STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
MICHAEL R. LORDEON	)	
	)	
VS.	)	W.C.C. 98-01149
	)	
ELXSI CORP. d/b/a BICKFORDS RESTAURANTS	)	

DECISION OF THE APPELLATE DIVISION

HEALY, J. This matter came on to be heard before the Appellate Division upon the petitioner/employee's appeal from the decision and decree entered by the trial judge. The case originated as the employee's Original Petition alleging that he sustained a work-related injury on November 28, 1997 and seeking incapacity benefits from November 28, 1997 to January 11, 1998. At the pretrial conference, the trial judge denied the petition and the employee claimed a trial. At the conclusion of that proceeding, the trial judge rendered a decision and entered a decree which contained the following findings and orders:

> "1. That the petitioner has failed to prove by a fair preponderance of the credible evidence that he sustained a work related injury on November 28, 1997 which arose out of and in the course of his [sic] employment with the respondent, connected therewith and referable thereto.
>
> "2. That any injury the employee sustained was not work related.

"It is, therefore, ordered:

"1. That the petition be denied and dismissed."

From this decision and decree the employee has duly claimed his right of appeal.

This case centers on the issue of the employee's credibility. The employee was thirty-five (35) years old at the time of his injury and was employed as an assistant manager by the employer, which operates a Bickford's Family Restaurant on Jefferson Boulevard in Warwick, Rhode Island. He had been working for the employer for three (3) years at the time of his alleged injury.

The employee was working the second shift on November 27, 1997, the Thanksgiving holiday. The store manager testified this was one of the slowest nights of the year.

As an assistant manager, the employee was required to fill in for various employees if the restaurant was short-staffed. This was the case on November 27, 1997 and as a result, the employee was required to clear tables. He testified that while he was busing tables, he felt a pulling sensation in his neck and lower back. It was painful, but not debilitating, and he continued working and completed his shift. He testified that he did not report his injury to the general manager, even though he knew that company policy required him to do so. Although he conceded that he had not prepared a formal report, he did claim he had mentioned his injury in passing to Frank Zabatta, the other assistant manager on duty with him that evening.

The employee left the restaurant at about 3:00 a.m. and went home to bed. When he arose the next morning, he "felt the same pain, much worse" and sought treatment at St. Joseph Hospital emergency room. He told the emergency room staff he had an onset of pain at work "but denies a specific injury." (Resp. Exh. #3) He underwent x-rays of the cervical spine and was given a cervical collar and pain medication. The employee was told to remain out of work. He testified that while he was at the hospital, he called Bickford's and spoke to assistant manager Joseph Celeti. The employee told Mr. Celeti he would not make his shift that night because he suffered an injury. According to Mr. Celeti, the employee did not attribute his injury to work. The following day the employee reported an injury to Earl Thompson, the general manager. Similarly, Mr. Thompson testified that the employee did not attribute his injury to a workplace accident.

The employee was evaluated by Dr. Randall Updegrove on December 3, 1997. The doctor diagnosed the employee as suffering from "cervicothoracic mild spasm and myofascial pain with possible underlying facet irritation." (Resp. Exh. #1, p. 13) However, Dr. Updegrove could not relate this condition to the employee's work:

> "Well, the reason for that opinion at that time was based on the fact that he had noted that he had no difficulties before he retired for sleep on that evening, that he was asymptomatic, and that he noted an abrupt onset of difficulties upon, upon executing a movement, that is rising from bed, and that subsequent to that he developed troubles or symptoms. Therefore, it did not appear to be any association between his activities he had performed prior to that time and those symptoms. And certainly that scenario for the onset of cervical pain such as he appeared to manifest is not an unusual one." (Resp. Exh. #1, p. 18-19)

Dr. Updegrove then referred the employee to Dr. Stanley Stutz. The employee told Dr. Stutz he had been injured while busing tables. The doctor's diagnosis was consistent with Dr. Updegrove's. However, Dr. Stutz testified that, based upon the history offered by the employee, he would relate the injury to the work activities.

Fortunately, the employee's recovery was uneventful, and Dr. Stutz cleared him to return to work without restrictions on January 7, 1998. The employee testified he did return, briefly, to Bickford's and then voluntarily left their employment.

At trial, the court heard from four (4) witnesses: the employee, assistant managers Joseph Celeti and Frank Zabatta, and general manager Earl Thompson. The court also reviewed the depositions and reports of Dr. Stanley Stutz and Dr. Randall Updegrove, and the reports of St. Joseph Hospital emergency room. The trial judge found the weight of the evidence was decidedly against the employee:

> "After reviewing the testimony of all parties, I believe that the credibility assessment must be resolved in favor of the petitioner's co-workers. I believe their testimony is supported by the history received by Dr. Updegrove and the Lady of Fatima Hospital that there was no specific incident which occurred at work. It appears that if the employee did indeed sustain a work related injury, with the knowledge of an assistant manager, he certainly would have made out a report as was company policy. To accept the employee's version of the facts would require this court to reject the testimony of three witnesses and the reports of two medical providers which all indicate that there was no specific incident at work which caused the injury. The record appears to be overwhelmingly in conflict with the petitioner's allegation and I must accordingly find so." (Tr. Dec. pp. 9-10)

The court then entered a decree denying the petition. The employee has duly claimed his right of appeal.

Pursuant to R.I.G.L. § 28-35-28(b), a trial judge's findings on factual matters are final unless found to be clearly erroneous. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). This review is more circumscribed when the trial court bases its determination on a credibility assessment. When the ultimate decision turns on a credibility determination, the court's findings should be given great weight upon review. Laganiere v. Bonte Spinning Co., Inc., 103 R.I. 191, 236 A.2d 256 (1967). Guided by these principles and cognizant of the legal duty imposed upon us, we have carefully reviewed the entire record of this proceeding and we find no merit in the employee's reasons of appeal. We, therefore, deny and dismiss the appeal and affirm the decision and decree of the trial judge.

We must first note the employee's counsel has withdrawn from this case and no other attorney entered an appearance for the employee. Furthermore, Mr. Lordeon did not appear at the oral argument. The docket indicates that the appellant had been notified his attorney had withdrawn, and had also received notice of the appellate argument. Nevertheless, the employee's counsel did submit five (5) reasons of appeal before he withdrew from further representation and therefore we will proceed to decide the matter based upon those reasons.

The employee's first three (3) reasons are general recitations that the decision and decree are against the evidence and against the law. As such they

lack the specificity required when a party seeks review of a trial decision. Bissonnette v. Federal Dairy Co., Inc., 472 A.2d 1223 (R.I. 1984). We, therefore, deny and dismiss the employee's first three (3) reasons of appeal.

The employee's fourth reason of appeal alleges the trial judge overlooked or misconceived "clear histories of a bussing incident" as the source of his back and neck pain. We disagree. The employee made no report of an injury at the time the incident occurred on November 27, 1997. This failure is particularly telling since as an assistant manager, he knew company policy required such a report. The assistant manager with whom he was working, Frank Zabatta, had no recollection of the employee injuring himself or claiming an injury. Joseph Celeti, another assistant manager, spoke with the employee the following day and was told by the employee that he did not know how he was injured. Finally, Earl Thompson, the general manager, testified that he had been told by the employee that he did not know how he was injured. The employee denied a specific injury when he presented at the St. Joseph Hospital emergency room seeking treatment and did the same when he saw Dr. Updegrove.

Dr. Stutz attributed the injury to the employee's work but conceded that he did so based upon the history given by the employee which he assumed to be accurate and credible. When he was presented with the history contained in Dr. Updegrove's notes, Dr. Stutz admitted it differed from the history he was given.

The trial judge found the employee's claim that he sustained a work-related injury was not worthy of belief. The testimony of a witness in a workers'

compensation proceeding is subject to the evaluation of the trial court, which may reject all or some of the witness' testimony as unworthy of belief. Delage v. Imperial Knife Company, Inc., 121 R.I. 146, 148, 396 A.2d 938, 939 (1979).

Thus, based upon the record before us, we cannot say the trial judge was clearly wrong when he found there was no credible evidence that the employee suffered a work-related injury. Therefore, the employee's fourth reason of appeal is denied and dismissed.

The employee's fifth and final reason of appeal alleges the trial judge was wrong to make a negative credibility assessment based upon the testimony of the three (3) coworkers. The employee argues that Mr. Zabatta, Mr. Celeti, and Mr. Thompson testified they had no recollection of the employee conversing about an injury at work rather than specifically recalling that the employee never stated that he was injured at work. We disagree.

Mr. Celeti, the assistant manager who spoke to the employee the night of November 28, 1997 when he called in sick, testified:

> "Q. Did you ask him what his problem was?
>
> "A. I asked him what happened, yes.
>
> "Q. Did you ask him what part of his body his problem was with?
>
> "A. No, he said he hurt his shoulder.
>
> "Q. Did you ask him whether or not it was anything that happened at work?
>
> "A. No.

"Q. All right. What did he tell you again?

"A. I don't know. I asked him what happened and his words were, I don't know." (Tr. p. 51)

Earl Thompson, the general manager, testified:

"Q. Now when Mr. Lordeon called you on Saturday morning, did he identify himself?

"A. Yes.

"Q. Tell us what the discussion was.

"A. He said that he was at--he had to go to the emergency because he hurt himself and that he--he was referred to a specialist and he wouldn't be in until Monday. He had to go see the specialist and he would call me Monday.

"Q. Did you ask him what happened?

"A. I asked him what happened and he said he didn't know." (Tr. pp. 55-56)

Mr. Zabatta simply stated that he was on duty with the employee the night of the alleged injury and had no recollection of the employee claiming any sort of injury.

Given the record before us, we cannot say the trial judge was clearly wrong when he found that the testimony of Mr. Celeti, Mr. Zabatta and Mr. Thompson offered no support for the employee's claim. Therefore, the employee's fifth and final reason of appeal is denied and dismissed.

For the aforesaid reasons, the employee's reasons of appeal are denied and dismissed and the decree appealed from is hereby affirmed.

In accordance with Sec. 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

Arrigan, C.J. and Morin, J. concur.

ENTER:

_____
Arrigan, C.J.

_____
Healy, J.

_____
Morin, J.

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before 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 29, 1998 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Arrigan, C.J.

_____
Healy, J.

_____
Morin, J.

I hereby certify that copies were mailed to Michael T. Wallor, Esq., and Michael Lordeon on

_____