STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

)

MARILYN PRATT

)

VS.)

W.C.C. 99-02019

)

STANLEY BOSTITCH

DECISION OF THE APPELLATE DIVISION

HEALY, J. This matter came to be heard before the Appellate Division upon the petitioner/employee's appeal from the decision and decree denying the employer's petition for benefits. This matter was heard as an Employee's Original Petition for benefits alleging a loss of hearing as a result of her employment with Stanley Bostitch. The alleged injury date set forth in the petition is November 23, 1998.

The trial court denied and dismissed the employee's petition on several grounds. The court found that the employee left her place of employment [Stanley Bostitch] on November 1, 1993, and she did not file the instant petition until April 12, 1999; and that the period of limitations found in R.I.G.L. § 28-35-57 had run long prior to the filing of the petition. He also held that there had been a complete failure of medical proof in this matter; and that the loss of use calculation required by the Rhode Island Workers' Compensation Act § 28-33-19(4)(iv) had not been followed. From that decision and decree the instant appeal followed.

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). Cognizant of this legal duty imposed upon us, we have carefully reviewed the entire record of this proceeding. For the reasons set forth, we find no merit in the employee's appeal; therefore, affirm the trial judge's decision and decree.

The Rhode Island Supreme Court has long held that the Workers' Compensation Appellate Division may decide only those questions of law properly raised on appeal Bissonnette v. Federal Dairy Co., Inc., 472 A.2d 1223, 1226 (R.I. 1984). The justices have frequently stated that the Appellate Division, "generally may not consider an issue unless the issue is properly raised on appeal by the party seeking review." Falvey v. Women and Infants Hospital, 584 A.2d 417, 419 (R.I. 1991). In order for issues to be properly before the Appellate Division, the statutory requirements of R.I.G.L. § 28-35-28 must be satisfied. The pertinent language of R.I.G.L. § 28-35-28 mandates, "…the appellant shall file with the administrator of the court reasons of appeal stating specifically all matters determined adversely to him or her which he or she desires to appeal…" This Tribunal is without authority to consider reasons of appeal that fail to meet the statutorily required level of specificity. General recitations that a trial judge's decree was against the law and the evidence fail to meet the specificity requirements of R.I.G.L. § 28-35-28. Falvey, 584 A.2d 417 (R.I. 1991).

Thus, the employee's stock reasons of appeal: 1. "The Decree is against the law."; 2. "The Decree is against the evidence."; and 3. "The Decree is against the law and the evidence and the weight and sufficiency thereof." fail to meet the required standard of specificity. Accordingly, we deny and dismiss employee's reasons of appeal numbers 1, 2, and 3.

The employee next appeals the trial judge's finding that the statute of limitations found in R.I.G.L. § 28-35-57 had run prior to the filing of the instant petition. In reaching that conclusion, the trial judge determined that the employee had filed this instant petition on April 12, 1999 and that she had ceased her employment with Stanley Bostitch on or about November 1, 1993. The trial judge also noted that it was clear that the employee had no longer been exposed to machinery noise at Stanley Bostitch subsequent to November 1, 1993. He went on to discuss the period of limitations and held that "it is abundantly clear that the statute time frames have long since run."

In considering this issue, it is important to note that filings in the Workers' Compensation Court are controlled by a statute of repose. The Rhode Island Supreme Court has held that unlike other periods of limitations, those time frames specified in the Workers' Compensation Act, particularly § 28-35-57, are considered statutes of repose. See Ponte v. Malina Company, 745 A.2d 127, 133 (2000); Salazar v. Machine Works, Inc., 665 A.2d 567, 568 (1995). A "statute of limitations" bars a right of a action unless the action is filed within a specified period after an injury occurs whereas a "statute of repose" terminates any right of action after the applicable time period elapses irrespective of whether there has been a discoverable injury as yet. Ponte, 745 A.2d 127, 133 (R.I. 2000). It is, therefore, the employee's burden to demonstrate that the petition was filed

within the relevant time frames. The facts in the present matter are precisely to the contrary. As noted, the last exposure to harmful noise in the employ of this respondent was, at the latest, November 1, 1993, the day she ceased employment. The petition was filed on April 12, 1999, over five (5) years later. In the absence of some additional evidence, the inescapable conclusion is that the employee has failed to satisfy her burden of persuasion in showing that her petition was filed within the time limitations of R.I.G.L. § 28-35-57. Therefore, the trial court's decision and decree should not be disturbed.

The appellant also claims that the facts and history of her claim established the causal nexus between her employment with Stanley Bostitch and her hearing loss. Further, the petitioner refers to "competent medical evidence" as establishing the existence and cause of her hearing loss. Under the holding in Parenteau v. Zimmerman Eng'g., 111 R.I. 68, 299 A.2d 168 (1973), the trial judge is entitled to elect one expert opinion over the other when presented with conflicting, competent opinions. As long as the medical opinion relied upon is deemed competent, the judge's choice of which expert to base the decision on should not be disturbed. In the instant petition, the trial judge relied upon the opinion of the court appointed impartial expert, Dr. James J. Murdocco, and two experts presented by the employee, Dr. Charles Faber and Mary Kay Uchmanowicz, M.S., an audiologist. Neither party has challenged the competency of any of the medical experts who testified as to the causal relationship of Ms. Pratt's hearing loss. Therefore, because the trial judge relied on three competent medical experts to find that there has been a complete failure of medical proof establishing a causal nexus between the petitioner's hearing loss and her employment at Stanley Bostitch, the trial judge's finding will not be disturbed.

The employee is also challenging the constitutionality of R.I.G.L. § 28-33-19(4)(iv) under the equal protection clauses of the Rhode Island and United States Constitutions. Article 1, section 2, of the Rhode Island Constitution provides in pertinent part: "No person shall be deprived of life, liberty or property without due process of law, nor shall any person shall be denied equal protection of the laws." The Fourteenth Amendment of the United States Constitution provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. In re Advisory Opinion To The Governor (Rhode Island Ethics Commission-Separation of Powers), 732 A.2d 55, 62 (R.I. 1999); City of Pawtucket, 622 A.2d 34, 44; Kennedy v. State, 654 A.2d 708, 710 (R.I. 1995); Payne & Butler v. Providence Gas Co., 31 R.I. 295, 315, 77 A. 145, 153 (R.I. 1910).

Traditionally, the Rhode Island Supreme Court's evaluation of legislative enactments has been extremely deferential. The Supreme Court has held such enactments unconstitutional only when the legislation at issue must palpably and unmistakably be characterized as an excess of legislative power. City of Pawtucket, 622 A.2d at 44; Kennedy, 654 A.2d at 711. Specifically, the Rhode Island Supreme Court will not invalidate a legislative enactment unless the party challenging the enactment can prove beyond a reasonable doubt that the statue in question is repugnant to a provision in the constitution. City of Pawtucket, 622 A.2d at 45; Gorham v. Robinson, 57 R.I. 1, 7, 186 A. 832, 837 (R.I. 1936). "The party challenging the constitutional validity of an act carries the burden of persuading the court that the act violates an identifiable aspect of the Rhode Island or United States Constitution." Newport Court Club Associates v. Town

Council of Middletown, 800 A.2d 405, 409 (R.I. 2002). Thus, this court must begin its constitutional review with the understanding that legislative enactments are presumed to be valid and constitutional. Newport Court Club Associates, 800 A.2d 405, 409 (R.I. 2002). Moreover, we must "make every reasonable intendment in favor of the constitutionality of a legislative act, and so far as any presumption exists it is in favor of so holding." City of Pawtucket, 622 A.2d at 45; (quoting State v. Garnetto, 75 R.I. 86, 94, 63 A.2d 777, 781 (1949).

In assessing whether an enactment violates the equal protection guarantees of the Rhode Island and United States Constitutions, the Court "must examine both the nature of the classification established by the act and the individual rights that may be violated by the act." Newport Court Club Associates, 800 A.2d at 415; Boucher v. Sayeed, 459 A.2d 87 (R.I. 1983). "If a statute either infringes upon fundamental rights or results in the creation of a suspect classification, the statute must be examined with strict scrutiny." *Id.* Conversely, legislation that neither implicates a suspect class nor infringes upon a fundamental right is subject to rational-basis review. Id. (citing City of Cleburne, Tex v. Cleburne Living Center, Inc. 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313, 320 (1985); Newport Court Club Associates, 800 A.2d at 415; In re Advisory Opinion to the House of Representatives, 519 A.2d 578, 583 (R.I. 1987).

In the case at bar, the petitioner is challenging the constitutionality of R.I.G.L. § 28-33-19(4) under principles of equal protection. The brief filed in support of Ms. Pratt's constitutional challenge reads in pertinent part, "Petitioner submits that the R.I.G.L. § 28-33-29 impermissibly differentiates between injured workers and injured workers with hearing loss…" (Pet.'s brief p. 7). (Although the petitioner's attorney cites the statute

dealing with "exercise of rights or privileges by guardian, conservator, or next of friend" when advocating his client's due process claim, this panel concludes that the statute being challenged is in fact R.I.G.L. § 28-33-19(4)). The petitioner argues that R.I.G.L § 28-33-19(iv) provides specific compensation benefits for loss of hearing due to industrial noise and the formula set forth in said statute is unworkable. She asserts that the formulae in the statute unfairly treat employees with hearing loss differently from employees who suffer other types of loss."

The petitioner has failed to present either evidence or argument to demonstrate that she is a member of any recognized suspect class. A suspect class is one "saddled with such disabilities, subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 28, 93 S.Ct. 1278, 1294, 36 L.Ed.2d 16, 40 (1973). Since the petitioner has failed to establish that she is a member of a suspect class, R.I. Gen. Laws § 28-33-19(4)(iv) will be analyzed under a rational basis review.

A review of the statute unmistakably demonstrates a rational basis for the distinction. Hearing loss is evaluated in an entirely different manner than other work-related illnesses or injuries. The insidious onset of the condition and the absence of a single identifiable traumatic event distinguishes claims of this nature from other illness or injury. In most occupations, a partial loss of hearing acuity will not render the employee physically incapable of work. In order to provide some compensation to an affected employee, a distinction must be drawn between the hearing loss case and traditional work related injuries. Thus, the different treatment is appropriate and rational.

Petitioner also raises a constitutional challenge to the statute on a theory that it denies her right to equal access to the courts under the Rhode Island Constitution. Generally, fundamental rights are those rights which have their source, explicitly or implicitly, in the Constitution. Plyler v. Doe, 457 U.S. 202 216, 217 n. 15, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982). Article 1, § 5 of the Rhode Island Constitution provides: "Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which may be received in one's person or character." However, the right to bring a claim before the courts of the State of Rhode Island is not absolute.

It is well settled that legislatures may enact reasonable limits on parties' rights to have their claims adjudicated by the courts. U.S. v. Kubrick, 444 U.S. 111, 125, 100 S.Ct. 352, 361, 62 L.Ed.2d 259, 271 (1979). The Rhode Island Supreme Court has held Article 1, Section 5 of the Rhode Island Constitution should not be interpreted to bar the General Assembly from enacting laws that limit or place a burden upon a party's right to bring a claim in our courts. Dowd v. Rayner, 655 A.2d 679, 683 (R.I. 1995); Kennedy v. Cumberland Engineering Co. Inc., 471 A.2d 195, 198 (R.I. 1984). "Such limits or burdens violate the constitutional protection mandated by Article 1, § 5, only when statutes "prohibit court access absolutely for a generally recognized claim to a class of plaintiffs." Dowd, 662 A.2d at 683 (quoting, Kennedy, 471 A.2d at 198). (Emphasis added). However, the Legislature may place "permissibly * * * reasonable limits or burdens on the parties' right to have their claims adjudicated by the courts." Id.

In cases of this nature, R.I.G.L. § 28-33-19(4)(iv) provides standards by which occupational hearing loss must be evaluated. It should be noted that this statute was

amended by the General Assembly in July of 2001 in an attempt to better reflect current medical standards. In passing on the revisions to the statute, the General Assembly specifically chose to make the revised provisions and amendments operative for any occupational hearing loss that occurs on or after September 1, 2003. The legislature drew a specific distinction for cases involving traumatic (as opposed to occupational) hearing loss when it held that the revised statute would cover acuity hearing loss related to a single event immediately upon passage. R.I.G.L. § 28-33-19(4)(iv). However, until September 1, 2003, claims for occupational hearing loss, such as the type Ms. Pratt alleged, are to be evaluated and determined by the previous version of the statute. The General Assembly chose to make the new provisions of the statute effective upon a future date. This is unmistakably within their authority and will not be disturbed by this court. "The policy questions raised by the statute, and the question whether this statue is wise or unwise, are not for this court to determine. Those questions would better be addressed to the General Assembly which, under our system of government, is charged with the duty and responsibility of passing on the wisdom of such legislation." Hazard v. Howard, 110 R.I. 107, 111-112, 290 A.2d 603, 606 (R.I. 1972).

Ms. Pratt was afforded the opportunity to meaningfully pursue a remedy through the Workers' Compensation Court. Unfortunately, her medical witness was unable to determine a percentage of hearing loss in conformity with the measurements set forth in the previous version of R.I.G.L. § 28-33-19(4)(iv). The petitioner was not denied access to the courts nor was she denied the opportunity to meaningfully pursue a remedy. The fact that the General Assembly chose to revise the provisions of § 28-33-19(4)(iv) is of no moment particularly since they chose to make those provisions effective

prospectively. It is not appropriate for the Appellate Division to determine the wisdom of the General Assembly's clear, unmistakable legislative intent to make revised provisions of a statute effective upon a date in the future.

Consequently, the petitioner has not satisfied her burden of proof to overcome the presumption that statutes passed by the General Assembly are valid and constitutional. Supra. She has failed to demonstrate to this panel that the passage of R.I.G.L. § 28-33-19(4)(iv) could palpably and unmistakably be characterized as an excess of legislative power.

Therefore, we cannot hold that the trial judge was clearly erroneous. For the aforesaid reasons, the employee's reasons of appeal are hereby denied and dismissed and, therefore, affirm the trial judge's decision and decree.

In accordance with Sec. 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, copy of which is enclosed, shall be entered on

Olsson and Connor, JJ. concur.

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Healy, J.

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Olsson J.

_____
Connor, J.

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STANLEY BOSTITCH)

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 April 5, 2001 be, and they hereby are affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Healy, J.

_____
Olsson, J.

_____
Connor, J.

I hereby certify that copies were mailed to Stephen Dennis, Esq. and Michael Wallor, Esq. on _____