STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

JOSE DEMENESES	)	
	)	
VS.	)	W.C.C. 04-06754
	)	
AMERICAN INSULATED WIRE	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter came to be heard before the Appellate Division on the petitioner/employee's appeal from a decision and decree of the trial court regarding his original petition. The trial judge found that the employee sustained a work-related injury and awarded weekly benefits for a closed period of time. The employee contends that the trial judge improperly made a finding that he had voluntarily retired several months after that closed period. After a meticulous review of the record and consideration of the arguments of the parties, we deny the employee's appeal and affirm the decision and decree of the trial judge in this matter.

The employee testified through an interpreter that he had worked for the employer for twenty-five (25) years. Apparently, for at least a majority of that time, he was a forklift operator. He began to complain of problems with his hands in November 2003. Eventually, his primary care physician referred him to Dr. Manuel DaSilva for evaluation. The employee stopped working on March 3, 2004 because of pain and numbness in his hands. Dr. DaSilva operated on both of his hands and released the employee to return to work without restrictions on June 1, 2004. Mr. Demeneses returned to work for only two (2) days and has not worked since.

While the employee was out of work, he went to the company office approximately once a month to pay the premium for his Blue Cross coverage. On those occasions, he spoke with Diane Cardoso, the benefits representative at American Insulated Wire. The employee testified that on one such occasion, in approximately October 2004, he told Ms. Cardoso he was not certain that he would be returning to work due to the problems with his hands and he had been without any income since he left work. Ms. Cardoso advised him that if he could not return to work, he should sign some papers and the company would send him some checks.

The employee testified that Ms. Cardoso provided him with some paperwork which was in English. He did not read English, Ms. Cardoso did not speak Portuguese, and there was no interpreter present. He stated that he believed that by signing the paperwork, he would receive checks. The employee testified that he did not know that the paperwork was retirement papers and Ms. Cardoso did not tell him that they were retirement papers.

Ms. Cardoso testified that around the beginning of September 2004, the employee told her that he was not receiving any money since he left work except for Social Security Disability Insurance benefits and he wanted to retire. Ms. Cardoso testified that she explained to the employee the three (3) options for retirement under the collective bargaining agreement, two (2) of which were not available to him. The only option he was eligible for was disability retirement. Ms. Cardoso stated she had more than one (1) conversation with the employee regarding disability retirement, and that during two (2) or three (3) of those conversations, Luis Braga, a co-worker and friend of the employee, was present to interpret. The employee eventually conveyed his intention to retire based on the disability retirement option. After Ms. Cardoso prepared the necessary paperwork, Mr. Demeneses returned to the office on another day, without an interpreter, and signed the paperwork.

Mr. Braga testified that he has worked for the employer for twenty-six (26) years. He is friendly with Mr. Demeneses who has asked him to interpret for him in different situations both in and outside of work. He testified that, at the employee's request, he accompanied Mr. Demeneses to Ms. Cardoso's office on at least two (2) occasions when they discussed retirement. He stated that Ms. Cardoso explained the retirement options and the employee asked a number of questions. Mr. Braga was not present when the employee actually signed the retirement papers.

The medical evidence consisted of the deposition, affidavit and reports of Dr. Manuel F. DaSilva and the deposition and records of Dr. Gregory J. Austin. Dr. DaSilva, an orthopedic surgeon, first saw the employee on February 9, 2004. The employee complained of bilateral upper extremity pain. The doctor's diagnosis was bilateral carpal tunnel syndrome, right index and small trigger fingers and left shoulder impingement, with more than likely a rotator cuff tear. He concluded that the employee's bilateral carpal tunnel syndrome was caused by his employment as a fork lift operator for twenty-four (24) years. Dr. DaSilva performed carpal tunnel release surgery on the employee's left hand on March 22, 2004 and operated on the right hand on April 12, 2004. The doctor testified that Mr. Demeneses was totally disabled from March 22, 2004 to June 1, 2004, when the employee advised the doctor that he wanted to return to work.

Dr. Austin, an orthopedic surgeon, initially did a medical record review for the employer on September 29, 2005. The doctor subsequently examined the employee on December 12, 2005 and generated a report dated December 16, 2005. Dr. Austin asserted that the activities involved in driving a forklift were not the type that would cause carpal tunnel syndrome. He also stated that any disability after June 1, 2004 was due to a multitude of other physical problems which were not caused by his work activities.

The trial judge went to the employer's place of business and observed workers performing the forklift operator job. She found the opinions of Dr. DaSilva to be more compelling and persuasive based upon the knowledge gained from viewing the job. Consequently, she concluded that the bilateral carpal tunnel syndrome was work-related and awarded weekly benefits for the period from March 22, 2004 to June 1, 2004. The trial judge went on to address the issue of retirement. She found the testimony of Mr. Braga and Ms. Cardoso to be persuasive and did not believe the employee's testimony that he did not realize he was retiring from the company. In her decision, the trial judge, citing R.I.G.L. §28-33-45(c), noted that the employee is precluded from receiving workers' compensation benefits after October 2004. The decree contains a finding that the employee retired in October 2004. The employee has appealed that finding with regard to his retirement.

Pursuant to R.I.G.L. § 28-35-28(b), "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." The Rhode Island Supreme Court has recognized that a trial justice's factual findings may be "clearly erroneous" in circumstances where the court misconceives or overlooks material evidence. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). The Appellate Division is authorized to conduct a *de novo* review of the record only after a finding is made that the trial judge was clearly wrong. Id. (citing R.I.G.L § 28-35-28(b); Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986)). Guided by this standard of review, we find no error in the factual determinations made by the trial judge and accordingly, we affirm the decision and decree.

The employee has filed two (2) reasons of appeal contending that the trial judge erred in her findings regarding the employee's retirement. The concern is that the finding that the employee voluntarily retired in October 2004 triggers the application of R.I.G.L. § 28-33-45(c):

> "An employee shall not collect any indemnity benefits after his or her retirement for any injury sustained less than two (2) years prior to his or her retirement."

If the trial judge's finding that the employee voluntarily retired in October 2004 (less than two (2) years after the work-related injury) is allowed to stand, Mr. Demeneses would be precluded from receiving any weekly benefits in the future.

In his first reason of appeal, the employee argues that the trial judge should not have addressed the employee's retirement in October 2004 after she found that he was no longer disabled as of June 1, 2004. After reviewing the record, we find that the issue was properly before the trial judge for determination.

The original petition filed by the employee sought weekly benefits for total and/or partial incapacity from March 4, 2004 and continuing. This allegation was never amended to reflect a closed period of disability. The employee testified that he returned to work for two (2) days in early June, but was unable to continue working due to ongoing problems with his hands. The parties were before the trial judge for the trial of this matter on seven (7) occasions between March 15, 2005 and April 12, 2006, when the parties rested. The employee submitted medical reports of Dr. DaSilva for office visits on June 4, 2004, July 7, 2004, and September 16, 2005. Obviously this evidence addresses the employee's condition after June 1, 2004 and presents an issue as to whether the employee became disabled again after June 1, 2004 due to the work-related injury.

The employee also testified regarding his retirement on cross-examination and then on re-direct. *See* Tr. pp. 12-13, 16-20. Counsel for the employee specifically advised the trial judge that the employee's position was that he did not voluntarily retire. Tr. p. 13. As a result of the evidence introduced into the record, the issue of the employee's retirement was squarely before

the trial judge. She was obligated to address the retirement issue in light of the allegation in the petition of ongoing disability, the employee's testimony regarding inability to work after June 1, 2004 due to the condition of his hands, and the testimony about the circumstances of the retirement. The trial judge's decision and decree properly addressed the evidence presented during the course of the trial and we find no abuse of discretion on her part.

In the second reason of appeal, the employee asserts that the trial judge was clearly wrong in concluding that his retirement was voluntary. First, he argues that he did not realize that in signing the paperwork prepared by Ms. Cardoso, he was retiring from the company. The trial judge was confronted with conflicting testimony regarding the circumstances surrounding Mr. Demeneses' decision to accept a disability retirement from the employer. The employee claimed that he did not know that the papers he signed were retirement papers, that he believed he signed the paperwork so he could get some money because he could not work, that the papers were never explained to him, and that an interpreter was not present when he signed the papers.

However, Ms. Cardoso testified that she explained to Mr. Demeneses in detail the employee's retirement options after he stated that he could not return to work, that Mr. Braga was present and provided interpreting services during some of these discussions, that the employee told her that he was receiving Social Security Disability Insurance benefits, and that Mr. Demeneses took some time in making his decision to take the disability retirement. Mr. Braga, a friend of the employee, stated that he was present on at least two (2) occasions and translated for the employee when he and Ms. Cardoso discussed retirement and that the employee asked questions about the retirement proposal.

In assessing the conflicting testimony, the trial judge stated that she was persuaded by the testimony of Ms. Cardoso and Mr. Braga in finding that the employee was fully aware that he

was accepting a retirement when he signed the papers. "This Court does not believe that when the employee signed the retirement papers he did not know that he was retiring from the company. The Court found the employee's testimony in this regard unpersuasive." Trial Dec., p. 14. The trial judge is in the best position to assess the credibility of witnesses that appear before her. The testimony of any witness is subject to evaluation by the trial judge who may reject all or part of it as unworthy of belief. Buonauito v. Ocean State Dairy Distrib., 509 A.2d 988, 991 (R.I. 1986). The trial judge's determination of the credibility of a witness and rejection of testimony on that basis is not reversible on appeal if it is supported by competent evidence. Delage v. Imperial Knife Company, Inc., 121 R.I. 146, 148, 396 A.2d 938, 939 (1979). Based upon the record before us, we cannot say that the trial judge was clearly wrong to base her finding that the employee voluntarily and knowingly retired on the testimony of Ms. Cardoso and Mr. Braga.

The employee further argues that the evidence clearly establishes that he retired because the work-related injury prevented him from returning to his regular job with the employer. Our review of the record reveals that the only evidence indicating that the employee retired due to the effects of his work-related injury was the statement of the employee himself. Admittedly, the employee accepted a so-called "disability retirement." However, there is no medical evidence whatsoever that supports the assertion that the employee could not work after June 1, 2004 due to the effects of bilateral carpal tunnel syndrome, the only condition which was found to be work-related. The reports of Dr. DaSilva and Dr. Austin both indicate that Mr. Demeneses had a number of other physical problems which prevented him from working, including rheumatoid arthritis and cervical myelopathy. There is no evidence in the record that any of these other conditions were related to his work activities. Although the employee's retirement may not have

been purely "voluntary," his decision to retire was made knowingly and not due to the effects of his work-related injury. Therefore, the trial judge was not clearly erroneous in stating that as a result of his retirement in October 2004, the employee was precluded from receiving weekly benefits for that injury in the future.

Based upon the foregoing discussion, the appeal of the employee is denied and dismissed and the decision and decree of the trial judge is 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

Sowa and Hardman, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Sowa, J.

_____
Hardman, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

JOSE DEMENESES)
)
VS.) W.C.C. 04-06745
)
AMERICAN INSULATED WIRE)

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 May 1, 2006 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Sowa, J.

_____
Hardman, J.

I hereby certify that copies of the within Decision and Final Decree of the Appellate Division were mailed to Stephen J. Dennis, Esq., and Ann Marie Paglia, Esq., on

_____