STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

OLGA PERDOMO	)	
	)	
VS.	)	W.C.C. 2007-01241
	)	
BENJAMIN BOX COMPANY	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's appeal from the decision and decree of the trial judge, which found that the employee failed to prove she sustained a work-related injury to her right shoulder due to repetitive motion. After conducting a careful review of the record in this matter and considering the arguments of both parties, we deny and dismiss the employee's appeal.

The matter came before the court on the employee's original petition alleging that she injured her right shoulder on January 30, 2007, which resulted in disability from that date and continuing. The employee filed a similar petition against her previous employer, Catina, Inc. (hereinafter "Catina"), W.C.C. No. 2007-01987. Both of the petitions were denied at the pretrial conference and the employee filed timely claims for trial. The two (2) matters were consolidated for hearing before the trial judge.

Ms. Perdomo testified through an interpreter that she had been employed by Catina for about three (3) years, ending on April 11, 2006. Her job required her to operate a machine using

a foot pedal to make dog leashes or something similar. She indicated that she did not have any problems with her shoulder while working for Catina. She was out of work for about six (6) months before she began working at Benjamin Box on October 3, 2006. Ms. Perdomo stated that she first experienced pain in her right shoulder on January 15, 2007. She testified that her job required her to stand in front of a machine, take about a one (1) inch stack of paper, make it even, feed one end into the cutting machine and press a foot pedal causing the machine to cut the corners off the paper. The stack of paper was then flipped to cut the other end and then stacked in a pile to the side of the machine. Ms. Perdomo asserted that she had to push down hard on the paper so it would lie flat and applying this pressure caused the pain in her shoulder.

The employee related that during the two (2) weeks after January 15, 2007, she missed work on two (2) occasions due to pain in her shoulder. She testified that she called the employer and told them why she could not come to work on each occasion. On January 31, 2007, she called in again and told her boss, Sami, that she could not come to work. Later that evening, she went to the emergency room at Fatima Hospital complaining of ongoing pain in her right shoulder which had recently worsened. The diagnosis was tendonitis and the employee was advised to stay out of work until February 5, 2007 and to avoid lifting more than ten (10) pounds when she returned to work. The following day, the employee went to Benjamin Box with her daughter to hand in a note from the hospital, but her employer would not accept it. The owner informed her that they did not have work for her any longer.

The employee was treated with injections into her right shoulder at Memorial Hospital on February 15, 2007 and February 23, 2007. She sought further treatment with a chiropractor, Dr. John A. Herner, on April 11, 2007 because her shoulder pain was progressively worse over the last three (3) months. The doctor diagnosed a repetitive shoulder girdle strain, which he opined

was causally related to her work activities. Dr. Herner testified at his deposition that he knew she did repetitive pulling, pushing, and pressing as some sort of machine operator, but that he knew little else and was not familiar with any details of her job duties.[1]

On cross-examination, the employee acknowledged that she was absent from work for a significant amount of time during the three (3) months at Benjamin Box and she was warned regarding her excessive absenteeism. Ms. Perdomo asserted that she always called in or had a good reason and that many of her absences were due to medical appointments for her children.

Thomas Murphy, the president and owner of Benjamin Box, explained that the company manufactures gift boxes, candy boxes and similar items. He testified that from October 2006 through January 2007, Ms. Perdomo had numerous unexcused absences. She missed eight (8) hours in October, fourteen (14) hours in November, twenty-seven (27) hours in December and twenty-four (24) hours in January. Mr. Murphy asserted that the employee never asked for approval in advance and she did not call in any of the mornings she was absent. With the assistance of the production coordinator, Samia Rosa, acting as translator, he informed the employee on more than one (1) occasion that her absenteeism was not acceptable. He testified that he gave Ms. Perdomo three (3) verbal warnings, and told her some time in the middle of January that if she had another unexcused absence her employment would be terminated. He stated that the employee was absent from work on January 31, 2007, and when she came into the building with her daughter on February 1, 2007, he informed her that she was terminated. Ms. Perdomo then handed him the note from the hospital regarding her injury. Mr. Murphy asserted that this was the first time he knew anything about an injury at work.

[1] "Using, predominantly, her right upper extremity in a repetitive fashion for, you know, in a full-time position for, you know, during a full workday over a period of time causes, the repetitious activity causes aberrant movement and can injure joints and muscles due to the repetitive nature of the work." (Herner Dep. 15:1-7.)

Mr. Murphy also explained that the employee actually performed two (2) jobs while she worked at Benjamin Box, as a packer and as operator of the machine which mitered the corners of the paper. The paper is applied to cardboard boxes by a machine. The boxes slide out of the machine onto a table and the packer rubs each side to ensure that the paper has properly adhered to the box. The employee would then put the base and cover of the box together and place it into a larger box. When the larger box is full, the packer closes it and puts it on a skid. The pace was fast and from time to time it involved lifting above the shoulder level. Mr. Murphy's description of the paper cutting, or mitering, job was consistent with the employee's testimony except he testified that she was not required to apply any pressure to the paper as she fed it into the machine. He also indicated that the time spent in each job by Ms. Perdomo varied day to day and week to week.

Samia Rosa, the production coordinator, testified that she translated for Mr. Murphy in his discussions with the employee. She indicated that Ms. Perdomo was warned three (3) times during the month before she was terminated that any further absences would result in her termination.

The trial judge concluded that the employee failed to prove she sustained a work-related injury. He rejected the testimony of Dr. Herner as incompetent because the doctor lacked sufficient knowledge of the employee's work activities to render a competent opinion as to causal relationship. In addition, the trial judge found that the employee's testimony was not credible, citing a number of inconsistencies between the testimony of the employee and that of Mr. Murphy and Ms. Rosa. The employee then filed a timely claim of appeal. The trial judge also denied the employee's petition against Catina due to a lack of any evidence to connect her

alleged injury and disability to her employment there. The employee did not appeal that determination.

When the Appellate Division reviews a trial decision, the trial judge's findings on factual matters are final unless found to be clearly erroneous. *See* R.I.G.L. § 28-35-28(b); Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). In particular, with regard to findings based upon credibility determinations, the appellate panel must initially conclude that the trial judge was obviously mistaken in his assessment of the credibility of the witnesses or that he overlooked or misconceived material evidence in arriving at his conclusions. Mulcahey v. New England Newspapers, Inc., 488 A.2d 681, 683 (R.I. 1985). Only after finding that the trial judge was clearly wrong may the appellate panel conduct its own *de novo* review of the record.

The employee filed four (4) reasons of appeal. The first reason is a general statement that the decree is against the law and the evidence which does not satisfy the statutory requirements for a valid reason of appeal. In her second reason, the employee contends that the trial judge failed to apply the correct burden of proof and erroneously rejected the testimony of Dr. Herner as incompetent. We find no error on the part of the trial judge in his assessment of the testimony of the doctor.

On direct examination, Dr. Herner was never asked what he knew about the employee's job duties. Rather, after inquiring as to the history he recorded and his examination findings, counsel simply asked if he had an opinion as to the causal relationship between the diagnosis and her job. After responding that there was a direct causal relationship, the doctor explained: "That her job duties as a machine operator, which involved repetitive upper extremity pulling, pushing and pressing, the repetitive nature of her work involving those activities caused her injury." (Pet.'s Ex. 3 at 14.) When questioned in more detail on cross-examination, Dr. Herner

admitted that he did not know what type of press the employee operated, or the frequency or force of the alleged pushing, pulling, and pressing movements of her right arm. There was no indication that he had any knowledge of the items the employee was putting into the machine, the weights she had to lift, or the height at which she performed these activities. The doctor was never presented with a hypothetical or written document describing more specifically the employee's work activities. He was entirely unaware of the fact that she also performed the job of a packer and did not always work full-time on the paper cutting machine.

The employee must establish the pertinent facts necessary to prove the allegations of her petition by a fair preponderance of the credible evidence. The trial judge's statement that "it is incumbent upon the doctor to analyze and appreciate the manner in which the employee utilized her right arm and hand for him to causally relate her symptoms to her duties," does not indicate a deviation from this standard. (Trial Op. 10.) Rather, it acknowledges the basic evidentiary principle that an expert must have an adequate foundation for his opinion. The doctor's understanding that the employee's job involved some type of repetitive motion of her right arm is not a sufficient basis for an expert opinion on causation.

Rule 705 of the Rhode Island Rules of Evidence states that "before testifying in terms of opinion, an expert witness shall be first examined concerning the facts or data upon which the opinion is based." Our Supreme Court has mandated that "an expert's opinion must be predicated upon facts legally sufficient to form a basis for his [or her] conclusion." Alterio v. Biltmore Construction Corp., 119 R.I. 307, 312, 377 A.2d 237, 240 (1977). In the workers' compensation context, if a medical expert's opinion is based upon facts which are not established by the evidence or on a misconception of the pertinent facts, the probative force of the opinion is destroyed. *See* Leviton Mfg. Co. v. Lillibridge, 120 R.I. 283, 288-289, 387 A.2d 1034, 1037

(1978) (citing Woods v. Safeway System, Inc., 101 R.I. 343, 344-345, 223 A.2d 347, 348 (1966)).

The employee has alleged that she sustained an injury to her right shoulder due to repetitive activities performed during the course of her employment with Benjamin Box. It is clear from Dr. Herner's testimony that he had a very minimal understanding of the employee's actual job duties, which had been gleaned from the employee. The information he did have was not only incomplete, it was also inaccurate. In assessing the credibility of the witnesses who testified before him, the trial judge found that the description of the employee's job duties as both a packer and paper cutter provided by the owner, Mr. Murphy, was more accurate than that provided by the employee. He further accepted Mr. Murphy's assertion that the paper cutting job did not require the application of pressure on the paper being cut, in contrast to the employee's contention that her shoulder pain was caused by applying significant pressure with her hands to the paper. Consequently, the opinion of Dr. Herner as to the cause of the employee's condition lacks the necessary foundation, thereby destroying its probative value. Lacking any expert medical opinion establishing causation, the employee cannot satisfy the burden of proof.

In the third reason of appeal, the employee argues that the trial judge "overlooked substantial evidence which established the Employee's right to compensation." Our review of the trial decision reveals that the judge thoroughly discussed the records of Fatima Hospital and Memorial Hospital and the deposition testimony of Dr. Herner. He also extensively reviewed the testimony of the employee, Mr. Murphy, and Ms. Rosa. The employee has not directed our attention to any particular piece of evidence that was overlooked by the trial judge and we find no indication of such an oversight on his part.

In her fourth reason of appeal, the employee contends that the trial judge was clearly wrong in relying upon Dr. Herner's testimony as dispositive of the petition against the prior employer, Catina, and yet rejecting that testimony as incompetent in the petition against Benjamin Box. The employee appears to have misconstrued the trial judge's reference to Dr. Herner's testimony with regard to the petition against Catina.

In addressing the allegations against Catina, the trial judge stated, "It appears that the testimony of the employee and Dr. John Herner, DC is dispositive of the petition against Catina, Incorporated." (Trial Op. 2.) Ms. Perdomo testified that she never experienced any pain or other symptoms related to her right shoulder during her employment with Catina. Dr. Herner never mentioned the employee's work at Catina as a factor in his diagnosis or opinion as to causal relationship. In fact, it appears from his testimony that he was unaware of her employment at Catina. Therefore, it was actually the lack of any testimony implicating Catina by the employee or the doctor that was dispositive as to that petition. The trial judge was not referring to his reliance on any competent expert testimony by Dr. Herner in denying the petition against Catina. Consequently, we find no error or inconsistency in the trial judge's analysis.

Based upon the foregoing discussion, the employee's appeal is denied and dismissed and the decision and decree 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

Connor and Hardman, JJ. concur.

ENTER:

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Olsson, J.

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Connor, J.

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Hardman, 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 October 3, 2007 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

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Olsson, J.

_____
Connor, J.

_____
Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Robert D. Goldberg, Esq., and Michael T. Wallor, Esq., on

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