STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

KENNETH W. GEORGE)
)
VS.) W.C.C. 97-05584
)
ROGER WILLIAMS MEDICAL)
CENTER

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter came on to be heard before the Appellate Division upon the petitioner/employee's appeal from the denial of his Original Petition in which he alleged that he sustained a work-related injury to his low back and left leg on May 25, 1997. After thoroughly reviewing the record and considering the arguments of the parties, we deny the employee's appeal and affirm the decision and decree of the trial judge.

In his petition, the employee stated that he injured his low back and leg while lifting a soup pot at work and this injury resulted in disability beginning May 29, 1997. He initially had received some weekly benefits pursuant to a Non-Prejudicial Agreement, but those benefits were terminated in August 1997. The petition was denied at the pretrial conference and the employee claimed a trial in a timely manner.

During the course of the trial, the central issue was whether the employee's injury was sustained during the course of his employment. The employee testified that he was employed as a cook at Roger Williams Medical Center. At approximately 12:30 p.m. on May 25, 1997, the employee stated that he felt a pain in his back while lifting a ten (10) gallon soup pot. He thought it was just a pulled muscle and not a serious injury, so he did not report the incident to his brother, Timothy George, who was the acting supervisor that day. The following day was Memorial Day and he was not scheduled to work. He returned to work on May 27, 1997 and worked a full shift without reporting his injury to anyone.

On May 28, 1997, the employee again reported to work. He decided to seek medical treatment because he was experiencing severe pain in his back and down his leg. He indicated that he made an appointment for that afternoon with Dr. Robert A. L'Europa, a chiropractor, whose name he found in the Yellow Pages. He then went to see his supervisor, Catherine Barton. He told her that he had pulled his back out on Sunday lifting a soup pot and he asked permission to leave work a few minutes early so he could see the doctor. He stated that Ms. Barton consented.

The following day, the employee had his brother-in-law deliver a note to Ms. Barton from Dr. L'Europa which stated that Mr. George was unable to work for two (2) weeks. This information was relayed to Karen Peloquin, the director of the department, who in turn contacted Lynette Hie, the benefits coordinator. The employee received a call from Ms. Hie that afternoon. Ms. Hie advised the

employee that he had already exhausted all of his leave of absence time and that he could be terminated if he stayed out of work. Ms. Hie advised him to speak to Ms. Peloquin about the situation. Mr. George called Ms. Peloquin to discuss the matter and told her that he had injured himself while working. She informed him that it did not matter how it happened.

That same day, May 29th, the employee's brother-in-law, who also worked at Roger Williams Medical Center, brought an incident report to Mr. George, which he filled out and had delivered the next day to Susan Montminy, the employee health and workers' compensation specialist at the hospital.

The remainder of the employee's direct testimony concerned his treatment with Dr. L'Europa and his ability to return to work. At the time of his live testimony, the employee felt he could not perform the job duties of a cook at Roger Williams Medical Center because he was still having problems bending and standing for prolonged periods of time.

On cross-examination, the employee admitted that he knew that the Roger Williams Medical Center's policy required that all injuries should be reported to a supervisor immediately. He also acknowledged that he had followed that policy on at least seven (7) prior occasions when he injured himself, reported it immediately to his supervisor, and then headed directly to the emergency room at Roger Williams for treatment. When pressed on his failure to report the back injury, the employee stated that he initially thought he had only pulled a muscle, and he did not feel that it was serious enough to report.

Three (3) witnesses testified for the respondent. At the time of her testimony, Ms. Lynette Hie was no longer employed by Roger Williams Medical Center. In May 1997, she was their benefits coordinator which involved handling health insurance issues, leaves of absence, and other employee benefits matters. She testified that on May 29, 1997, she had two (2) conversations with the employee. The first conversation occurred at around 3:00 p.m. that day, after she had learned that Mr. George had sent in a doctor's note to excuse him from work for two (2) weeks. She informed him that he had used up his time allocated for leave of absence when he was out of work in 1996 due to a motor vehicle accident. She recommended that he contact his supervisor because he could be terminated from his position if he remained out of work for that period of time.

Within thirty (30) minutes, Ms. Hie received another call from the employee. In this second call, the employee inquired about what kind of leave time he would have if his claim was for worker's compensation. Ms. Hie inquired whether he had been injured and he informed her that he had been hurt on the job. She then told him that it was a totally different situation and that the employee would be out as long as the doctor said he could not work. She also asked him if he had filled out an incident report. When he responded in the negative, she advised him to come in as soon as possible to complete the report and turn it in to Susan Montminy, the health office nurse.

Ms. Hie had contemporaneous notes of her conversations with Mr. George which indicated the date, time and subject matter of their telephone calls. In

addition, after her conversations with the employee, she sent the employee a memorandum dated May 30, 1997 in which she reiterated their original conversation regarding the employee's lack of available time under the leave of absence policy and the possible termination of his employment. On June 30, 1997, Ms. Hie sent the employee a second memorandum stating that his leave of absence was considered worker's compensation leave and not medical leave time.

The second witness for the respondent was Ms. Susan Montminy. She testified that when she returned to work on Monday, June 2nd, after not working on Friday, May 30th, she had a voicemail from Ms. Hie advising her that Mr. George would be sending an incident report to her. She did receive the incident report that day. Ms. Montminy called Mr. George on June 4, 1997. Their conversation basically consisted of an explanation and discussion of the procedures for a workers' compensation claim.

Ms. Montminy testified that she was involved in formulating the personnel policies of Roger Williams Medical Center. She stated that these policies were made known to the employees through an orientation process and through staff meetings where materials, such as updated newsletters and pamphlets, would be provided. She stated that it was stressed to employees that all injuries should immediately be reported to their supervisor. If medical treatment was required, the employee would be sent to the emergency room in the hospital.

The final witness for the employer was Ms. Catherine Barton, the employee's supervisor. Ms. Barton stated that she was aware of the hospital's policy regarding the reporting of work-related injuries which stated that as soon as the incident/injury occurred, the supervisor was to be notified regardless of how minor it appeared to be. She agreed that if an incident occurred on May 25, 1997 as alleged by Mr. George, then he should have reported it to his brother Timothy, the acting supervisor at the time.

On May 27, 1997, Ms. Barton stated that the employee worked a full shift and she observed him on and off throughout the course of the day. She stated that he never explicitly expressed any discomfort to her and she did not see him grimacing while he performed his duties. In addition, she testified that they were short a cook that day so the employee's duties would have been increased. Ms. Barton also worked with Timothy George on May 27th and shared an office with him. She stated that he never mentioned anything to her about an incident on May 25th involving his brother.

Ms. Barton testified that on May 29, 1997, the employee worked the 8:00 a.m. to 4:30 p.m. shift. The employee approached her in the afternoon and asked if he could leave a little early to go to the doctor. She told him he could leave early as long as he was done with his work. She asked him what was wrong and if he was sick. He responded that he was not sick; but that he had just pulled a muscle or something and she thought he motioned to his leg.

Ms. Barton stated that she heard the employee's testimony about injuring himself when he lifted a soup pot and believes it to be untrue because the first time she heard about the soup pot was when the employee handed in the accident report, in which he described how he was injured and the date he reported it. She wrote a note about their May 28th conversation on the back of the accident report because she did not want to sign anything that stated that the injury was actually reported to her. In addition, Mr. George dated the report May 30, 1997. However, Ms. Barton believed that she received the report on June 2, 1997. Ms. Barton testified that because of these inaccuracies, she had Karen Peloquin, the director, sign the employee's accident report and Ms. Barton noted her concerns on the back of it.

The trial judge, citing inconsistencies in the employee's version of events, the delay in reporting the incident, and the conflicts in information provided by the employee on the initial intake form for Dr. L'Europa, concluded that the employee had not established that he sustained a work-related injury on May 25, 1997. Based upon the evidence presented, he found that the employee alleged that he was injured at work after he found out that he had no leave time left and would likely be terminated if he remained out of work.

The role of the Appellate Division in reviewing the factual findings of a trial judge is sharply circumscribed by statute. Rhode Island General Laws § 28-35-28(b) states, "The findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." The Appellate

Division is entitled to conduct a *de novo* review of the evidence only after a finding is made that the trial judge is clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996); Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986). Such review, however, is limited to the record made at the trial level. Whittaker v. Health-Tex, Inc., 440 A.2d 122 (R.I. 1982).

In support of his appeal, the employee offered eleven (11) reasons of appeal which essentially present two (2) issues to this panel. The first issue is whether the trial judge erred in finding the employee unworthy of belief and, therefore, concluding that any injury sustained by the employee did not occur at work.

It is well-settled that the trial judge is uniquely qualified to both assess the credibility of a witness and to determine what evidence to accept and what evidence to reject because he has the opportunity to observe the appearance of a witness, his attitude, and the manner in which he testifies. Davol, Inc. v. Aguiar, 463 A.2d 170, 174 (R.I. 1983). Credibility determinations made at the trial level are given great deference on appeal and will not be overturned absent a finding of clear error. Laganiere v. Bonte Spinning Co., 103 R.I. 191, 195, 236 A.2d 256, 258 (1967).

The employee contends that his testimony as to how he was injured, and the testimony of his physicians connecting his current condition to that incident were uncontradicted, and the trial judge was clearly wrong to disregard it. We recognize that a trial judge cannot reject uncontradicted testimony arbitrarily.

However, such evidence “may be rejected if it contains inherent improbabilities or contradictions that alone or in connection with other circumstances tend to contradict it.” Hughes v. Saco Casting Co, 443 A.2d 1264, 1266 (R.I. 1982). In addition, uncontradicted testimony may be rejected due to lack of credibility so long as the trial judge clearly explains the reasons for rejecting the testimony. Id.

Based upon our review of the record, we cannot say that the trial judge’s conclusions were clearly wrong. In fact, they are well supported by the evidence. The employee did not file an incident report regarding the alleged injury until at least May 30th, five (5) days after it occurred, despite the fact that over the last twelve (12) years he had promptly reported at least seven (7) other injuries. No one witnessed the incident and Mr. George did not tell anyone about it on May 25th.

The employee worked a full eight (8) hour shift on May 27th and most of his shift on May 28th. He still never mentioned to anyone that he had injured his back. On May 28th, when he asked Ms. Barton for permission to leave early to see his doctor, he asserts that he told her that he injured himself lifting a soup pot. Ms. Barton denied that he stated he had been hurt at work. Two (2) items lend credence to Ms. Barton’s testimony. First, if Mr. George reported to her that he was injured at work, an incident report would have been filled out on that day in accordance with company policy. Second, the employee could have been treated in the hospital’s emergency room in accordance with standard procedure, rather

than finding a doctor in the Yellow Pages and trying to set up an emergency appointment.

On the intake form completed by the employee for Dr. L'Europa's office, Mr. George left blank the answer to the question whether he was injured at work. The Report of a Compensable Injury form completed by Dr. L'Europa is dated May 30, 1997, two (2) days after the initial visit and after the employee found out that he could not take time out of work without being terminated from his job unless it was a worker's compensation injury.

On another form of the doctor's office, portions of it are handwritten by two (2) different people and other portions were filled in with a typewriter. The initial information regarding insurance lists Blue Cross/Blue Shield as the provider, but then next to that Complogic, the third party administrator for Roger Williams, is noted. An attorney's name is listed on the form, but the employee stated that he had not contacted an attorney in late May regarding his workers' compensation claim. Consequently, it is impossible to state with any certainty when any of the information on the form was recorded.

On May 29, 1997, the employee spoke with Lynette Hie on two (2) occasions. During the first conversation, he never mentioned that he would be out of work because he had injured himself on the job, even after she told him that he had no leave time left and could be terminated. Only in the subsequent conversation did Mr. George indicate that he injured himself at work four (4) days earlier.

The above noted facts obviously raise significant doubt as to the veracity of the employee's contention that he injured his back at work. There is nothing in the record which would provide any grounds for rejecting the testimony of the three (3) witnesses presented by the employer. The trial judge concluded that he did not believe the employee's assertion that he was hurt while lifting a soup pot at work. Based upon our review of the record, we find no basis to overturn his credibility determinations. Because the physicians' opinions regarding causation were entirely based upon the history provided by the employee, which was rejected on credibility grounds, their opinions must be rejected as well.

The second issue raised by the employee on appeal was that the trial judge was clearly wrong to find that the employee's failure to report his injury in a timely manner was willful and that the trial judge misapplied R.I.G.L. § 28-33-33, regarding the effect of inaccuracies in a notice of injury, to the detriment of the employee. However, after a careful review of the record, it is clear that R.I.G.L. § 28-33-33 was neither invoked as a defense at trial, nor referenced or analyzed by the trial judge in his decision or decree. The employee's claim was rejected on credibility grounds, not due to any technical deficiencies in the notice to the employer of the alleged injury.

For the foregoing reasons, we deny and dismiss the employee's appeal and affirm the trial court's decision and decree.

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.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

KENNETH W. GEORGE	)	
	)	
VS.	)	W.C.C. 97-05584
	)	
ROGER WILLIAMS MEDICAL CENTER	)	

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 face and the orders contained in a decree of this Court entered on March 15, 2001 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

____

ENTER:

____
Olsson, J.

____
Bertness, J.

____
Sowa, J.

I hereby certify that copies were mailed to Bernard P. Healy, Esq., and Francis T. Connor, Esq., on

____