STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

MARRIOTT c/o PROVIDENCE SCHOOLS	)	
	)	
VS.	)	W.C.C. 98-03489
	)	
CARMELO D'ANZI	)	

DECISION OF THE APPELLATE DIVISION

MORIN, J. This matter is before the Appellate Division on the appeal of the petitioner/employer from a trial judge's decision and decree on the employer's petition to review. The petition alleged that the employee's incapacity had ended, and that the employee committed fraud in violation of the provisions of R.I.G.L. § 28-33-17.2 and § 28-33-17.3. The trial judge agreed that the employee was no longer disabled and discontinued his weekly benefits. However, he concluded that the employer had failed to prove the fraud allegation. The employer has filed this appeal, arguing that the trial judge failed to properly apply the fraud statutes. After careful consideration of the arguments of the parties and a thorough review of the record, we affirm the conclusions of the trial judge and deny the employer's 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. See Diocese of Providence v. Vaz, 679 A.2d 879 (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.; Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I.

1986). Such review however, is limited to the record made before the trial judge. Vaz, supra, (citing Whittaker v. Health-Tex Inc., 440 A.2d 122 (R.I. 1982)).

Cognizant of this legal duty imposed upon us, we have carefully reviewed the entire record. For the reasons set forth, we affirm the trial judge's decision and decree.

The employee worked for the employer as a janitor in a Providence, Rhode Island high school. He was injured on October 10, 1997 when a steel trash can fell on his left foot. A Memorandum of Agreement documented his injury as "left foot inflammation," which resulted in partial disability beginning November 16, 1997.

In support of the fraud allegation, the employer offered the testimony and reports of Richard Delmastro and John Leonard, private investigators who were hired by the employer to conduct surveillance of the employee's activities. Mr. Delmastro testified he first observed the employee on March 19, 1998. On that occasion, he followed the employee into the St. Anthony's Society Club (hereinafter "St. Anthony's"),[1] where he saw the employee tending bar, taking food orders, serving lunch to customers, accepting payments and washing glasses. The employee was not always in sight during the surveillance,[2] neither on this particular date nor on other dates when he was observed in the club, but Mr. Delmastro stated when he was within sight he was never sitting down. He never, on any occasion, observed the employee simply sitting, eating, talking and playing cards.[3] When Mr. Delmastro first observed the employee on March 19th, he noticed a slight limp, but he never saw a limp again.

On March 26, 1998, Mr. Delmastro again entered St. Anthony's between the hours of noon and 2:00 p.m. and observed the employee performing the same activities he had witnessed

[1] St. Anthony's is a charitable organization that also functions as a club open to serve food and drinks to its members for a limited number of hours each day. Generally, non-members are permitted to walk in and eat during the lunch hours.
[2] He would occasionally go into a back room, possibly a kitchen.
[3] The employee testified these were the only activities he participated in at St. Anthony's.

on March 19. During the thirty (30) minutes he was inside St. Anthony's, Mr. Delmastro did not see the employee sit down at all. On three (3) more dates in April, Mr. Delmastro observed the employee in St. Anthony's undertaking the same activities as on his first visit. He observed the employee for twenty (20) to thirty-five (35) minutes each time and never saw him off his feet or walking with a limp. Photographs and video taken of the employee by Mr. Delmastro on certain days were admitted into evidence.

Mr. Leonard testified that he observed the employee on June 24, 1998 and August 3, 1998 at St. Anthony's tending bar, setting tables, taking orders and serving food. He never noticed the employee limping or sitting down and playing cards. Two (2) videos taken by Mr. Leonard were admitted into evidence. The investigators acknowledged that Mr. D'Anzi was not present at St. Anthony's every day that it was open. In addition, they never observed him performing any type of outdoor activity around his residence or elsewhere.

Dr. A. Louis Mariorenzi, an orthopedic surgeon who evaluated the employee at the request of the employer, testified that the employee limped when the doctor asked him to walk in front of him, but when the employee was not aware that the doctor was watching him, the limp disappeared. He indicated that Mr. D'Anzi told him that his only activities were watching television and shopping with his wife. The doctor concluded that the employee was capable of returning to his former employment as a janitor.

Two (2) members of St. Anthony's, Joseph Amoroso and Henry Iannonne, testified on behalf of the employee. Mr. Amoroso, the club president, testified that St. Anthony's has no employees and no member has ever been paid any wages by St. Anthony's. He explained that no one has a set schedule of hours to be at the club, but they all help out from time to time. Both members testified they have seen the employee tending bar at the club. They also agreed they

have noticed the employee walk with a limp, though sometimes it is more pronounced than others. They also stated that the employee often leans against the bar and may sit on a stool located right at the end of the bar.

Mr. D'Anzi was sixty-two (62) years old at the time this petition was being litigated. He arrived in the United States from Italy in 1963 and stayed until 1984, when he returned to Italy with his family. In 1990, he came back to the United States and began working for the Providence School Department. He has some difficulty reading, writing, and understanding English and he speaks somewhat broken English. The employee acknowledged that he represented to the doctors and the employer that he has not worked since the October 1997 injury. He downplayed his activities at St. Anthony's, stating that he was sitting most of the time and only occasionally served food or drinks. He denied being on his feet for any length of time. He asserted that he never received any wages from the club or kept tips left by customers.

Mr. D'Anzi testified that he limps all the time, but some days it is worse than others and sometimes it is not noticeable if he takes medication.

In his decision, the trial judge dismissed the fraud allegation due to a lack of evidence establishing that the employee received any wages. The employer acknowledged that it was unable to prove a failure to report earnings, however, it contends that the employee committed fraud by intentionally misrepresenting his condition and his activities to the physicians and the employer. The employer is requesting that the court order the forfeiture of weekly benefits due to the intentional misrepresentation.

In its petition, the employer alleged that the employee committed fraud under the provisions of R.I.G.L. §§ 28-33-17.2(h) and/or 28-33-17.3. Section 28-33-17.2 is entitled "Employee's affirmative duty to report earnings – Penalties for failure to provide earnings report

– Civil and criminal liability." Subsections (a) through (g) explain the employee's duty to report earnings and various procedures for filing reports in certain situations. Subsection (h) states as follows:

> "Any employee who by any fraudulent means obtains or attempts to obtain workers' compensation benefits, whether by failure to report earnings, falsification of the earnings report document, or intentional misrepresentation, may forfeit the right to any future weekly workers' compensation benefits as determined by the workers' compensation court."

It is the employer's contention that the employee made statements that intentionally misled the employer, the doctors and the court, and that these statements were "obviously motivated by a desire to continue to receive benefits." (Employer/Appellant's Statement of the Case, p.2) However, § 28-33-17.2 deals with fraud and intentional misrepresentations in the context of the employee's duty to report earnings. The trial judge accepted the testimony of the employee, Mr. Amoroso, and Mr. Iannonne that St. Anthony's had no employees and did not pay Mr. D'Anzi any wages. The employer's private investigators were unable to produce any evidence that the employee received any wages or payment of any kind from St. Anthony's. There is nothing in the record to establish that the employee falsified the earnings report he submitted or that his assertion that he did not receive any wages or other type of remuneration from St. Anthony's was an intentional misrepresentation. Given these facts we cannot say the trial judge was clearly wrong in refusing to forfeit the employee's right to future benefits pursuant to R.I.G.L. § 28-33-17.2(h).

Rhode Island General Laws § 28-33-17.3(b)(1) discusses the criminal liability of a person who willfully or knowingly makes a false statement or representation in order to obtain or continue weekly benefits. See R.I.G.L. §§ 28-33-17.3(b)(1)(i) and 28-33-17.3(b)(1)(ii). There is more latitude for a finding of fraud under this statute than R.I.G.L. § 28-33-17.2 because it

prohibits knowingly making false statements in the course of pursuing benefits, and is not limited to only intentional misrepresentations regarding the reporting of earnings.

This leads us to our narrow focus on this appeal -- did the trial judge commit error by failing to discuss whether the employee's statements to his doctors and to the court regarding his condition and limited activities violated the broader statute, R.I.G.L. § 28-33-17.3, after finding no fraud under § 28-33-17.2. An employee is under a continuing duty, once disability is established, to be truthful with regard to their symptoms and condition and to not exaggerate their symptoms in order to continue to receive benefits. Machado v. Leviton Mfg. Co., W.C.C. No. 97-05010 (App. Div. 7/8/99), *citing* Restrepo v. Standard Uniform, W.C.C. No. 91-13203 (App. Div. 1994) and Kenyon Piece Dyeworks v. Hargraves, W.C.C. No. 91-01656 (App. Div. 1992).

The employer would like this case to fall in line with Machado where we remanded for failure to address issues of fraudulent misrepresentation, the same argument the employer lays out in this case. However, the two cases are easily distinguished. In Machado, the trial judge failed to address the fraud issue, finding it to be irrelevant because the employee was already receiving benefits rather than attempting to obtain benefits. Like the employee in Machado, Mr. D'Anzi is looking to keep benefits, not obtain benefits, but in the present case, the trial judge addressed the fraud issue.

Certainly, the fraud statute is important to preserve the integrity of this court and protect the reputation and rights of those employees who come before us seeking benefits for injuries that were honestly incurred. But, we must also note that the statutes relied upon by the employer explicitly require intentional, willful, or knowing misrepresentations. Though he does not refer to intent in his written decision, in addressing the employee's motion to delay entry of the decree

for the purpose of including a counsel fee for successfully defending against the fraud allegation, the trial judge said:

> ". . . In my position, I'm satisfied that the company didn't come close enough to the fraud issue. There were a lot of elements missing in the fraud. I think I'm dealing more with just a man who probably isn't the most astute individual in words and he is associating with a club, which is run by a religious society, as people want to do in the old days, when they came from the old country and I think it is somewhat foolish to be hanging around, doing what he was doing, but I really don't think there was the intent to deceive or woeful [sic] intent to commit a fraud upon this system." (Emphasis added.) (Tr. p. 158)

This statement, though not incorporated into the trial judge's written decision on the merits, is on the record, in evidence before us, and is indicative of the trial judge's frame of mind as he ruled on the fraud issue. It is clear from this statement that the trial judge did not believe the requisite state of mind was present for the employee to defraud the employer or the court. Also, he was analyzing this issue from more than the one (1) angle that was reflected in his decision. Clearly, he did not believe that the employee had intentionally misrepresented his condition or his activities. Given this statement, we do not believe the trial judge ignored the questions raised by the employer on appeal in making his determination on the fraud allegation. Accordingly, we do not find that the trial judge erred in failing to forfeit the employee's potential future benefits (his weekly benefits were discontinued pursuant to a finding in this case that his incapacity had ended) or failing to find criminal liability under the workers' compensation statutes.

For the reasons set forth above, we affirm the decision and decree of the trial judge and deny and dismiss the employer's reasons for appeal.

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

Healy, C.J. and Connor, J. concur.

ENTER:

_____
Healy, C.J.

_____
Morin, J.

_____
Connor, 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/employer and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

1. That the findings of fact and the orders contained in a decree of this Court entered on September 9, 1999 be, and they hereby are, affirmed.

2. That a counsel fee of One Thousand and 00/100 ($1,000.00) Dollars is awarded to the law firm of Coia & Lepore, Ltd. for their successful defense of the employer's appeal in this matter.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Healy, C. J.

_____
Morin, J.

_____
Connor, J.

I hereby certify that copies were mailed to Mark P. McKenney, Esq., and Alfredo T. Conte, Esq., on _____