STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT APPELLATE DIVISION

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| DAVID W. HALL | ) | |
| | ) | |
| VS. | ) | W.C.C. 99-06860 |
| | ) | |
| NARRAGANSETT ELECTRIC COMPANY | ) | |

DECISION OF THE APPELLATE DIVISION

ROTONDI, J. This matter came on to be heard before the Appellate Division upon the respondent/employer's appeal from the decision and decree of the trial court entered on August 13, 2002. This matter was heard as an employee's Original Petition seeking workers' compensation benefits. The petition, as amended, seeks weekly compensation benefits for partial incapacity from September 23, 1999 through October 29, 1999 and compensation for total incapacity from October 30, 1999 through February 8, 2000. The petition alleges work-related stress resulting from an explosion that occurred at an electrical substation located in Olneyville as a basis of recovery of workers' compensation benefits. The petition also seeks dependency benefits for four (4) minor children, Ashley (date of birth November 19, 1983), Meaghan (date of birth April 26, 1986), Lauren (date of

birth December 12, 1987, and Kaitlyn (date of birth April 4, 1991). The trial judge granted the employee's petition and awarded workers' compensation benefits for partial incapacity from September 22, 1999 through February 7, 2000. From that decision and decree, the instant appeal followed.

The underlying facts of the petition are not in dispute. The parties stipulated that the employee has four (4) dependent children. (Tr. pp. 5-6). The parties also stipulated that the employee's average weekly wage without overtime was Nine Hundred Ninety-four and 17/100 ($994.17) Dollars, and with overtime was Twelve Hundred and 77/100 ($1,200.77) Dollars.

The employee testified that he is a "senior first-class electrical worker" with Narragansett Electric. Mr. Hall further testified he has been employed with Narragansett Electric for fourteen (14) years. His job duties included "switch and ground substations, electrical wiring, new construction work, maintenance on the equipment." (Tr. p. 6) Mr. Hall successfully completed numerous hours of training over a four and a half (4 1/2) year period with Narragansett Electric in order to obtain his position as a "senior first-class electrical worker." In addition, the employee testified that the switching activities involve "putting on 20 thousand volt rubber gloves and grabbing the switch stick and open the fiberglass switch stick, opens up a big carbon stick, which disconnects the switch." (Tr. p. 7). The switching activities de-energize the electrical line connected to the electrical equipment in a substation or could de-energize power to the outlying street. In addition, Mr.

Hall travels in an electric company truck while performing other aspects of his job duties.

On September 21, 1999, the employee began work at 7:00 a.m. He was part of a three (3) person team that had been working together for a number of weeks. The other members of the two (2) man team were Tommy Eley and George Manuppelli. At approximately 1:45 p.m., an explosion occurred at the Olneyville substation where they were working. Mr. Hall described the explosion as, "the loudest explosion I have heard in my life." (Tr. p. 11). Mr. Hall then described what he witnessed:

> "I heard George yelling for Tommy . . . and I heard Tommy screaming. I then saw Tommy come, running out of the closed door on fire. And then George came out another closed door running after him. . . I ran back up the stairs . . . I grabbed the fire blanket. As I turned around Tommy was running after me. I tackled him with the fire blanket and George was right there. We wrestled him to the ground and put him out." (Tr. pp. 11-12)

The three (3) men escaped the building and waited for the rescue. Mr. Eley's injuries appeared to be the worst.

> "Tommy's skin on his arms were (sic) hanging off his arms. His skin was hanging right off his arms and the side where he was burned, same thing, side skin was hanging right off. Tommy, was I guess--we were all shocked, but Tommy was in shock. He thought he was okay. That must be a shock, he thought he was fine. He wanted to get up and walk around." (Tr. p. 13)

The employees were taken to Rhode Island Hospital via ambulance. Mr. Hall testified that while in the emergency room he felt terrible, had problems relaxing, was breathing heavy and had a dry mouth. He was not

admitted to Rhode Island Hospital and was discharged from the emergency room after a few hours of observation and was taken home by his wife.

The trial judge found that on September 21, 1999, the employee sustained a mental injury caused by emotional stress resulting from a situation of greater dimensions than the day-to-day emotional strain and tension which all employees encounter daily without serious medical injury. He further determined that as a result of his work injury, the employee was partially incapacitated for work from September 22, 1999 through February 7, 2000 and returned to his regular job on February 8, 2000, at which time he was no longer disabled either in whole or in part. The employer appeals from the decision and decree entered on August 13, 2002.

The employer filed the following, *inter alia*, as its Reasons of Appeal:

> "1. The trial judge was clearly erroneous by relying on the incompetent testimony of a mental health counselor.
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> "2. Since Dr. Giblin is not qualified to testify, the Trial Judge was clearly erroneous for failing to rely on Dr. Weiner's testimony, the only competent medical evidence.
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> "3. Even if Dr. Giblin is qualified to testify, the Trial Judge was clearly erroneous because the employee did not establish that his mental inpacity (sic) was directly and exclusively referable to the work-related injury."

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., Inc. 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 of this proceeding. For the reasons set forth, we find that the trial judge did not commit clear error and, therefore, find no merit in the employee's appeal. We, therefore, affirm the trial judge's decision and decree.

There is a common element to each of the employer's reasons of appeal to the Appellate Division. In each reason the employer asserts that the trial judge was clearly erroneous for relying on the testimony of Terry Giblin, Psy.D., in reaching his decision. [1] However, the employer overlooks the trial

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[1] In reading the employer's Reasons of Appeal, it would appear that Narragansett Electric is challenging the competency of Dr. Giblin's testimony. It is questionable whether the employer may now challenge the competency of Dr. Giblin's testimony at all. Employer's counsel did not object to Dr. Giblin's deposition testimony. In fact, counsel stipulated to Dr. Giblin's qualifications as stated. (Pet. Exh. 2, pp. 2-3). It would seem the appropriate time for counsel to object to the competency of Dr. Giblin's testimony would have been at the outset of the deposition conducted on June 5, 2000.

In addition, when reading the deposition of Dr. Giblin, it appears to this tribunal that employer's counsel objected to Dr. Giblin's opinions on causation and disability and not to his competency to testify. (Pet. Exh. 2, pp. 10-12). At no point in the deposition of Dr. Giblin did employer's counsel object to the competency of Dr. Giblin to testify. Rather, there were objections to Dr. Giblin's opinions only.

Further, the trial record is devoid of any objection to the admission of the deposition of Dr. Giblin into evidence. On September 12, 2000 the deposition of Dr. Giblin was admitted into evidence by the trial judge without objection from the employer's counsel, although counsel

judge's consideration of medical testimony and reports in addition to those of Dr. Terry Giblin. The employer's mistake is fatal to its appeal.

After thoroughly reviewing the entire record, it is clear that the trial judge relied upon all of the medical evidence introduced by the employer and the employee.

> "There is no dispute that the explosion and fire on September 21, 1999 constituted a traumatic event in the work lives of the employee and his two coworkers. Additionally, all of the doctors agree (though not on a final diagnosis) that the employee sustained an emotional reaction as a result of the events of that day." (Tr. Dec. p. 8)(emphasis added)

The medical evidence introduced by the employee and subsequently considered by the trial judge was the deposition testimony and reports of David A. DiCecco, M.D. and Terry Giblin, Psy.D. In addition, the trial judge relied upon the reports of Charles E. Lutton, M.D., and Rab Cross, M.D., which were introduced by the employee. The trial judge discussed all of this medical evidence at some length, particularly in determining the length of disability. It is clear that all of this medical evidence was factored into his conclusions.

The trial judge also considered the deposition and report of Robert M. Weiner, M.D., who conducted a records review at the request of the employer.

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asked the court to rule on objections made during the course of the deposition as the judge read it.

Because the reliance of the trial judge upon Dr. Giblin's testimony is harmless error at best, the Appellate Division will not make any finding as to whether the issue of Dr. Giblin's competency has been properly preserved for appeal. We find it necessary to mention as a guideline to future litigants challenging the competency of medical witnesses that objections must be timely and clear to allow the trial judge ample opportunity to specifically rule upon them in a concise yet comprehensive manner.

Dr. Weiner opined that the employee had sustained a mental injury but disagreed as to the length of the incapacity resulting from that condition. The trial judge obviously chose to rely upon the opinions of the employee's physicians.

Even if this tribunal were to find that the trial judge committed error by relying upon Dr. Giblin's deposition testimony and report, such error would have been harmless. Specifically, Dr. DiCecco diagnosed the employee with post-traumatic stress syndrome. In addition, Dr. DiCecco causally related Mr. Hall's injury to the explosion of September 21, 1999. Notwithstanding, Dr. DiCecco's reservations about diagnosing Mr. Hall with post-traumatic stress disorder as an internist, the doctor's deposition testimony and report are competent medical testimony. The reports of Drs. Lutton and Cross also tend to support Dr. DiCecco's diagnosis.

The trial judge had the discretion to accept the competent medical opinions of the aforementioned healthcare providers over the conflicting opinion of another healthcare provider. Parenteau v. Zimmerman Eng'g, Inc., 111 R.I. 68, 299 A.2d 168 (1973). As such, this tribunal is unable to find that the trial judge's findings are clearly erroneous.

For the foregoing reasons, the employer's appeal is denied and dismissed and the decision and 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

Healy and Bertness, J.J. concur.

ENTER:

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Rotondi, J.

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Healy, J.

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Bertness, 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 respondent/employer and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

1. The findings of fact and the orders contained in a decree of this Court entered on August 13, 2002 be, and they hereby are, affirmed.

2. That the employer shall pay a counsel fee in the sum of Seven Hundred Fifty and 00/100 ($750.00) Dollars to Gregory L. Boyer, Esq., for the successful defense of the employer's appeal.

Entered as the final decree of this Court this day of

BY ORDER:

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ENTER:

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Rotondi, J.

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Healy, J.

_____
Bertness, J.

I hereby certify that copies were mailed to Gregory L. Boyer, Esq., and George E. Furtado, Esq., on

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