STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

KAREN THOMAS	)	
	)	
VS.	)	W.C.C. 04-02879
	)	
VERIZON NEW ENGLAND	)	
KAREN THOMAS	)	
	)	
VS.	)	W.C.C. 03-06107
	)	
VERIZON NEW ENGLAND	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. These two (2) matters were consolidated by the court for trial and remain consolidated on appeal to the Appellate Division. The employer has appealed from the decision of the trial judge granting the employee's petition for workers' compensation benefits and granting permission to undergo surgery. After thorough review of the record and careful consideration of the arguments of the parties, we deny the employer's appeal and affirm the decision and decrees of the trial judge.

W.C.C. No. 03-06107 is an original petition in which the employee alleges that she developed problems with both elbows and bilateral carpal tunnel syndrome due to repetitive work activities and that she is totally disabled as of July 16, 2003. At the pretrial conference on

January 9, 2004, the trial judge found that the employee developed bilateral epicondylitis due to her work activities and that she was partially disabled from July 16, 2003 and continuing. Both parties claimed a trial. After a full hearing on the merits, the trial judge concluded that the employee had developed an occupational disease, specifically bilateral medial, greater than lateral, epicondylitis, bilateral ulnar nerve compression, and bilateral carpal tunnel syndrome. He ordered the employer to pay weekly benefits for partial incapacity from July 16, 2003 and continuing. The employer filed a timely claim of appeal.

W.C.C. No. 04-02879 is an employee's petition requesting permission for surgery to be performed by Dr. Edward Akelman on both arms. The petition was denied at the pretrial conference and the employee filed a claim for trial. The matter was consolidated with W.C.C. No. 03-06107 for trial. At the conclusion of that proceeding, the trial judge found that the surgery was necessary to cure, rehabilitate or relieve the employee from the effects of her occupational disease. The employer has appealed this finding as well.

The employee testified that she began working for Verizon in July 2000 as a customer service representative in the collections department. Her job involved answering telephone calls and inputting data into a computer all day long. She related that in the latter months of 2000, her work station was modified and she believed that this led to the development of problems with her arms and hands. She stated that she gradually developed pain in her elbows and numbness in her hands which became severe around March 2003. She is right hand dominant and her right elbow and hand symptoms were worse than the left. After reporting her complaints to her primary care physician, she was referred to Dr. Kenneth J. Morrissey, an orthopedic surgeon.

Dr. Morrissey saw her on July 15, 2003 and advised her to stop working. Ms. Thomas testified that she has not worked at all since that date. Dr. Morrissey provided minimal

conservative treatment while her workers' compensation claim was pending. As her symptoms continued to worsen, she sought a second opinion from Dr. Edward Akelman on March 3, 2004. She has now switched her treatment to Dr. Akelman who has recommended surgery to address bilateral carpal tunnel syndrome and bilateral ulnar nerve compression.

The employee stated that she never had any problems with her arms or hands prior to working at Verizon. She acknowledged that she has missed some time from work due to a back injury and acute asthma attacks. She indicated that she does not engage in any type of repetitive activity involving her arms or hands outside of work. Ms. Thomas asserted that in her present condition, she is not able to return to her former position with Verizon.

The medical evidence consists of the affidavit, reports and deposition of Dr. Kenneth J. Morrissey, the affidavit, reports and deposition of Dr. Edward Akelman, and the reports and deposition of Dr. Gregory J. Austin. Dr. Morrissey evaluated the employee for the first time on July 15, 2003. The employee informed him that her complaints began about one (1) year ago and were gradually getting worse. His diagnosis was medial and lateral epicondylitis of the elbow, worse on the right than the left, and early bilateral carpal tunnel syndrome. He also could not rule out bilateral ulnar nerve neuritis of the elbows as well. In his report of that visit, Dr. Morrissey stated that the probable cause of the employee's condition was her repetitive work activities at Verizon. He recommended that she stop working.

Ms. Thomas underwent EMG and nerve conduction studies on November 25, 2003 which revealed abnormalities at the ulnar nerve across the elbow bilaterally and abnormalities at the median nerve across the carpal tunnel bilaterally. There was also a mild distal ulnar neuropathic conduction loss. Dr. Morrissey stated that he did not initiate any active treatment because he was waiting to see if the court approved the employee's workers' compensation claim.

Dr. Austin evaluated the employee on November 17, 2003 at the request of the court. His diagnosis was right elbow lateral and medial epicondylitis, mild ulnar neuritis and left lateral epicondylitis. He indicated that he did not find any evidence of carpal tunnel syndrome during his examination. The doctor stated in his report that the employee was still working at the time of his evaluation, although she had stopped working in July 2003. He noted that the condition was not severe and recommended conservative treatment with anti-inflammatories and possibly a cortisone injection and/or physical therapy. He did not expect that the employee would require surgical intervention.

Dr. Akelman, an orthopedic surgeon specializing in hand surgery, saw the employee for the first time on March 3, 2004. His diagnosis was bilateral medial greater than lateral epicondylitis, bilateral ulnar nerve compression at the elbow, and bilateral carpal and ulnar tunnel syndrome. He recommended surgical releases of the carpal and ulnar tunnels bilaterally. During the surgery, he would also inject both elbows with cortisone in an effort to address the elbow problems without surgery. In his report, he stated that the employee's condition was directly and causally related to her work activities.

The primary focus of the employer's defense in this matter was whether the work activities at Verizon were the sole cause of the employee's condition. The trial judge concluded that because there was no history of any trauma to the affected areas, the employee suffered from an occupational disease as defined in R.I.G.L. § 28-34-1(3). Despite the employer's arguments that other factors and activities contributed to the employee's disability, the trial judge, relying upon the testimony and opinions of Dr. Akelman in particular, found that the repetitive activities at work were the cause of the employee's condition and there would be no apportionment of liability. It was further found that the surgery proposed by Dr. Akelman was necessary.

The scope of the review of a trial judge's findings and orders by the Appellate Division is very limited. Section 28-35-28(b) of the Rhode Island General Laws states that the findings of fact made by a trial judge are final unless the appellate panel determines that they are clearly erroneous. The Appellate Division may not undertake a *de novo* review of the evidence absent an initial finding that the trial judge was clearly wrong. Applying this deferential standard of review to the cases before us, we find that the trial judge's conclusions are not clearly erroneous and we, therefore, deny the employer's appeal.

The employer has filed nine (9) reasons of appeal which can be reduced to two (2) basic issues. In the first seven (7) reasons, the employer basically argues that the trial judge erred in not reducing the amount owed by the employer pursuant to R.I.G.L. § 28-34-7 because other factors contributed to the development of the employee's occupational disease. In particular, the employer contends that the trial judge failed to consider the testimony of Dr. Austin, the impartial medical examiner. We have reviewed the entire record and find sufficient basis for the trial judge's decision that apportionment was not appropriate.

The pertinent portion of R.I.G.L. § 28-34-7 reads as follows:

> "Where an occupational disease is aggravated by any other disease or infirmity, not itself compensable, or where disability or death from any other cause, not itself compensable, is aggravated, prolonged, accelerated, or in any way contributed to by an occupational disease, the compensation payable shall be the proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as that occupational disease, as a causative factor, bears to all the causes of that disability or death, the reduction in compensation to be effected by reducing the number of weekly payments or the amounts of the payments, as under the circumstances of the particular case may be for the best interests of the claimant or claimants."

During cross-examination of both Dr. Morrissey and Dr. Akelman, the employer attempted to establish that factors outside of work such as her gender, household chores, and activities such as food shopping contributed to the development of the employee's condition. Dr. Akelman acknowledged that all of these factors can contribute to the development of carpal tunnel syndrome and cubital tunnel syndrome. However, he explained that based upon the particular facts of the employee's case, her condition was caused by the repetitive work activities at Verizon and not by any activities outside of work or her genetic profile. Dr. Morrissey also agreed in general terms that a number of factors can contribute to the development of the conditions the employee suffers from, but he also testified that based upon the facts of the employee's specific case, it was his opinion that her condition was directly related to her work activities.

The employer also attempted to attack the foundation of the doctors' opinions by pointing out that they had a limited description of the employee's job. Both of the doctors were aware that Ms. Thomas's job involved repetitive data entry work for the majority of her work day. Although they did not know exactly how many hours she spent doing data entry, it was clear that the data entry work was the most repetitive activity she performed on a daily basis. The employee's testimony was that she did data entry work for seven (7) hours a day. The physicians' understanding of the employee's job duties was sufficient to form a basis for their medical opinions regarding the cause of the employee's condition.

In his bench decision, the trial judge thoroughly reviewed the deposition testimony of the three (3) doctors – Dr. Morrissey, Dr. Akelman, and Dr. Austin. He acknowledged the discussions regarding other possible causative factors. He then explained that he found the

testimony of Dr. Akelman to be particularly persuasive in explaining his opinion that the condition is related solely to work in this case and the other potential causes are not involved. In its appeal, the employer basically argues that the trial judge should have accepted Dr. Austin's opinions over those of Dr. Akelman. In looking at Dr. Austin's testimony as a whole, we are not as certain as the employer seems to be that the doctor is stating definitively that the work activities were not the cause of the employee's condition. However, it is well-settled that in the face of conflicting medical opinions, the trial judge has the authority to select the opinion he finds more persuasive and probative on the issue of causation. Parenteau v. Zimmerman Eng., Inc., 111 R.I. 69, 299 A.2d 168 (1973). Dr. Akelman's opinion was certainly competent and provided sufficient basis to conclude that the employee's condition was caused by her repetitive work activities.

In the seventh and eighth reasons of appeal, the employer argues that it was prejudiced when the employee failed to inform Dr. Austin that she had missed some time from work for other health issues prior to leaving work in July 2003 due to the condition of her hands and arms. The employer fails to explain how any prejudice resulted from this lapse. Dr. Austin was sent the additional information and asked if it altered his opinions in any way. He responded that it did not. The employer thereafter relied upon the opinions of Dr. Austin in defending against the employee's petition and in prosecuting this appeal. We fail to discern how the employer was prejudiced in any way by this sequence of events.

Based upon the foregoing, the employer's appeal is denied and dismissed and the decision and decrees of the trial judge 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

Bertness and Sowa, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Bertness, J.

_____
Sowa, J.

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)
VERIZON NEW ENGLAND)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the respondent/employer and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

1. That the findings of fact and the orders contained in a decree of this Court entered on November 30, 2004 be, and they hereby are, affirmed.

2. That the respondent/employer shall pay a counsel fee in the sum of One Thousand Seven Hundred Fifty and 00/100 ($1,750.00) Dollars to Domenic J. Carcieri, Esq., for the successful defense of the employer's appeal.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Bertness, J.

_____
Sowa, J.

I hereby certify that copies were mailed to Thomas M. Bruzzese, Esq., and Domenic J. Carcieri, Esq., on

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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

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VERIZON NEW ENGLAND)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the respondent/employer and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

1. That the findings of fact and the orders contained in a decree of this Court entered on November 30, 2004 be, and they hereby are, affirmed.

2. That a counsel fee was awarded to Domenic J. Carcieri, Esq., in the decree entered in the consolidated case, W.C.C. No. 04-02879, for the successful defense of both of the appeals filed by the respondent/employer.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Bertness, J.

_____
Sowa, J.

I hereby certify that copies were mailed to Thomas M. Bruzzese, Esq., and Domenic J. Carcieri, Esq., on

_____