STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

ARNOLD WRIGHT	)	
	)	
VS.	)	W.C.C. 01-07912
	)	
WALGREENS	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter came before the Appellate Division upon the appeal of the petitioner/employee from a decision and decree of the trial judge which granted his Original Petition in part and denied it in part. The employee alleged that he sustained injuries to his back, neck, both shoulders, both legs and head on October 14, 2001 when he fell off of a ladder at work. At the pretrial conference, the petition was granted for injuries to his head, neck and back and the employee was awarded weekly benefits for partial incapacity from October 15, 2001 and continuing. The employer claimed a trial in a timely manner.

After a trial on the merits, the trial judge found that the employee had sustained injuries to his back and neck and he awarded weekly benefits for partial incapacity from October 15, 2001 to January 28, 2002. The employee's contention that he had also sustained an injury to his head which continued to disable him from work was denied. The employee filed a timely claim of appeal.

The employee presented three (3) Reasons of Appeal. The first two (2) contend that the trial judge's conclusion that the employee did not sustain a head injury is clearly erroneous in light of the uncontradicted medical evidence and the employee's testimony as to how the incident occurred. We find merit in this contention and sustain the employee's appeal on this issue.

The third reason of appeal alleges that the trial judge committed error because he provided only a general statement that he had reviewed the medical opinions and testimony of Dr. Steven C. Brin and Dr. Richard G. Bertini, but he failed to explain how he weighed that evidence or why he rejected it. Counsel for the employee conceded at oral argument that he really had no grounds to contest the trial judge's reliance on the opinions of Dr. A. Louis Mariorenzi with regard to the neck and back injuries and the length of the disability caused by those injuries. The testimony and reports of Drs. Brin and Bertini addressed only the neck and back injuries. Consequently, we can only infer that the employee is not pressing his third reason of appeal.

The employee testified that on October 14, 2001, shortly after 11:00 p.m., he lost his balance while on a ladder at work and fell backwards to the floor, landing on his back and shoulders and hitting the back of his head. He stated that he immediately felt pain and felt disoriented with blurred vision. He was uncertain whether he may have briefly lost consciousness. Because he was experiencing blurred vision, he called his mother to pick him up and she drove

him to the Roger Williams Hospital Emergency Room. He was examined and released.

The following day, October 15, 2001, he saw his primary care physician, Dr. Steven C. Brin. The doctor prescribed some medication and advised him to remain out of work. Apparently, he consulted an attorney around this time and was referred to Dr. Richard G. Bertini, an orthopedic surgeon, for treatment of his neck and back injuries. The employee was also referred to Dr. Albert J. Marano, a neurologist, for treatment of his head injury. Mr. Wright was also evaluated by Dr. A. Louis Mariorenzi, an orthopedic surgeon, at the request of the insurer.

The trial judge concluded that the employee did not sustain any injury to his head on October 14, 2001. First, he noted that the emergency room report did not mention that there was any bump, cut, or abrasion on the employee's head and he found it inherently improbable that he could have fallen from a height of over twelve (12) feet without sustaining some sort of visible damage to his head. Second, the trial judge noted that Dr. Marano, on the three (3) occasions he examined the employee, never noted any objective physical findings to substantiate the diagnosis of post-concussive syndrome. Third, it was noted that the reports of Roger Williams Hospital and Dr. Mariorenzi make no reference to any injury to the head.

Rhode Island General Laws § 28-35-28(b) provides that a trial judge's factual findings are final unless the Appellate Division determines that they are clearly erroneous. We cannot review and reject factual findings of a trial judge

without first finding that he or she overlooked or misconceived material evidence resulting in clear error. Grimes Box Co. v. Miguel, 509 A.2d 1002, 1004 (R.I. 1986). After reviewing the record in this matter, we find that the trial judge overlooked or misconceived material evidence in finding that the employee did not establish that he sustained a head injury. As a result, we conclude that this finding was clearly erroneous.

The employee was seen at Roger Williams Hospital Emergency Room in the very early morning hours of October 15, 2001. On the admission sheet, his chief complaints are recorded as neck, shoulder and back of the head. In the nursing assessment, it is noted that the employee struck his head on a metal frame and experienced dizziness when he got up from the floor. He had complaints of "occipital throbbing headache." The doctor's notes reflect that the employee struck the back of his head when he fell from fourteen (14) steps up on a ladder. He had some loss of consciousness and complained of headache and neck pain. The medical personnel were sufficiently concerned about a head injury that a CT scan of the head was done and the employee was given an instruction sheet regarding symptoms and treatment of a head injury. There is no notation that there was any cut or lump on the employee's head at the time.

Dr. Brin saw the employee the same day, October 15, 2001, and the employee advised him that he had fallen off of a ladder and hit his head. He complained of feeling drowsy. Shortly thereafter, the employee was referred to other physicians for treatment of his injuries.

Dr. Bertini initially evaluated the employee on October 25, 2001. The history he recorded was consistent with the employee's testimony with regard to the fall from the ladder and striking his head. His diagnosis included a "resolving cerebral concussion." Dr. Bertini, as an orthopedic surgeon, did not specifically examine or treat the employee for his head injury.

Dr. Marano, whose specialty includes treatment of head injuries, saw Mr. Wright for the first time on November 30, 2001, about six (6) weeks after the injury. Obviously any type of lump or bump on the head would have resolved by that point in time. After examining the employee, the doctor concluded that his symptoms were consistent with post-concussive syndrome. The doctor explained in his deposition that typical symptoms of post-concussive syndrome include headache, dizziness, mood disorders, ringing in the ears, changes in hearing, balance problems, and sleep problems. He noted that there are no objective tests to confirm the diagnosis, but rather the condition is diagnosed based upon the history of injury and the development of symptoms immediately following an incident.

Dr. Mariorenzi, an orthopedic surgeon, evaluated the employee on January 28, 2002 at the request of the insurer. His report notes that the chief complaints are pain in the low back, head and legs. The doctor also states that the history and medical records he reviewed indicate that the employee probably sustained a concussion and cervical strain, as well as a lumbosacral strain, as a result of the fall off of the ladder. Dr. Mariorenzi commented that in his opinion, the employee

had recovered from his “soft tissue injuries,” but he makes no comment as to whether the concussion has resolved, apparently because evaluation of head injuries is not really within his usual practice as an orthopedic surgeon.

It is clear from this review of the medical evidence that the trial judge overlooked or misconceived material evidence with regard to the alleged head injury. The history provided by the employee to every medical care provider was consistent and included the fact that he struck the back of his head when he fell. The fact that he did not sustain any cut or abrasion is not inherently improbable as the employee never indicated he struck his head on a sharp object. Many head injuries are in fact “closed” head injuries. It is not clear from the reports made contemporaneous with the incident whether he had a lump or bump as it is not even clear that the back of his head was specifically examined. Consequently, the fact that there was no obvious visual manifestation of an injury to the head is not in and of itself conclusive as to whether the employee sustained a head injury.

The trial judge emphasized that Dr. Marano examined the employee several times but had no objective findings to substantiate the injury. However, the doctor explained that post-concussive syndrome is not manifested by any objective findings, but is a combination of symptoms and complaints expressed by the patient. The CT scan and EEG studies were done to rule out more serious internal head injury and did not rule out a concussion.

The trial judge also overlooked the notations in the report of Dr. Mariorenzi regarding the head injury. The doctor noted that this was one (1) of the chief

complaints and also specifically stated that the history and records indicate that Mr. Wright did sustain a head injury. Consequently, the trial judge's statement that the report of the doctor is "conspicuously silent concerning any reference to an injury to the head" is clearly incorrect.

The reports of the emergency room also mention the complaints regarding the head and there was testing done to rule out a serious injury. The trial judge apparently disregarded the references to a head injury in each document from the emergency room personnel.

A review of the record leads to the conclusion that the trial judge was clearly wrong in finding that the employee had failed to establish that he sustained a head injury on October 14, 2001 in addition to his other injuries. The next issue is then, the extent of any disability related to the head injury. Dr. Marano is the only physician to specifically address this, and he testified that the employee was totally disabled from October 14, 2001 to April 1, 2002 and partially disabled thereafter. We find no reason to reject his opinions on this issue.

We would also note that the trial judge erroneously failed to award a counsel fee, witness fees and costs at the trial level. The employer in this matter claimed a trial from the Pretrial Order granting the employee's petition. Although the employee did not receive any additional benefits after the trial, he did successfully defend against the employer's appeal as his petition was again

granted. Consequently, counsel for the employee is entitled to a fee and reimbursement of witness fees, filing fees and any other appropriate costs.

Based upon the foregoing, the appeal of the employee is granted. In accordance with our decision, a new decree shall enter containing the following findings and orders:

1. That the employee has established by a fair preponderance of the credible evidence that he sustained a personal injury on October 14, 2001 arising out of and in the course of his employment with the respondent, connected therewith and referable thereto, of which the respondent had notice.

2. That the employee sustained a cervical strain, a lumbosacral strain and post-concussive syndrome.

3. That the employee's average weekly wage is Seven Hundred Twenty-nine ($729.00) Dollars.

4. That the employee has one (1) minor child dependent upon him for support.

5. That the employee was totally disabled from October 15, 2001 to April 1, 2002 and partially disabled from April 2, 2002 and continuing.

6. That the trial judge failed to award counsel fees, witness fees and costs at the trial level when the employee successfully defended the employer's claim for trial.

It is, therefore, ordered:

1. That the employer shall pay to the employee weekly benefits for total incapacity from October 15, 2001 through April 1, 2002, and for partial incapacity from April 2, 2002 and continuing until further order of this Court or agreement of the parties.

2. That the employer shall take credit for any benefits paid pursuant to the Pretrial Order entered on December 7, 2001 and the decree entered on April 24, 2002.

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

4. That the employer shall reimburse employee's counsel the sum of One Hundred Thirty-three ($133.00) Dollars for the appellate filing fee and the cost of the transcript.

5. That the employer shall pay a counsel fee in the amount of One Thousand ($1,000.00) Dollars to Albert J. Lepore, Jr., Esq., for services rendered before the Appellate Division.

6. That the matter is remanded to the trial judge for the purpose of awarding a counsel fee for services rendered at the trial level, as well as ordering reimbursement of witness fees and other appropriate costs.

We have prepared and submit herewith a new decree in accordance with the decision. The parties may appear on July 3, 2003 at 10:00 AM to show cause, if any they have, why said decree shall not be entered.

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 before the Appellate Division upon the appeal of the petitioner/employee from a decree entered on April 24, 2002.

Upon consideration thereof, the appeal of the 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 established by a fair preponderance of the credible evidence that he sustained a personal injury on October 14, 2001 arising out of and in the course of his employment with the respondent, connected therewith and referable thereto, of which the respondent had notice.

2. That the employee sustained a cervical strain, a lumbosacral strain and post-concussive syndrome.

3. That the employee's average weekly wage is Seven Hundred Twenty-nine ($729.00) Dollars.

4. That the employee has one (1) minor child dependent upon him for support.

5. That the employee was totally disabled from October 15, 2001 to April 1, 2002 and partially disabled from April 2, 2002 and continuing.

6. That the trial judge failed to award counsel fees, witness fees and costs at the trial level when the employee successfully defended the employer's claim for trial.

It is, therefore, ordered:

1. That the employer shall pay to the employee weekly benefits for total incapacity from October 15, 2001 through April 1, 2002, and for partial incapacity from April 2, 2002 and continuing until further order of this Court or agreement of the parties.

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

4. That the employer shall reimburse employee's counsel the sum of One Hundred Thirty-three ($133.00) Dollars for the appellate filing fee and the cost of the transcript.

5. That the employer shall pay a counsel fee in the amount of One Thousand ($1,000.00) Dollars to Albert J. Lepore, Jr., Esq., for services rendered before the Appellate Division.

6. That the matter is remanded to the trial judge for the purpose of awarding a counsel fee for services rendered at the trial level, as well as ordering reimbursement of witness fees and other appropriate costs.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Healy, J.

_____
Olsson, J.

_____
Connor, J.

I hereby certify that copies were mailed to Albert J. Lepore, Jr., Esq., and Robert Jeffrey, Esq., on

_____