STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT APPELLATE DIVISION

MARIAN WACH)
)
VS.) W.C.C. 98-03454
)
INDUPLATE, INC.)

DECISION OF THE APPELLATE DIVISION

BERTNESS, J. This matter is before the Appellate Division on the petitioner/ employee's appeal from a decree of the trial court denying the employee's original petition alleging upper airway irritation and occupational asthma which occurred on April 24, 1998, claiming total disability from April 27, 1998 and continuing, as well as dependency benefits for one (1) dependent child.

The petitioner has filed nine (9) reasons of appeal as follows:

> "1. The Trial Judge was in error as a matter of law in stating 'The Employee bears the burden of establishing that his condition and incapacity are the probable result of the conditions of his employment...,' when the Employee need only prove that the Employee's occupational disease and disability are due to the nature of his employment and was contracted in employment.
>
> "2. The Trial Judge was clearly wrong in not acknowledging that vapors, acids, and fumes were in the nature of Marion (sic) Wach's employment.
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> "3. The Trial Judge was clearly wrong in that exposure to vapors, acids, and fumes is in the nature of Marion (sic) Wach's employment and thereby qualifies as an

occupational disease pursuant to G.L.R.I. Section 28-34-2(28).

"4. The Trial Judge was clearly wrong in applying a standard of proof which relates to a traumatic incident rather than a lesser standard for exposure to an occupational disease from the nature of Marion (sic) Wach's employment.

"5. The Trial Judge overlooked the Employer's admission against interest by its General Manager, as testified by the Petitioner:

> A. He told me, 'Everything here is no good for you. There is a lot of chemicals here and they are not good for you.['] (T-25)

"6. The Trial Judge was clearly wrong in discounting the testimony of Dr. Settipane when Dr. Settipane could not identify which chemical 'caused his condition' (Decision, p. 9) where it was clear that many chemicals from the MSDS sheets and report of Dr. David Kern were respiratory irritants and in the nature of Marion (sic) Wach's employment.

"7. The Trial Judge overlooked the assessment of Dr. David Kern that '...Mr. Wach was suffering from upper airway irritational consequent to being exposed to various vapors and mists, such as chromic acid generated in the electroplating process,' which is in the nature of his employment.

"8. The Trial Judge was clearly wrong in overlooking the opinion of Dr. David Kern that the Petitioner was disabled at least from April 27, 1998, until July 1, 1998, from an occupational disease which was contracted in the nature of his employment.

"9. The Trial Judge erred in failing to appoint a mandatory impartial medical examiner pursuant to G.L.R.I. Section 28-34-5."

After carefully reviewing the record and the employee's reasons of appeal in this matter, we find that the trial judge committed no error. The appeal is

therefore denied and dismissed and the findings of fact and orders contained in the trial court decree are hereby affirmed.

Marian Wach worked for Induplate. His job involved removing plated parts from an oven to be polished and also removing parts from a dryer, placing them on trays for inspection, then boxing the parts and taking them to a shipping area. He began working for the employer in 1992 in its Lincoln facility. He was transferred to the North Providence facility in February 1998. The North Providence facility was involved in plating automobile parts. The plating area included tubs filled with chemicals. Mr. Wach worked approximately fifty (50) feet away from the plating tubs, but he would walk to within ten (10) or twenty (20) feet of them several times a day.

Beginning in April 1998, Mr. Wach began coughing at night and had trouble breathing. On April 23, 1998, the employee was instructed to wash plastic containers with water. He performed this job closer to the chemical tubs. Mr. Wach apparently wanted to return to the Lincoln facility for work, however, his request was denied. He received a layoff notice and sought medical treatment the following day. He began treating with Dr. Russell A. Settipane on May 5, 1998. He also treated with Dr. David G. Kern. Mr. Wach's coughing and breathing problems persisted after leaving work.

David Demers, the employee's supervisor, denied any knowledge of the employee's breathing complaints or coughing. He stated that all of the chemical tubs were equipped with exhaust blowers to draw the fumes outside. He

indicated that the ventilation is monitored by OSHA and the Narragansett Bay Commission and that the company has never been cited for any violations. Mr. Demers did admit that on April 23, 1998, Mr. Wach was cleaning trays at a sink using water to remove dirt and dust. The sink was closer to the plating area than where Mr. Wach normally worked. Mr. Wach told Mr. Demers that he no longer wanted to work at the North Providence facility but did not give him a reason. Mr. Wach was laid off from work on April 24, 1998.

Erin Falls, the company human resources director, offered Mr. Wach light duty employment on July 13, 1998. The job was for work at the Lincoln facility. Mr. Wach refused the job, claiming he was too ill.

The affidavit and one (1) report of Dr. David G. Kern were admitted as an employer's exhibit. The report dated July 1, 1998 simply indicates that Mr. Wach could return to work as an inspector at Induplate in the same area where he was working until the third week of April 1998.

The deposition of Dr. Russell A. Settipane was also admitted as an exhibit. Dr. Settipane first treated Mr. Wach on May 4, 1998. At that time, he complained of the onset of a cough occurring when he was exposed to a powder in the air at work. Dr. Settipane opined that Mr. Wach suffered from a probable cough asthma, triggered by workplace exposure. He recommended avoiding all exposures at the workplace. Dr. Settipane was unsure whether it was powder or a chemical in the air that aggravated the employee's asthma. He acknowledged that his opinions were based on the history given to him by Mr. Wach, and if that

history was different then his opinions could change. Dr. Settipane was unable to state whether any of the chemicals used at Induplate were actually airborne and caused the employee's symptoms. He admitted that there are patients who develop asthma with no specific cause.

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). The Appellate Division is entitled to conduct a *de novo* review only when 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)). Such review, however, is limited to the record made at trial. Vaz, supra (citing Whittaker v. Health-Tex, Inc., 440 A.2d 122 (R.I. 1982)).

The petitioner lists nine (9) reasons of appeal. In his first reason, he alleges that the trial judge erred in reciting the standard of proof necessary in an occupational disease case. The petitioner alleges that the trial judge erred in requiring the employee to show "that his condition and incapacity are the probable result of the conditions of his employment, not merely a possible consequence." (Dec. p. 11). The petitioner argues that he need only show that the "occupational disease and disability are due to the nature of his employment and was contracted in employment."

The petitioner appears to be relying on R.I.G.L. § 28-34-3, although no reference is cited. That section provides as follows:

> "If an employee is disabled or dies and his disability or death is caused by one of the diseases mentioned in the

> schedule contained in § 28-34-2, and the disease is due to the nature of the employment in which that employee was engaged and was contracted in, he...shall be entitled to compensation for his...disablement,..." (emphasis added)

What the petitioner overlooked is that he must establish that his disability is "caused by" the occupational disease. Natale v. Frito-Lay, Inc., 119 R.I. 713, 382 A.2d 1313 (1978). The standard of proof is by a fair preponderance of the evidence. Blecha v. Wells Fargo Guard-Co. Serv., 610 A.2d 98 (R.I. 1992); Mastronardi v. Zayre Corp., 120 R.I. 859, 862-63, 391 A.2d 112, 115 (1978).

In the instant petition, Mr. Wach was required to establish by a preponderance of the evidence that his disability was caused by "conditions which are characteristic of and peculiar to" his employment. R.I.G.L. §28-34-1(3). He needed to establish by way of medical testimony that his incapacity is the probable result of the conditions of his employment. Lovitt Foods, Inc. v. Veiga, 492 A.2d 1237 (R.I. 1985). For this reason, we find that the trial judge correctly recited the law. Therefore, the petitioner/employee's first reason of appeal must fail.

The petitioner/employee next argues that the trial judge was wrong in not acknowledging that "vapors, acids, and fumes were in the nature of" the employee's employment. We disagree. The trial judge carefully considered Mr. Wach's testimony that he worked approximately fifty (50) feet from the plating area and tubs with chemicals when he began experiencing symptoms. Moreover, she noted that the plating tubs are fitted with exhaust fans which draw the fumes

out to filters, and the ventilation and air quality is monitored on a regular basis by the appropriate government agencies. She also noted that the employee's testimony regarding the circumstances for leaving work was contradictory, in that the employee was not happy with his transfer to the North Providence facility. Moreover, she was presented with conflicting testimony from David Demers, who stated he has never smelled fumes coming from the plating tubs. This evidence, in combination with the fact that Dr. Settipane did not identify a specific cause for the employee's symptoms, and the fact that the employee worsened over time after leaving work, caused the trial judge to reject the petition. There was certainly enough evidence for the trial judge to find that the employee failed to prove that his disability was due to chemical exposure. For this reason, the employee's second reason of appeal must fail.

The petitioner's third, fourth and fifth reasons of appeal similarly concern the standard of proof and facts presented. Since the trial court found that the employee had failed to establish an exposure to fumes, the trial judge did not err in failing to find an occupational disease. The court was, therefore, justified in rejecting the employee's testimony concerning an alleged statement made to him by his general manager regarding chemicals.

In his sixth reason, the petitioner argues that the trial judge was wrong in discounting Dr. Settipane's testimony. As a general rule, uncontradicted medical evidence may be rejected if it contains inherent improbabilities or contradictions that alone, or in combination with other circumstances, tend to contradict it.

Hughes v. Saco Casting Co., 443 A.2d 1264 (R.I. 1982). In this case, the trial judge noted that Dr. Settipane's reports initially identified the employee's condition to be of "unknown etiology," although the doctor testified with "reasonable certainty" that the employee suffered from an occupational respiratory condition. The doctor relied on the employee's statements that glass, blasting powder and chemicals were in the air. The trial judge was justified in rejecting this testimony when she found that the plating vats have blowers or exhaust fans which pull the fumes out to filters and then outdoors, and that the air quality is monitored by government agencies. Moreover, she noted that the employee's condition has progressively worsened in spite of the lack of continued exposure, and that he had been treated in the hospital for hyperventilation. Consequently, there was sufficient evidence in the record upon which the trial judge could rely to reject the opinions of Dr. Settipane.

The petitioner's seventh reason of appeal alleges that the trial court overlooked Dr. Kern's assessment that the employee was "suffering from upper airway irritational [sic] consequent to being exposed to various vapors and mists, such as chromic acid generated in the electroplating process." However, the only report of Dr. Kerns which was in evidence before the trial judge was a report dated July 1, 1998, which simply states that Mr. Wach can return to work at Induplate in the same area where he was working in April 1998. There was no medical report presented concerning Mr. Wach's exposure. For this reason, the petitioner/employee's seventh reason of appeal must fail. For the same reason,

the employee's eighth reason of appeal must fail. There was no opinion presented by Dr. Kern concerning the cause of the employee's disability.

Finally, the petitioner/employee alleges that the trial court erred in failing to appoint an impartial medical examiner pursuant to R.I.G.L. § 28-34-5. We disagree. The trial court's decree was entered on November 26, 2002. Rhode Island General Laws § 28-34-5 was amended pursuant to P.L. 2001, ch. 256, § 5 and P.L. 2001, ch. 355, § 5. The amendments provide that the court "may" appoint an impartial physician in the case where an employee alleges he suffers from an occupational disease. This statute is viewed as procedural law and, therefore, must be given retroactive effect. Moretti v. City of Pawtucket, W.C.C. No. 01-05076 (App. Div. December 2, 2003). Since this matter was not decided until after the statutory amendment, the trial judge committed no error in failing to appoint an impartial examiner.

For the reasons stated, the employee's reasons of appeal are denied and dismissed and the decision and decree appealed from are hereby 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 Ricci, JJ. concur.

ENTER:

_____
Bertness, J.

_____
Connor, J.

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Ricci, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

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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 November 26, 2002 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

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ENTER:

_____
Bertness, J.

_____
Connor, J.

_____
Ricci, J.

I hereby certify that copies were mailed to Conrad M. Cutcliffe, Esq. and Ronald A. Izzo, Esq. on _____