STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

OCEAN STATE JOB LOT	)	
	)	
VS.	)	W.C.C. 2009-05442
	)	
ROGER IDARRAGA	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's claim of appeal from the decision and decree of the trial judge granting the employer's petition to review after finding that the employee's incapacity for work resulting from a March 16, 2008 work injury had ended. The trial judge ordered that the employer may discontinue the payment of weekly benefits for partial incapacity as of December 21, 2009, which was the date of the examination of the employee by the impartial medical examiner appointed by the court. After a thorough review of the record and careful consideration of the parties' respective arguments, we affirm the decision and decree of the trial judge and deny the employee's appeal.

The employee had been receiving weekly benefits pursuant to a pretrial order entered in W.C.C. No. 2008-04277 on August 28, 2008 in which it was found that the employee sustained a low back strain on March 16, 2008 resulting in partial incapacity from March 17, 2008 and continuing. The employer filed this petition to review on September 10, 2009 alleging that the employee's incapacity for work had ended, based upon the reports of Dr. Philo F. Willetts, Jr., an

orthopedic surgeon. At the pretrial conference, the employee presented reports of his treating physician, Dr. Kenneth J. Morrissey, an orthopedic surgeon. Due to a conflict in the medical opinions, the trial judge ordered an impartial medical examination with Dr. David J. Cicerchia, another orthopedic surgeon. After receiving the report of Dr. Cicerchia, the trial judge entered a pretrial order on February 1, 2010, finding that the employee's incapacity for work had ended and discontinuing his weekly benefits as of that date. The employee filed a timely claim for trial.

The employee did not testify in this matter. The employer introduced the deposition and reports of Dr. Willetts who examined the employee on three (3) occasions at the request of the employer. Most recently, Dr. Willetts evaluated Mr. Idarraga on July 27, 2009. The doctor noted significant symptom magnification and the possibility of a behavioral disorder. He concluded that the employee was capable of returning to his regular job.

The employee introduced into evidence the deposition testimony and reports of Dr. Morrissey, who treated the employee on a regular basis since March 20, 2008. As of his first examination of Mr. Idarraga, the doctor found him to be totally disabled for any and all work activities. Dr. Morrissey repeatedly noted persistent lower back pain with spasm, limited range of motion, and reduced straight leg raising. He maintained his opinion that Mr. Idarraga was unable to work. After the employee cancelled several appointments subsequent to an office visit on April 30, 2010, Dr. Morrissey saw him on August 3, 2010 and released him to work without restrictions.

The report of the impartial medical examination by Dr. Cicerchia was marked as a court exhibit pursuant to R.I.G.L. § 28-33-35(b), over the objection of the employee. This statute provides, in pertinent part, as follows:

> The report of the findings of the impartial medical examiner . . . shall be admissible as an exhibit of the court. The findings of the

> report shall become final and binding unless either party elects to contest the findings. . . . The contesting party shall pay the cost of the court appearance of the author of the report. In the event that the employee is the prevailing party, the employee shall be reimbursed for the entire amount paid by him or her for the court appearance of the author of the report.

R.I.G.L. § 28-33-35(b).

The employee had previously filed a notice of objection to the admission of the report and asserted his right to cross-examine the doctor. He then filed a motion, pursuant to Rule 2.13 of the Rules of Practice of the Workers' Compensation Court, requesting that the employer advance the deposition fee of Four Hundred Fifty and 00/100 ($450.00) Dollars requested by Dr. Cicerchia. At the hearing on the motion, the trial judge found that the employee lacked the financial resources to pay the witness fee requested by the doctor, but he denied the motion based upon the specific language of the statute stating that the contesting party shall pay such costs. Consequently, Dr. Cicerchia did not testify by deposition or before the court, but his report was admitted as a full exhibit.

Dr. Cicerchia was provided with the reports of Kent Hospital, Dr. Morrissey, Dr. Willetts, and the Dr. John E. Donley Rehabilitation Center. During his examination, the doctor noted the employee walked with a slightly antalgic gait and had superficial tenderness throughout his lower back, but he found no spasm and no neurological deficits. He concluded that Mr. Idarraga was no longer disabled and could return to work without restrictions.

In his bench decision, the trial judge reviewed all of the medical evidence, noting that all of the physicians agreed that the employee was no longer disabled and the issue had become on what date his disability ended. The trial judge chose to rely upon the opinion of Dr. Cicerchia and ordered that the employee's weekly benefits would be discontinued as of December 21, 2009, the date of the doctor's examination. The decree, therefore, modified the pretrial order in

that the date benefits were discontinued was changed from February 1, 2010 (the date of the pretrial conference) to December 21, 2009 (the date of Dr. Cicerchia's examination). The employee claimed an appeal from the decree entered on November 24, 2010.

Our review of a trial judge's decision and decree is guided by the standard set forth in R.I.G.L. § 28-35-28(b), which mandates that "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." We are precluded from undertaking a *de novo* review of the evidence without first determining that the trial judge was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). In the present matter, the facts are not in dispute. The issues raised by the employee simply involve whether the law was properly applied to those facts. After reviewing the relevant case law and the pertinent statutory provisions, we find no error committed by the trial judge.

The employee has filed two (2) reasons of appeal. Initially, he argues that the trial judge erred when he modified the pretrial order in his decree to discontinue benefits as of December 21, 2009, the date of Dr. Cicerchia's examination, rather than February 1, 2010, the date of the pretrial conference. Despite his assertion in his reasons of appeal that the statute explicitly precludes the trial judge from modifying benefits as of a date prior to the date he actually renders that decision, the employee does not refer us to any specific provision of the Workers' Compensation Act that contains this admonition. Our review of the Act has not yielded any statutory provision containing language precluding such action.

This issue has, however, been previously addressed by the Appellate Division in Bernardo v. Coats American, W.C.C. No. 1996-03642 (App. Div. 5/22/98). The employee in Bernardo had filed an original petition alleging she sustained a work-related injury on February 12, 1996 resulting in disability beginning March 5, 1996 and continuing. At the pretrial

conference on June 20, 1996, the trial judge granted the petition and awarded a closed period of incapacity ending on June 20, 1996, relying upon the report of the examination of the employee performed by Dr. Stanley Stutz on April 22, 1996. After trial, the trial judge issued a decree containing the same findings as the pretrial order and the employee filed a claim of appeal.

Although the Appellate Division agreed with the trial judge's reasoning and conclusion that the employee was only disabled for a closed period of time, the panel found that the trial judge erred in setting the end date of disability as the date of the pretrial conference, rather than the date of Dr. Stutz's examination. The Appellate Division concluded that the date of the examination which formed the basis for the doctor's opinion that the employee was no longer disabled was the actual date on which the employee's incapacity ended. The panel explained that by making this correction, "we are protecting not only the rights of the employer, but, also, the rights of the employee in the event that a subsequent petition for review alleging a return for incapacity is filed. (R.I.G.L. Sec. 28-35-45)." Id. at 5. In the present matter, we see no reason to depart from our holding and reasoning in Bernardo.

In his second reason of appeal, the employee argues that the trial judge erred in denying the employee's motion to order the employer to pay the expert witness fee requested by the impartial medical examiner, Dr. Cicerchia, as a condition to his appearance at a deposition for cross-examination. The employee contends that the trial judge's reliance on the explicit language contained in R.I.G.L. § 28-33-35(b) conflicts with the holding of the Rhode Island Supreme Court in Gerstein v. Scotti, 626 A.2d 236 (R.I. 1993).

In the present matter, the trial judge admitted the report of Dr. Cicerchia as a court exhibit on his own motion; neither party moved the report as part of the presentation of their case. This situation is distinguishable from Gerstein in which the defendant in a personal injury case in the

Superior Court presented a physician's affidavit and report pursuant to R.I.G.L. § 9-19-27, which allows for the presentation of medical evidence by affidavit. That statute also permits the opposing party, at his or her own expense, to cross-examine the physician regarding his report. After the plaintiff in Gerstein notified the physician of his intention to depose him, the defendant filed a motion for a protective order to prohibit the taking of the deposition unless the plaintiff paid the doctor an expert witness fee.

The Court concluded that under the terms of the statute, the plaintiff was required to pay the cost of the issuance of the notice of deposition and any supporting subpoena, as well as the fee of the stenographer taking the deposition. With regard to payment of the expert witness fee, the Court engaged in what it labeled "interstitial rule making and balancing in applying the legislative intent" behind the language of § 9-19-27. Gerstein, 626 A.2d at 238. In order to provide a reasonable opportunity for cross-examination, the Court concluded that the proponent of the expert witness's affidavit and report must pay the fee required for up to one (1) hour of cross-examination of the expert witness.

In the matter presently before the appellate panel, the report of the impartial medical examiner was marked as an exhibit of the court without an affidavit pursuant to § 28-33-35(b), which simply states that the report "shall be admissible as an exhibit of the court." The report was not submitted into evidence as part of the employer's case, i.e., the employer was not the proponent of Dr. Cicerchia's opinion. Therefore, the holding in Gerstein does not impose an obligation on the employer to pay the expert witness fee of Dr. Cicerchia so that the employee can cross-examine him. The language of § 9-19-27 which was at issue in Gerstein is not applicable to this situation and the employee's citation of that case in support of his position is misplaced.

As noted previously, § 28-33-35(b) provides that the party contesting the findings of an impartial medical examiner shall pay the cost of the appearance of the author of the report. This language was added to the statute in 1992 and has not been amended since then. This directive is repeated in Rule 2.24 of the Rules of Practice of the Workers' Compensation Court which addresses admission of an impartial medical examiner's report. The rule states:

> The contesting party shall pay the cost of the deposition of the examiner, including any reasonable fee to the examiner, or the cost of the appearance of the examiner, to testify before the court, subject to the procedure set forth in W.C.C. – R.P. 2.13(B)(3). (Emphasis added.)

The rule also reiterates the proviso that if the employee is the prevailing party after trial, that the employer shall reimburse the employee for the entire cost of the testimony of the impartial examiner.

Rule 2.13 was amended in 1994 in response to the decision of the Rhode Island Supreme Court in Gerstein. The amendment sought to allow, in the context of a workers' compensation case, the shifting of the cost of deposing expert medical witnesses.

> The court may, in its discretion, upon motion after notice is given of the intention to submit evidence by affidavit pursuant to R.I.G.L. § 9-19-27, or objection to an Impartial Medical Examination report seasonably made, require the party seeking to take the deposition of the expert witness or other party to pay the costs incurred in the taking of the deposition including a reasonable expert witness fee or such other conditions as the Court deems appropriate. (Emphasis added.)

The Reporter's Notes to Rule 2.13 provide further background and explanation of the rationale behind this modification of Gerstein in the workers' compensation arena and the factors to be balanced when considering such a motion to shift costs.

> While the rule still requires the proponent of an affidavit to pay the fees charged by the expert witness for the first hour of cross-examination in most cases, it also recognizes the economic

> disparity which may exist between the employer and employee in workers' compensation litigation. This rule allows a party offering an affidavit to seek a protective order where the exercise of the right of cross-examination could result in the exclusion of the affidavit due to the inability of a party to pay the expert witness fee in advance. It is anticipated that in ruling on a motion for protective order filed under this section, the Court will assess and attempt to balance the interests of all parties utilizing the guidelines enunciated by the R.I. Supreme Court in Martinez v. Kurdziel, 612 A.2d 669 (1992).

W.C.C. – R.P. 2.13(B)(3) Reporter's Notes.

In considering the issue raised by the employee in this matter, we are placed in the position of attempting to reconcile the statutory language and these rules of practice as applied to the circumstances of Mr. Idarraga's case. Impartial medical examiners must be qualified and approved by the Medical Advisory Board which operates under the authority of the Chief Judge of the Workers' Compensation Court. *See* R.I.G.L. § 28-30-22(b)(6) and (c). An impartial medical examiner is appointed by the court to provide an unbiased opinion to assist the court in deciding questions such as the nature and cause of an injury, the extent of disability, and the necessity of certain medical treatment, in cases where the employer and employee have presented conflicting medical opinions. It is the rare case that a trial judge rejects the opinion of the impartial medical examiner; most often such cases result from the impartial examiner lacking an accurate history or certain test results that may affect his opinion.

We believe the provisions of § 28-33-35(b) reflect this special deference accorded to the impartial medical examiner by allowing the admission of the examiner's report without affidavit and directing that the examiner's findings shall be binding absent a notice of contest from either party. The mandate that the contesting party shall bear the cost of the appearance fee of the impartial examiner causes the party to weigh the potential benefit to be gained from cross-

examination versus the cost and also serves to discourage the taking of depositions without an adequate reason for doing so.

The concerns expressed by the Rhode Island Supreme Court in Martinez v. Kurdziel, *supra*, that a party may be precluded from presenting their case are not present in Mr. Idarraga's case. He has had his day in court and presented his medical evidence. In fact, the employer requested cross-examination of the employee's treating physician, Dr. Kenneth Morrissey, and the employee moved to shift the cost of that deposition to the employer under Rule 2.13(B)(3), which motion was granted by the trial judge. The employer also made its medical expert available for cross-examination by the employee. The employee did not indicate why or how the impartial examiner's opinion was flawed, or what information he sought to bring out on cross-examination that would affect the weight to be accorded that opinion. As an aside, it should be pointed out that pursuant to § 28-33-35(a), the employer paid the cost of the impartial medical examination ordered by the court. Under the circumstances of this case, we find that the trial judge properly adhered to the specific language of § 28-33-35(b) requiring the contesting party to pay the cost of the appearance of the impartial medical examiner.

We would note that in the appropriate situation, a trial judge, under Rule 2.13(B)(3), may, in his discretion, consider shifting the cost of the appearance of an impartial medical examiner from the contesting party to the opposing party, taking into consideration and balancing the interests of the parties in accordance with the guidelines enunciated in Martinez v. Kurdziel, *supra*. We would expect that this would be a rarity and the exception, rather than the rule.

Based upon the foregoing discussion, we deny and dismiss the appeal of the employee and affirm the decision and decree of the trial judge. 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

Hardman and Ferrieri, JJ., concur.

ENTER:

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Olsson, J.

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Hardman, J.

_____
Ferrieri, J

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the claim of appeal of the respondent/employee, and upon consideration thereof, the employee's 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 November 24, 2010 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.

_____
Hardman, J.

_____
Ferrieri, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Daniel R. Sumner, Esq., and Ronald A. Izzo. Esq., on

_____