STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT APPELLATE DIVISION

ANTHONY G. TOBBEN	)	
	)	
VS.	)	W.C.C. 01-08424
	)	
NEW VISIONS FOR NEWPORT COUNTY, INC.	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the petitioner/employee's appeal from the denial of his Original Petition for workers' compensation benefits. The employee alleged that he sustained a broken left fibula neck on October 16, 2001 resulting in total incapacity from October 17, 2001 and continuing. The petition was denied at the pretrial conference and the employee claimed a trial in a timely manner. After a trial on the merits of the case, the trial judge found that the employee had failed to prove that his injury arose out of and in the course of his employment and he denied the petition. The employee filed this claim of appeal. After careful consideration of the arguments of counsel and review of the record, we conclude that the findings of the trial judge are not clearly erroneous and we affirm his decision and decree.

The employee testified that he was employed as a maintenance person by the respondent which involved maintaining classrooms for the Head Start program at seven (7) locations and also taking care of the grounds at two (2) locations. The outdoor work included cutting grass, picking up trash, shoveling snow, sweeping sidewalks, and collecting leaves.

On October 16, 2001, the employee was rolling a chipper/shredder/ vacuum up a ramp to put it in the back of a minivan when his left hip gave way and he could not stand. He did not fall to the ground and managed to sit in the back of the van and call his supervisor on his cell phone. He then called his wife who picked him up and drove him to the Veterans Administration Hospital in Providence. He was examined and x-rays were taken. He was informed that he had a fractured hip and surgery was scheduled for the next day. He underwent a second surgery on December 18, 2001 and was to undergo a third surgery in the following year to remove hardware.

The employee acknowledged that he had broken his hip previously, although he was unaware of when exactly it happened. In November 1998, during the course of a regular doctor's visit, x-rays were taken of his torso which revealed an old fracture of his left hip. He could not recall any specific trauma to the hip prior to that time and indicated that he did not have any problems with it until early September 2001. Around that time, he began to experience some aching, especially when he put weight on his left leg. At his annual checkup in

September 2001, he informed the doctor of his complaints and had x-rays taken on September 25, 2001.

The employee stated that he never heard from the doctor regarding these x-rays. He admitted that he may have told his supervisor before starting work on October 16, 2001 that he was in a lot of pain from his left hip.

The medical evidence in this matter consists of two (2) depositions and reports of Dr. James O. Maher, III, and voluminous records from the Veterans Administration Medical Center (hereinafter "the VA"). The VA records reveal that the employee was diagnosed with osteopenia and osteoporosis a number of years ago. He had a left femoral neck fracture sometime prior to 1998. A bone scan in 1998 revealed evidence of bone trauma involving the rib cage bilaterally and also the lower thoracic and upper lumbar vertebrae. X-rays of the cervical, lumbar, and thoracic spines revealed advanced degenerative disc disease, as well as compression fractures in the lower thoracic and upper lumbar spines.

The intake report at the VA on October 16, 2001 stated that the employee was complaining of severe left hip pain and denied any fall or injury. He had been seen at the VA in September with similar complaints, but an x-ray revealed only the old fracture. The diagnosis was a left femoral neck fracture, which had "spontaneously displaced."

Dr. Maher was the only physician to render any opinion as to the cause of the hip fracture. The employee saw Dr. Maher only once, on January 25, 2002.

The doctor testified that ". . . it appeared that the injury was work related." (Pet. Exh. 3A, p. 6)

The trial judge found that the testimony and report of Dr. Maher were not sufficient to satisfy the employee's burden of proof on the issue of causation and he, therefore, denied the petition. The employee has filed three (3) reasons of appeal in which he contends that the trial judge erred in finding that the employee failed to satisfy his burden when Dr. Maher stated that the injury was work related and there was no contrary evidence. After careful consideration of the arguments of counsel and review of the record, we find that the trial judge's conclusions are not clearly wrong and, therefore, we must deny the employee's appeal.

The scope of review by the Appellate Division is very limited. Rhode Island General Laws § 28-35-28(b) mandates that the findings of the trial judge on factual matters are final unless found to be clearly erroneous. See also Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). We cannot substitute our judgment for that of the trial judge as to the weight of the evidence or the credibility of witnesses. The Appellate Division shall conduct a *de novo* review of the evidence only after 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).

A review of Dr. Maher's depositions and report reveal some of the weaknesses cited by the trial judge. It is obvious that the doctor had very little history as to the employee's prior problems and limited information as to how the

alleged work injury occurred. Dr. Maher stated that he was unaware of any previous spontaneous fractures, including the previous fracture of the left hip, and any compression fractures. He also had no knowledge of the fact that the employee had been previously diagnosed with osteopenia and osteoporosis, as well as advanced degenerative disc disease in the cervical, thoracic, and lumbar spines.

The history recorded by Dr. Maher stated that the employee was injured while using a wood chipper to clean up leaves and that he experienced acute pain in the left hip and fell to the ground. When asked if he knew the mechanism of injury, the doctor replied:

> "I think what happened was that his hip broke while he was working, and he sustained the fracture." (Pet. Exh. 3A, p.9)

The doctor had no information as to what exactly the employee was doing when he experienced the acute pain or how any force was exerted on the left hip.

It seems evident that the doctor's opinion that the injury is work related is primarily derived from the employee's own statements and the fact that it happened during the work day. In his report he wrote:

> "In review of this case, it does appear that this is a work-related injury in that Mr. Tobben had experienced some left hip pain in the past, usually related to activities at work and his acute injury did take place while working as well."

Doctor Maher reiterated this opinion during his deposition as well, but during cross-examination, after he was presented with the employee's past medical

history, he did acknowledge that other factors could have contributed to the injury.

Viewing the record as a whole, we cannot say that the trial judge was clearly wrong in his assessment of Dr. Maher's testimony. It is clear that the doctor lacked significant history and background information as to the mechanism of injury and the employee's medical history. This lack of information would obviously affect the evidentiary weight given to the doctor's opinions on the issue of causation. The trial judge's overall impression of the doctor's testimony was that it was not sufficiently probative or persuasive to satisfy the employee's burden of proof in this matter. This conclusion was not clearly erroneous and, therefore, we are powerless to review his factual determinations.

The employee contends that he was not required to establish that his work activities were the sole cause of his injury and disability, but that he is entitled to benefits because he has proven that his preexisting disease or infirmity was aggravated or accelerated by his employment. This argument misses the mark, however, because medical evidence of probative force would still be required to establish this proposition. The necessary opinion evidence on this issue was not forthcoming from Dr. Maher.

Finally, the employee argues that the trial judge could reasonably infer from the uncontradicted established facts that the injury was caused by the

employee's work activities. There are certain cases in which the court has indicated that medical testimony is not necessary to establish a prima facie case.

> "If the reasonable probabilities flowing from the undisputed evidence disclose a progressive course of events beginning with an external accident in which each succeeding happening including the injury appears traceable to the one that preceded it, medical evidence is not essential for an injured employee to make out a prima facie case." Valente v. Bourne Mills, 77 R.I. 274, 279, 75 A.2d 191, 194 (1950).

This case does not present such a clear cut sequence of events that would lead to a rational and natural inference that a causal relationship necessarily exists between the employment and the injury. The issue of causation was complicated in this matter due to the employee's preexisting conditions and previous incidents of fracture and hip pain. Expert medical testimony was required to sort out the effect of those factors. The trial judge did not err in failing to infer from the facts of this case that the hip fracture was necessarily caused by the employment.

Based upon the foregoing, the employee's appeal is denied and dismissed and the decision and decree of the trial court are affirmed.

In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, a copy of which is enclosed, shall be entered on

Connor and Salem, JJ. concur.

ENTER:

____
Olsson, J.

____
Connor, J.

____
Salem, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

ANTHONY G. TOBBEN)
)
VS.) W.C.C. 01-08424
)
NEW VISIONS FOR NEWPORT)
COUNTY, 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 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 November 6, 2002 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

_____

ENTER:

_____
Olsson, J.

_____
Connor, J.

_____
Salem, J.

I hereby certify that copies were mailed to Joseph M. Beagan, Esq., David D. Bagus, Esq., and Earl Metcalf, Esq., on

_____