STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

LOUISA FORTES	)	
	)	
VS.	)	W.C.C. 02-03143
	)	
INTERNATIONAL PACKAGING	)	

DECISION OF THE APPELLATE DIVISION

SALEM, J. This matter came to be heard before the Appellate Division on the petitioner/employee's appeal from a decision and decree entered at the trial level on June 4, 2003. This matter was heard in the nature of an employee's original petition alleging an occupational injury to her right shoulder and arm from overuse and seeking compensation from April 29, 2000 and continuing.

The trial judge found that the employee failed to prove by a fair preponderance of the evidence that she suffered an occupational injury to her right upper extremity on or about April 29, 2000, arising out of and in the course of her employment with the respondent. Therefore, the trial judge ordered that the employee's petition be denied and dismissed.

The facts of this matter are as follows. Through an interpreter, the employee testified on her own behalf. She began working for the respondent, International Packaging, in 1995, as a machine operator. The machine the

employee worked on cut paper to make boxes. She stated that her job required her to pick up piles of paper approximately ten (10) inches high from a box, put them on a table in front of her, and feed the paper into the machine using both her hands and arms. The employee worked approximately forty (40) hours per week and was paid hourly.

The employee testified that in early 2000, she began feeling fatigued and pain started to radiate down her arms to the tips of her fingers while she was working. She stated that she had never had this pain before.

In May of 2000, the employee sought treatment for her pain. She went first to the emergency room and later saw Dr. Lynn Ho, her primary care physician. The employee stated that Dr. Ho told her to remain home for two (2) weeks but she was only able to stay home for one (1) week because she did not have enough leave time left.

When she returned to work, the employee attempted to do her regular duties, but at her coffee break the manager told her to stop working and report to the office. There she was told her leave time was exhausted and she was fired. She stated that she never told her supervisor, Manny, that she was having shoulder problems. After her termination, the employee continued to treat with Dr. Ho who ultimately referred her to Dr. Michael Feldman.

The employee gave Dr. Feldman a history of being tired at work and feeling a lot of pain. He sent her for therapy but she still felt the same. As a result, she opted for surgery in October of 2000. After the surgery, the employee stated that

she felt pain and she had trouble raising her right hand; she felt it had no strength and stated that she could not use it for a number of things. She treated with Dr. Feldman until September 2001. At the time of trial, the employee was treating with Dr. Michael Belanger and continued to have pain when moving her arm. She stated she took medication for the pain and was depressed because she could not do housework or care for her children.

Cross-examination of the employee revealed that the employee lived alone with her five (5) minor children. Her youngest child was born in October of 1999. She stated that before she had pain she was able to get the baby in and out of the crib as well as carry him around. After the employee became injured, she stated that she needed help to get the baby in and out of the crib because the crib was a little high.

The employee was also questioned about a videotape of her job. The employee stated that the videotape differed from her job in that the employee in the videotape was working at a slower pace than normal because the worker took only a small stack of papers out of the box at a time and used only one hand to take the papers out of the box. The employee agreed with the videotape where it showed the employee feeding the machine with her left hand and removing the paper with her right. After it went through the machine, the employee stated that the paper was placed in a pile and when the pile was high enough she would use both hands to place it in a container on her right.

The respondent presented the live testimony of Manuel Mello, who works for the employer as a production supervisor in the cardboard division. He was the employee's supervisor in May of 2000. His testimony focused mainly on the accuracy of the videotape. Mr. Mello stated that the employee demonstrating the job on the videotape was working at a normal speed. He testified that the rate at which an employee can operate the machine was at a fixed pace because the operator cannot force the machine to go faster than the foot pedal allows. He testified that he had operated the machine personally and stated that if the machine was forced to go too fast it would jam. Therefore, the employee could not have performed the job twice as fast as the employee in the videotape. He also stated that the container holding the paper at the side of the machine was at waist level.

The medical evidence consisted of the deposition testimony of Drs. Michael Feldman and Peter A. Pizzarello. Dr. Feldman is a board certified orthopedic physician and was the employee's treating physician for her injury. Dr. Feldman diagnosed the employee with impingement of the right shoulder. Initially, he treated the employee conservatively with cortisone injections and therapy, but when the employee's symptoms failed to improve, he performed an arthroscopic procedure. The arthroscopy revealed a small labral tear to the employee's right shoulder which the doctor was able to repair. Dr. Feldman opined that the employee's condition was causally related to her job with International Packaging. He based this opinion on the fact that at the time of the arthroscopic

surgery the tear appeared to be traumatic rather than degenerative. He arrived at that opinion based upon the absence of any other injuries and her statements that her job put tremendous stress on her shoulder. He testified that he understood the employee's job required her to perform repetitive activities with her upper extremities; typically using her arms below shoulder level and out in front of her.

Dr. Pizzarello, an orthopedic surgeon, did not examine the employee, but he reviewed a packet of information containing Dr. Feldman's records and reports, the reports from Dr. Lynn Ho, the MRI of the employee's right shoulder, and the videotape of the employee's job. Dr. Pizzarello was asked to render an opinion with regard to the relationship of the employee's job duties and the injury to her right shoulder. He opined, to a reasonable degree of medical certainty, that the employee's injury was not work-related. He based his opinion on the fact that the employee's work would not cause that type of pathology because it did not involve any pushing, pulling, or overhead work. Dr. Pizzarello stated that based on what Dr. Feldman found in the arthroscopic surgery, the employee would have to perform overhead pushing, pulling, and lifting and have a repetitive elevation of the humeral head upwards of ninety (90) degrees to cause her condition. Therefore, considering the activities of the job depicted on the videotape, the motions performed by the employee on a daily basis could not have caused the injury. In addition, the employee had no history of a specific

traumatic event that could have caused her problems. Thus, he found no causal connection.

After a careful review of the evidence, the trial judge found, "in light of the medical evidence presented by both doctors," that the employee's shoulder injury was not the result of overuse syndrome but rather a result of trauma. Since there was no history from the employee as to a traumatic injury to her shoulder at work, the court found that the employee had not proven causation. The trial judge stated that there was insufficient evidence to show that the employee suffered from an overuse injury as alleged in her petition for benefits. Thus, the trial judge concluded that the employee failed to prove by a fair preponderance of the credible evidence that she suffered an occupational injury to her right upper extremity, arising out of and in the course of her employment.

The employee presents three (3) arguments on appeal. First, the employee argues that the trial judge erred by finding that she failed to meet her burden of proof. Second, the trial judge erred by placing upon the employee the burden of proving that the original injury to her shoulder arose out of and in the course of her employment with the employer and misapplied R.I.G. L. §§ 28-34-2 and 28-34-4. Lastly, the trial judge erred in failing to find a causal connection or nexus between the disability of the employee and her employment with the employer where there was no evidence of any other injury or trauma suffered by the employee.

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. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (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., *citing* R.I.G.L. § 28-35-28(b); Grimes Box Co., Inc. v. Miguel, 509 A.2d 1002 (R.I. 1986). Such 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 on us, we have carefully reviewed and examined the entire record in this matter and 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's first reason of appeal is a general recitation that the trial judge was wrong to find that the employee failed to prove by a fair preponderance of the evidence that she suffered an occupational injury to her upper right extremity. As such, it lacks the specificity required for consideration by this panel. Bissonette v. Federal Dairy Co., Inc., 472 A.2d 1223 (R.I. 1984). Therefore, it is denied and dismissed.

The employee's second and third reasons of appeal deal with the employee's required burden of proving causation under R.I.G.L. §§ 28-34-2 and 28-34-4. Relying on Gosselin v. Parker Brass Foundry, 83 R.I. 463, 119 A.2d 189 (1955), the employee notes that an employee does not have to prove a direct

causal relationship between an occupational injury and the job where she was disabled. Following this rationale, the employee argues that the only burden upon her was to show some legal evidence that the conditions of her employment were such as to expose her to the possibility of disease. The employee points to the testimony of Dr. Pizzarello which stated that the employee's condition was degenerative in nature and was secondary to repetitive use and the evidence that her job duties were repetitive for support. Based on this evidence, the employee concludes that her condition clearly fits the definition of an occupational disease. We disagree.

The employee's argument fails for several reasons. In Gosselin, there was no question that the employee was suffering from an occupational disease (silicosis) which he had developed over a long period of exposure while employed by different employers. In that case, the Rhode Island Supreme Court held that the employee did not have to prove he contracted the disease while working for his last employer in order to hold that employer responsible. In the present case, it was not accepted by the court or the employer that the employee was suffering from an occupational disease. The employee had merely alleged that the injury to her right upper extremity resulted from overuse in her employment. Thus, as it is a well-established principle that the party asserting the affirmative in a workers' compensation case has the burden to establish by competent legal evidence all the elements essential to entitle the employee to workers' compensation benefits, the employee still had the burden of proving by a fair preponderance of evidence

that she suffered from an occupational disease resulting from overuse. Soprano Const. Co., Inc. v. Maia, 431 A.2d 1223, 1225 (R.I. 1981).

The employee contends that the testimony of Dr. Pizzarello, which states the employee's condition was degenerative and secondary to repetitive use, coupled with the fact that the employee's job duties required constant repetitive motion, meets the burden of proving an occupational disease. However, in order to prove an occupational disease, the employee must show by a fair preponderance of the evidence that at some point during the course of his or her employment he or she was exposed to conditions that could have caused the injury for which he or she seeks compensation. Blecha v. Wells Fargo Guard·Co. Serv., 610 A.2d 102 (R.I. 1992); Perez v. Columbia Granite Co., 74 R.I. 503, 62 A.2d 658 (1948). Although Dr. Pizzarello did state that the type of injury suffered by the employee could be caused by degeneration and repetitive use, he also stated that the employee's job duties would not have caused the type of injury she suffered.

Dr. Pizzarrello opined that the employee would have to actually be pushing and pulling upward at the level of the chest or shoulder in order to cause the type of damage found in the employee's shoulder. There was no evidence presented by the employee that she had ever engaged in these types of activities in any work environment. Additionally Dr. Feldman, after performing her arthroscopy, opined that the injury was traumatic as opposed to degenerative.

The trial judge explicitly denied the petition "in light of the medical evidence presented by both doctors that the employee's shoulder injury is not a result of an overuse syndrome but is a result of a trauma." (Tr. Dec. at 12). She went on to state that with no history from the employee as to a traumatic injury to her shoulder at work the employee had not proven causation. After reviewing the record, we can find no error on the part of the trial judge.

For the above stated reasons, we affirm the decision and decree of the trial judge and deny and dismiss the employee's reasons of appeal.

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

Olsson and Sowa, JJ. concur.

ENTER:

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Olsson, J.

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Sowa, J.

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Salem, 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 June 4, 2003 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____
Dennis I. Revens, Administrator

ENTER:

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Olsson, J.

_____
Sowa, J.

_____
Salem, J.

I hereby certify that copies were mailed to Bernard P. Healy, Esq., and Ronald A. Izzo, Esq., on

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