not record such a history and there was no indication of a work-related injury on the patient intake sheet completed by the employee. Dr. Gelch also had no history of the employee's prior work injury resulting from a motor vehicle accident in July 1998.

During his testimony, a hypothetical question was posed to Dr. Gelch in which he was asked to give his opinion as to causal relationship assuming that on July 15, 2000, the employee felt a pinch in his left shoulder while maneuvering carts filled with bundles of newspapers. Dr. Gelch responded as follows:

> "It is very difficult. The paresthesias of the left upper extremity certainly indicate nerve irritation. The discomfort in the shoulder when he was pushing these carts really doesn't mean much. I think that with the description of that type of job you could essentially herniate a disc, but I don't think I could say absolutely to a reasonable degree of medical certainty that his description as you narrated really is that of a herniated disc." (Ee's Exh. #4, p. 7)

When asked again as to the cause of the herniated cervical disc, the doctor stated that it was "not typical, but conceivable," that pushing the carts could cause a herniated disc. (Ee's Exh. #4, p. 7) He stated that because he had no history of any specific incident, he believed that the herniated disc was simply caused by wear and tear.

It is well accepted that the trial judge is uniquely qualified to both assess the credibility of a witness and to determine what evidence to accept and what evidence to reject because he or she is in the best position to observe the appearance of a witness, his or her demeanor, and the manner in which he or she

responds to questions. Davol, Inc. v. Aguiar, 463 A.2d 170, 174 (R.I. 1983). It is within the trial judge's discretion to reject some or all of a witness' testimony as untruthful. Delage v. Imperial Knife Company, Inc., 121 R.I. 146, 148, 396 A.2d 938, 939 (1979). Credibility determinations made at the trial level are given great deference on appeal and will not be overturned absent a finding of clear error.

Based upon our review of the record, we cannot say that the trial judge's conclusions were clearly wrong. In fact, they are well supported by the evidence. The employee testified that he believed he told each doctor that the injury was work-related, yet none of the doctors recorded this fact in their records or recall mention of such an injury. Furthermore, when asked a hypothetical question about whether the alleged incident on July 15, 2000 was the cause of the employee's condition, Dr. Gelch could only state that "it's not typical, but conceivable." Consequently, the trial judge's finding that there is no competent medical evidence to support the employee's allegations is not clearly erroneous.

In his second argument on appeal, the employee contends that the trial judge erred in denying his petitions because the evidence established that his injuries were disabling and there was no other cause for them other than his work activities. Although the employee has shown that he has a disabling condition, he has not carried his burden in establishing a causal link between that condition and his work activities. Dr. Savoretti initially attributed the employee's condition

to a 1998 motor vehicle accident, although he did not have symptoms of a cervical disc until 2000. Dr. Savoretti also testified,

> "And I think the problem is he has the herniated disc, no question about that. And here we're just trying to figure out exactly when it happened. I can't figure out exactly when it happened. I just know he has a problem." (Er's Exh. E, p. 23)

Dr. Gelch testified that he could not state to a reasonable degree of medical certainty that the herniated cervical disc was caused by the alleged incident in July 2000. He initially attributed the problem to normal wear and tear and the aging process because he never had any history of a specific incident.

We cannot fault the trial judge for finding this evidence to be unpersuasive on the issue of causation. It is the employee's burden to come forth with affirmative probative evidence to establish the causal relationship between an incident at work and his disabling injury. In this case, multiple causes were raised and none of the doctors stated with any degree of certainty which one caused the herniated disc.

Based upon the foregoing, we conclude that the findings of the trial judge are not clearly erroneous. Therefore, the employee's reasons of appeal in both matters are hereby denied and dismissed.

In accordance with Sec. 2.20 of the Rules of Practice of the Workers' Compensation Court, decrees, copies of which are enclosed, shall be entered on

Healy and Connor, JJ. concur.

ENTER:

_____
Healy, J.

_____
Olsson, J.

_____
Connor, 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 October 16, 2002 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

_____

ENTER:

_____
Healy, J.

_____
Olsson, J.

_____
Connor, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq., and John W. Kershaw, Esq., on

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Connor, J.

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