STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

NARRAGANSETT BAY COMMISSION	)	
	)	
VS.	)	W.C.C. 02-01334
	)	
MICHAEL McKNIGHT	)	
MICHAEL McKNIGHT	)	
	)	
VS.	)	W.C.C. 02-01504
	)	
NARRAGANSETT BAY COMMISSION	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. These two (2) matters have been consolidated for hearing and decision by the court. W.C.C. No. 02-01334 is an employer's petition to review alleging that the employee's incapacity for work has ended. The trial judge granted the petition and the employee has filed a claim of appeal. W.C.C. No. 02-01504 is an employee's petition to review alleging that his incapacity has increased from partial to total incapacity as of January 29, 2002; that he sustained injuries to his cervical spine and left arm as a result of the effects of his

previous work-related injuries; and that the employer has refused to pay for necessary medical services rendered by Dr. William Golini. The trial judge denied the employee's petition in its entirety and the matter is now before the Appellate Division pursuant to the employee's claim of appeal. After careful review of the record in both matters and consideration of the arguments of the parties, we affirm the decision of the trial judge in W.C.C. No. 02-01504 and reverse the decision of the trial judge in W.C.C. No. 02-01334.

The employee, who was sixty-seven (67) years old at the time of his testimony, was initially injured on June 23, 1987 while working as a waste water mechanic for the Narragansett Bay Commission. After suffering this first injury to his left knee, the employee returned to work until injuring his back on December 19, 1988. From the time of the second injury, the employee has been out of work receiving weekly workers' compensation benefits and suffering from problems with both his low back and left knee. In January 1999, the employee underwent a total left knee replacement which was done by Dr. Kenneth Morrissey.

The employee related that even since the knee replacement, he has had problems with the left leg simply giving out on him. On February 13, 2001, he was alone in the parking garage at Providence Place Mall when his leg buckled and he fell and hit his head. Later that day, the employee went to the hospital because his vision was distorted and he did not feel right. He also told the hospital personnel that his left elbow was bothering him and he had numbness in his left hand.

Due to the problems with his left elbow and hand, the employee's primary care doctor referred him to Dr. William Golini, a neurologist, who subsequently sent him to Dr. Harvey Baumann, an orthopedic surgeon. Dr. Baumann performed surgery on the employee's left elbow in November 2001, but the employee testified that he still has numbness in his hands.

Mr. McKnight explained that his job with the employer required him to squat, kneel, bend, and stoop all day long, as well as lift as much as seventy-five (75) to one hundred (100) pounds. He asserted that he could not perform the physical duties of that position any longer due to his injuries. He indicated that he uses a cane prescribed by Dr. Morrissey because he feels that his knee is still unstable.

The medical evidence consists of the deposition and records of Dr. Kenneth Morrissey, the deposition and records of Dr. William J. Golini, the testimony, affidavit and reports of Dr. Harvey M. Baumann, the deposition and reports of Dr. A. Louis Mariorenzi, and the deposition and reports of Dr. James E. McLennan.

Dr. Morrissey, an orthopedic surgeon, has treated the employee for his left knee and low back problems since December 1988. He saw the employee about a month after his fall in the parking garage in 2001. At that time, Mr. McKnight complained of low back pain radiating down his left leg, and neck pain radiating down his left arm into his hand and fingers. The doctor stated that pain shooting down the left leg from his back caused the employee's leg to buckle and the resulting fall caused injuries to his neck and left wrist.

Dr. Morrissey testified that immediately prior to the fall in the parking garage, it was his opinion that the employee was partially disabled. As of his March 20, 2001 examination, he found that the employee was totally disabled due to his additional injuries. He noted that according to the AMA Guides to the Evaluation of Permanent Impairment, the employee had a permanent partial disability due to the left knee replacement alone. As of his last visit with the employee, in May of 2002, Dr. Morrissey's medical opinion was that the employee remained totally disabled from all work and the disability was causally related to the 1987 and 1988 work injuries to his left knee and low back.

Dr. Golini saw the employee on a referral from the employee's general practitioner on March 23, 2001, approximately a month after he fell in the parking garage. The employee described the incident to him and complained of neck pain, headache and numbness in the left hand. The doctor conducted a physical examination, as well as EMG and nerve conduction studies. His diagnosis was a pinched nerve in the neck at C6 and a pinched nerve in the left elbow. Dr. Golini noted that the results of an MRI of the cervical spine done on March 26, 2001 corresponded to the results of the EMG studies in that it revealed a left-sided disc herniation at C5-6. He stated that in his medical opinion, the employee's neck and left elbow problems were caused by his fall in February 2001, which in turn was directly due to weakness in his left leg caused by his work-related back injury.[1] He concluded that the employee was

[1] Dr. Golini was referring to the December 1988 low back injury.

temporarily totally disabled and his disability was due to the cervical and left arm problems resulting from the fall in the parking garage.

The employee continued to have problems with weakness and atrophy in the left hand which Dr. Golini felt may have been caused by the pinched nerve in his left elbow. The doctor referred the employee to Dr. Baumann for further evaluation of this problem at his last office visit in August 2001.

Dr. Baumann saw the employee for the first time on September 25, 2001. He recorded a history that in February 2001, Mr. McKnight had fallen in a parking garage when his leg gave out and he fell onto his back and left elbow. The doctor's physical findings included limited extension of the left elbow, almost complete atrophy of all of the intrinsic muscles in his hand, and no sensation in the fifth finger and half of the fourth finger.

Based on his findings and the results of the EMG studies done by Dr. Golini, Dr. Baumann diagnosed the employee with tardy ulnar palsy, ulnar nerve compression, and left cervical radiculopathy. On November 6, 2001, the doctor performed a left epicondylectomy and ulnar nerve neurolysis with Z-plasty. At the time of his testimony, Dr. Baumann had last seen the employee in February 2002. He testified that he found the employee to be totally disabled during the period of his treatment and that the conditions he diagnosed and the resulting disability were caused by the fall in the parking garage in February 2001.

Dr. Mariorenzi, an orthopedic surgeon, examined the employee on two (2) occasions at the request of the employer. At the first evaluation on July 17,

2000, the doctor indicated that the employee had a permanent partial impairment due to his left knee replacement. He noted that due to limited flexion of the knee, the employee would have difficulty working in positions requiring kneeling or an excessive amount of squatting, but he was otherwise capable of gainful employment.

Dr. Mariorenzi evaluated the employee again on January 21, 2002. He noted similar findings with regard to the left knee and maintained his opinion as to the employee's permanent partial impairment. The doctor asserted that based upon his evaluation of the knee, the employee's fall in February 2001 was not related to his total knee replacement.

When questioned regarding the employee's ability to return to his regular job duties as a wastewater mechanic, Dr. Mariorenzi replied:

> "I don't think the weightlifting is a problem. My original evaluation, I thought that if he had a job where he had to do some kneeling is okay and as long as he had not to do an excessive amount of squatting. So if the amount of kneeling and squatting that he does is not excessive, if it's occasional or what have you, if it's not the main function of his job, then he certainly can go back to that type of work." Resp. Exh. 1, p. 9-10.

Dr. James E. McLennan, a neurosurgeon, testified that he conducted a medical records review of the employee at the request of the employer which he documented in a report dated July 15, 2001. Thereafter, on October 24, 2001, the doctor evaluated the employee in his office. He was asked to assume that the employee's job required him to do heavy lifting of tools and equipment, and bending and stooping in awkward positions frequently on a full-time basis. Dr.

McLennan stated that if his low back was the employee's only problem, he would allow him to return to those job duties. The doctor explained that, based upon his review of the medical records and his physical examination, the employee's low back complaints were not the cause of any chronic disability. He was unable to comment as to the cause of the fall in February 2001 as he had no history regarding that incident. Dr. McLennan deferred to Dr. Mariorenzi with regard to whether the employee was unable to perform his former job duties due to the problems with his left knee.

The trial judge chose to rely upon the opinions of Drs. Mariorenzi and McLennan in deciding the issues raised by both petitions. He indicated that Dr. Mariorenzi had concluded that the employee was capable of returning to his former employment in response to a hypothetical question based upon statements of the employee contained in a discovery deposition of the employee. The trial judge also cited the opinion of Dr. McLennan that the employee's work-related back injury was not preventing him from working. With regard to the employee's petition alleging injuries to his neck and left elbow due to the fall in the parking garage, the trial judge, again relying on the opinions of Drs. Mariorenzi and McLennan, determined that neither the left knee injury nor the low back injury were the cause of the fall.

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 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). After careful review of the record in these matters, we find that the trial judge was clearly wrong when he found that the employee was capable of returning to his former employment and we therefore grant the employee's appeal in W.C.C. No. 02-01334. With regard to W.C.C. No. 02-01504, we find no error on the part of the trial judge in his evaluation of the evidence and therefore deny the employee's appeal in that matter.

The employee has filed four (4) reasons of appeal in these matters which were consolidated on appeal as well as at the trial level. The four (4) reasons are directed solely at the trial judge's decision regarding the employer's petition to review, W.C.C. No. 02-01334. The employee has not cited any error on the part of the trial judge in his determination that the fall in the parking garage in February 2001 was not due to the effects of the employee's work-related injuries to his left knee or low back. The trial judge was faced with conflicting expert medical opinions as to the cause of the fall. As is his prerogative, he chose to rely upon the opinions of Drs. Mariorenzi and McLennan as the most probative on this issue. See Parenteau v. Zimmerman Eng., Inc., 111 R.I. 68, 299 A.2d 168 (1973). We cannot say that the trial judge was clearly wrong in his evaluation of the evidence and his ultimate determination regarding this issue. Consequently, the employee's claim of appeal in W.C.C. No. 02-01504 is denied and dismissed.

In W.C.C. No. 02-01334, the employee argues that the trial judge's finding that the employee is no longer disabled in whole or in part is clearly erroneous because the trial judge misinterpreted the medical testimony and, in fact, there is no medical evidence to support such a conclusion. It is the employee's contention that Dr. Mariorenzi never stated that the employee was capable of returning to his regular job duties. After review of the record, we agree with the employee.

The only evidence introduced at trial regarding the employee's job duties as a waste water mechanic was the employee's own testimony and a standardized job description submitted through the deposition of Dr. Mariorenzi. The employee testified that his job involved squatting, kneeling, bending, and stooping all day long, among other things. (Tr. p. 11-12) Dr. Mariorenzi testified that he had reviewed a typewritten job description for the position of wastewater treatment facility mechanic provided to him by the employer. He noted, however, that the document did not provide any detail as to the actual physical activities required to perform the job, such as squatting and kneeling, and what percentage of the employee's day was taken up with those activities.

Counsel for the employer then asked the doctor a hypothetical question utilizing what he described as the employee's description of his job taken from a deposition conducted before the trial which was never introduced into evidence at the trial. Dr. Mariorenzi clearly stated that so long as the job did not require an excessive amount of kneeling and squatting, then the employee could perform

that work. (Resp. Exh. 1, p. 9-10 and 15) He explained that if the kneeling and squatting was only occasional and not the main function of the job then Mr. McKnight could return to that position.

The trial judge specifically stated that he was relying on the opinion of Dr. Mariorenzi that the employee was capable of returning to his former job duties. In addition, he concluded that the doctor had sufficient and accurate knowledge of the employee's job duties from the hypothetical question he was asked which was taken from the employee's deposition. The trial judge clearly overlooked the testimony of the employee regarding his job duties and misconceived or misinterpreted the statements of Dr. Mariorenzi.

Uncontradicted testimony may not be arbitrarily rejected. Lombardo v. Atkinson-Kiewit, 746 A.2d 679, 688 (R.I. 2000). Such testimony may be disregarded if it contains inherent improbabilities or contradictions, or on credibility grounds, provided the trial judge clearly states the reason the testimony was rejected. Hughes v. Saco Casting Co., Inc., 443 A.2d 1264, 1266 (R.I. 1982), *citing* Correia v. Norberg, 391 A.2d 94 (R.I. 1978). There is no discussion in the decision of the trial judge as to his reason for disregarding the testimony of the employee that his former job required extensive kneeling and squatting.

Dr. Mariorenzi testified that if the amount of kneeling and squatting required in the performance of the employee's job was only occasional and not excessive, then he could go back to that type of work. Given the employee's

uncontradicted testimony that he had to kneel and squat all day, it is apparent that those activities cannot be deemed occasional. Considering the employee's uncontradicted testimony that his job requires him to kneel or squat all day in conjunction with Dr. Mariorenzi's testimony that the employee is partially, permanently disabled due to a restriction on excessive kneeling or squatting, it is apparent that the trial judge was mistaken in finding that the doctor's testimony supported the conclusion that the employee was no longer disabled.

When an employer petitions the court for review alleging that the employee's incapacity has ended, it bears the burden of proving the essential elements of that claim by competent evidence. C.D. Burnes Co. v. Guilbault, 559 A.2d 637, 639 (R.I. 1989). Considering our discussion regarding Dr. Mariorenzi's testimony, upon which the trial judge based his decision that the employee was fit to return to work, we cannot say that the employer presented any evidence to prove their claim that the employee's incapacity has ended. Therefore, the trial judge's finding that the employee is no longer disabled is clearly erroneous.

For the reasons set forth above, we grant the employee's appeal, and reverse the decision and decree of the trial judge, in W.C.C. No. 02-01334. In accordance with our decision, a new decree shall enter in that matter containing the following findings and orders:

1. That the employer has failed to prove by a fair preponderance of the credible evidence that the employee's incapacity has ended.

2. That the employee's incapacity due to the effects of the work-related injury he sustained to his low back on December 19, 1988, has ended.

3. That the employee remains partially disabled due to the effects of the work-related injury he sustained to his left knee on June 23, 1987.

It is, therefore, ordered in W.C.C. No. 02-01334:

1. That the employer shall reinstate the payment of weekly benefits for partial incapacity to the employee from January 15, 2003 and continuing until further order of the court or agreement of the parties.

2. That the employer's petition to review is denied and dismissed.

3. That the employer shall reimburse the employee or employee's counsel the sum of One Hundred Eighty and 00/100 ($180.00) Dollars for the cost of the trial transcript and Twenty-five and 00/100 ($25.00) Dollars for the cost of filing the claim of appeal.

4. That the employer shall reimburse the employee the sum of Three Hundred Fifty and 00/100 ($350.00) Dollars for the cost of the expert witness fee paid to Dr. Kenneth Morrissey.

5. That the employer shall reimburse employee's counsel the sum of One Hundred Ninety-one and 20/100 ($191.20) Dollars for the cost of the transcript of the deposition of Dr. Kenneth Morrissey.

6. That the employer shall reimburse employee's counsel the sum of One Hundred Thirty-one and 75/100 ($131.75) Dollars for the cost of a copy of the deposition of the employee, Michael McKnight.

7. That none of the costs associated with the deposition testimony of Dr. William Golini are awarded to the employee as his testimony was not pertinent to the issue presented by this petition.

8. That the employer shall pay counsel fees to Albert J. Lepore, Jr. Esq., in the sum of One Thousand and 00/100 ($1,000.00) Dollars for the successful prosecution of the employee's appeal before the Appellate Division, and the sum of Four Thousand Four Hundred and 00/100 ($4,400.00) Dollars for services rendered in the defense of this petition at the trial level.

We have prepared and submit herewith a new decree in accordance with the decision rendered regarding W.C.C. No. 02-01334. The parties may appear on at 10:00 a.m. to show cause, if any they have, why said decree shall not be entered.

In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree regarding W.C.C. No. 02-01504, a copy of which is enclosed, shall be entered on

Bertness and Sowa, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Bertness, J.

_____
Sowa, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

MICHAEL McKNIGHT)
)
VS.) W.C.C. 02-01504
)
NARRAGANSETT BAY COMMISSION)

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 January 15, 2003 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Olsson, J.

_____
Bertness, J.

_____
Sowa, J.

I hereby certify that copies were mailed to Albert J. Lepore Jr., Esq., and Francis T. Connor, Esq., on

_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

NARRAGANSETT BAY COMMISSION)
)
VS.) W.C.C. 02-01334
)
MICHAEL McKNIGHT)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the appeal of the respondent/employee from a decree entered on January 15, 2003.

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

1. That the employer has failed to prove by a fair preponderance of the credible evidence that the employee's incapacity has ended.

2. That the employee's incapacity due to the effects of the work-related injury he sustained to his low back on December 19, 1988, has ended.

3. That the employee remains partially disabled due to the effects of the work-related injury he sustained to his left knee on June 23, 1987.

It is, therefore, ordered in W.C.C. No. 02-01334:

1. That the employer shall reinstate the payment of weekly benefits for partial incapacity to the employee from January 15, 2003 and continuing until further order of the court or agreement of the parties.

2. That the employer's petition to review is denied and dismissed.

3. That the employer shall reimburse the employee or employee's counsel the sum of One Hundred Eighty and 00/100 ($180.00) Dollars for the cost of the trial transcript and Twenty-five and 00/100 ($25.00) Dollars for the cost of filing the claim of appeal.

4. That the employer shall reimburse the employee the sum of Three Hundred Fifty and 00/100 ($350.00) Dollars for the cost of the expert witness fee paid to Dr. Kenneth Morrissey.

5. That the employer shall reimburse employee's counsel the sum of One Hundred Ninety-one and 20/100 ($191.20) Dollars for the cost of the transcript of the deposition of Dr. Kenneth Morrissey.

6. That the employer shall reimburse employee's counsel the sum of One Hundred Thirty-one and 75/100 ($131.75) Dollars for the cost of a copy of the deposition of the employee, Michael McKnight.

7. That none of the costs associated with the deposition testimony of Dr. William Golini are awarded to the employee as his testimony was not pertinent to the issue presented by this petition.

8. That the employer shall pay counsel fees to Albert J. Lepore, Jr. Esq., in the sum of One Thousand and 00/100 ($1,000.00) Dollars for the successful

prosecution of the employee's appeal before the Appellate Division, and the sum of Four Thousand Four Hundred and 00/100 ($4,400.00) Dollars for services rendered in the defense of this petition at the trial level.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Olsson, J.

_____
Bertness, J.

_____
Sowa, J.

I hereby certify that copies were mailed to Francis T. Connor, Esq., and Albert J. Lepore, Jr., Esq., on

_____