STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

JAMES G. WELCH	)	
	)	
VS.	)	W.C.C. 99-01503
	)	
MURDOCK WEBBING CO., INC.	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division in connection with an order directing the parties to appear and show cause why the appeal in this matter is not in order for summary disposition. After hearing the arguments of counsel and reviewing the record, the panel finds that cause has not been shown and the appeal may be decided at this time.

The employee was paid weekly benefits for a brief period of time pursuant to a decree entered on January 12, 1984 in W.C.C. No. 82-03263. In that decree, it was found that he sustained an aggravation of a preexisting back injury on February 2, 1982 and was totally disabled from the date of injury until May 10, 1982. On March 16, 1999, the employee, acting *pro se* filed this Employee's Petition to Review alleging that he had not received any benefits for seventeen (17) years and the insurer had only paid four (4) of his medical bills. The petition

was denied at the pretrial conference on April 7, 1999 and the employee claimed a trial in a timely manner.

Thereafter, the employee obtained counsel to proceed with his claim. The petition was amended on December 11, 2000 to include allegations that the employee suffered a return of incapacity on January 1, 1983, that the employer refused to provide or pay for necessary medical services, and that the employer refuses to give written permission for major surgery. On June 12, 2002, the petition was amended again by stipulation to allege a return of incapacity beginning February 1, 1984 and a return of incapacity beginning April 1, 1996.

At the conclusion of the trial, the trial judge denied and dismissed the employee's petition after finding that he failed to prove by a fair preponderance of the evidence that he sustained any return of incapacity as a result of his February 2, 1982 work injury and that he had offered no evidence regarding the allegation that the employer refused to provide or pay for necessary medical services or surgery. The employee has filed a claim of appeal from that decision and decree. After careful review of the record in this matter, we deny the employee's appeal and affirm the findings and orders of the trial judge.

The employee was seventy-six (76) years old at the time of his testimony in December 2000. He testified that in 1982 he was employed by the respondent as a weaver which required him to draw ends, put little bobbins in the loom and bend and reach over the harness of the looms. The employee performed these tasks seven (7) days a week for eight (8) hours a day. The employee stated that

these activities aggravated his back. He indicated that since his first back injury (prior to 1982), his back has been "haywire" and has progressively worsened.

Mr. Welch was out of work from February 2, 1982 to May 10, 1982 due to problems with his back. He went back to the company in May 1982, but was told that the department he had worked in was closing and he was terminated. The employee collected unemployment compensation for a year while unsuccessfully trying to find work. After his unemployment ran out, he began collecting Social Security retirement benefits.

The employee introduced the deposition testimony and reports of Dr. Jason N. Miller and Dr. Lawrence Goodstein into evidence. Dr. Goodstein, a chiropractor, evaluated the employee for the first time on August 4, 2000. At that time, Mr. Welch informed the doctor that his back condition was due to repetitive stress on his back as a result of weakness in a chair he had to sit on at work. After conducting a physical examination, Dr. Goodstein concluded that the employee's current condition was the result of the 1982 injury and that he was partially disabled.

On cross-examination, the doctor acknowledged that he only had reports of prior treatment from Dr. Woo, an acupuncturist who treated the employee from 1994 to 1999. He also admitted that he was not aware of the specific details of the employee's job duties in 1982. Dr. Goodstein agreed that some portion of Mr. Welch's condition was due to his age. The doctor stated that he was also treating the employee for neck complaints.

Dr. Miller, a chiropractic physician, took over the treatment of the employee from Dr. Goodstein on December 12, 2001. Dr. Miller had Dr. Goodstein's notes available to him as they worked in the same office. The doctor admitted that he did not know exactly what the employee did as a weaver; however, he opined that absent any prior or subsequent trauma, the employee's condition was due to his activities at work in 1982. On May 4, 2002, Mr. Welch underwent an MRI study of the lumbar spine which revealed only mild diffuse degenerative disc disease.

At the end of the trial, the parties entered a stipulation agreeing that the last payment for medical services rendered to the employee was made on September 19, 1995 to Dr. John Thayer. The trial judge evaluated the evidence and concluded that Dr. Goodstein and Dr. Miller lacked an adequate foundation to render expert opinions as to the cause of the employee's condition. In addition, neither of the doctors could state whether he was disabled as of 1983, 1984, or 1996, as alleged in the petition, because they only began treatment in 2000 and 2001. He further noted that the employee had voluntarily retired and removed himself from the competitive labor market.

The role of the Appellate Division in reviewing findings of fact is sharply circumscribed by statute. Rhode Island General Laws §28-35-28(b) states that, "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 was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996); Grimes Box Co., v. Miguel, 509 A.2d 1002, 1004 (R.I. 1986).

The employee has filed three (3) reasons of appeal. The first two (2) reasons raise essentially the same issue - the trial judge's rejection of the medical testimony based on the doctors' failure to obtain a complete and accurate description of the employee's job duties and their failure to obtain adequate information as to the "mechanism" of the employee's first and second injuries. The primary issue in this case was whether any incapacity in 1983, 1984, 1996, or 2000, was related to the work injury sustained by the employee on February 2, 1982.

The history recorded by Dr. Goodstein and Dr. Miller was rather sparse. Only one (1) of them indicated that Mr. Welch actually injured his back for the first time in 1961. They were unaware of how long he was out of work due to the injury in 1982, or whether he had ever returned to work since then. They both acknowledged that they had limited information as to the specific job duties the employee performed as a weaver, although they stated there was some bending and reaching. Dr. Goodstein believed the injury in 1982 occurred due to weakness in a chair the employee sat on at work, while Dr. Miller seemed to relate it to the general repetitive work activities. None of the doctors had any information as to the exact nature of the employee's condition at the time of the injury or in May 1982 when he was deemed capable of returning to work. The

only medical records made available to the doctors were some records of Dr. Woo, an acupuncturist, which ended in 1994.

Both of the doctors acknowledged that the employee's advanced age contributed to his condition. Dr. Miller testified that the degenerative changes shown on the MRI study were likely a result of the aging process.

The facts of this case alone set up a significant hurdle which the medical evidence must overcome. The employee was out of work for about three (3) months as a result of the 1982 injury. That "injury" was not a traumatic incident, but rather was described as an aggravation of a preexisting back problem. The employee initially alleged a return of incapacity in 1983, 1984 or 1996. No medical evidence was presented which correlated with any of those dates. So the employee was left with trying to prove that a return of incapacity in 2000 is related to an aggravation of a preexisting condition which occurred eighteen (18) years ago.

Considering these facts and the doctors' lack of specific and accurate information as to the employee's job duties, the mechanism of the 1982 injury, and his activities and condition since 1982, we find that the trial judge was not clearly wrong in concluding that the opinions of Dr. Goodstein and Dr. Miller lacked foundation and were not persuasive on the issue of causation.

In his final reason of appeal, the employee argues that the trial judge was wrong to find that the employee retired voluntarily where the employee's uncontradicted testimony indicated that he had been forced to retire due to his

work. The employee cites Rocha v. State, 689 A.2d 1059 (R.I. 1997), in support of his contention. The employee asserts that his uncontradicted testimony was that he was out of work and receiving worker's compensation benefits in 1982, collected unemployment benefits after he was laid off, and was forced to retire when no one would hire him because he had been on workers' compensation. We find no merit in his argument.

It is well-established that when an employee voluntarily leaves the work force and surrenders the capacity to earn wages, he is not entitled to workers' compensation benefits for any incapacity which arises thereafter. Mullaney v. Gilbane Bldg Co., 520 A.2d 141, 143-144 (R.I. 1987). In the present case, the employee's incapacity ended and he attempted to return to work. It is unclear whether he worked for a short time before being laid off or was told that he was laid off at the time of his return. Mr. Welch collected unemployment benefits for a year while unsuccessfully searching for work. He testified that no one would hire him after they found out that he had been on workers' compensation for several months. The employee, then at an eligible age, opted to retire and receive his Social Security benefits. He never looked for work thereafter.

The present case is clearly distinguishable from the facts in Rocha v. State, *supra*. In Rocha, medical and lay testimony was presented which established that the employee suffered a return of incapacity prior to her decision to retire. In the present matter, the employee collected unemployment benefits which would require a representation that he was capable of working. He testified that he

actually looked for work, but was unsuccessful in locating another position. In addition, there was no medical evidence presented that he was physically unable to work due to the effects of the work injury at the time of his retirement.

Based upon the facts of this case, we would apply the reasoning of the Rhode Island Supreme Court enunciated in Perlman v. Philip Wolfe, Haberdasher, 729 A.2d 673 (R.I. 1999). In Perlman, the Court stated that the employee bears the burden of proving that his absence from the work force is not voluntary, i.e., not due to retirement or an unwillingness to work. Rather, the employee must establish that it was caused by an inability to work due to the effects of the work injury, or the employer's refusal to allow the employee to return to work, or an inability to secure employment after a reasonable period.

As noted above, there was no medical evidence to indicate that the employee was physically incapable of working at the time of his retirement, apparently some time in 1983. There is no evidence to support a contention that the employer unreasonably did not allow the employee to return to work. The employee stated that he looked for work during the year he was receiving unemployment benefits. He noted that he "collected security for a whole year and once you put it on the computer, nobody will hire you." (Tr. p. 17) There is no clear statement as to the extent of the efforts made to find work or for how long those efforts were made. Consequently, we must agree with the trial judge's finding that the employee voluntarily removed himself from the work force many

years ago and is, therefore, not entitled to workers' compensation benefits for an alleged return of incapacity years after his retirement.

For the reasons set forth above, we deny and dismiss the employee's appeal 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

Bertness and Connor, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Bertness, 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/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 October 11, 2002 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Olsson, J.

_____
Bertness, J.

_____
Connor, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq., and Conrad M. Cutcliffe, Esq., on _____