STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

STEPHEN M. BADESSA	)	
	)	
VS.	)	W.C.C. 2011-05751
	)	
RHODE ISLAND HOSPITAL	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's claim of appeal from the decision and decree of the trial judge denying the employee's original petition. In his petition, the employee alleged that he sustained a left wrist injury radiating into his thumb due to "occupational activity from January into April, 2011," which resulted in incapacity beginning July 20, 2011, the day after he signed a letter resigning from his employment. After thoroughly reviewing the record in this matter and considering the respective arguments of the parties, we deny the employee's appeal.

Stephen Badessa (the "employee") was employed by Rhode Island Hospital (the "employer") for almost ten (10) years as a carpenter. His duties varied from hanging pictures to remodeling offices, depending upon the work orders he received from his supervisor. In late 2006 the employee was diagnosed with bilateral carpal tunnel syndrome. On January 16, 2007, Dr. Leonard F. Hubbard performed a left endoscopic carpal tunnel release and on April 3, 2007, the doctor performed the same surgery on the right wrist. At some point, Mr. Badessa returned to his regular employment with the hospital. In July 2010, he was diagnosed with recurrent

bilateral carpal tunnel syndrome and Dr. Hubbard proceeded to perform open carpal tunnel release surgery on both wrists in October and November of 2010. On January 10, 2011, the employee was released to return to work.

The employee testified that sometime in February 2011, he was carrying a piece of sheetrock with a co-worker up a flight of stairs. As they flipped the sheetrock over the railing, his left hand hit the railing. The employee is left-hand dominant. He testified that he immediately told Jay Hewitt, his supervisor, about the incident. He stated that thereafter he had progressively worsening pain in his left wrist and went to the employee health clinic around March of 2011. He indicated that he spoke with a woman named Jackie who informed him that he should see his own doctor for his complaints. Mr. Badessa saw Dr. Hubbard and had an MRI of his left wrist in April 2011.

The employee testified that he made Mr. Hewitt aware of these problems, and that Mr. Hewett put him on light duty work. He suffered a non-work-related illness that kept him out of work from April 17, 2011 until he returned on May 23, 2011. He stated that his wrist felt better with rest, but the pain increased after resuming work.

The employee testified that on July 18, 2011, he was exiting the men's room on the 10th floor of the APC building when he was confronted by Rob Connors, the facilities manager. Mr. Connors informed him that he had been in the bathroom for more than a half hour, and that he had received complaints about the employee frequently using the bathroom for extended periods of time. On July 19, 2011, the employee was called to the Human Resources Department where he met with Mr. Connors, Hector Arroyo, a human resources representative, Lou Sperling, the Vice President of Human Resources, and Linda Rosilino, the union representative. At this meeting, he was confronted with a bag of what was described as pornographic material. He

denied any knowledge of what it was or where it came from. Mr. Arroyo informed him that the material was found in the ceiling of the bathroom on the 10th floor of the APC building, but stated that the material was not the reason for the meeting but rather that he was "stealing time" by spending an inordinate amount of time in the restroom. At the conclusion of the meeting, the employee was asked to surrender his badge and keys and advised that he was suspended while the hospital conducted an investigation. In a private conversation with the employee Ms. Rosilino informed him that the hospital had statements of four (4) people who worked on the 10th floor stating that they observed him using the bathroom on numerous occasions for extended periods of time because they saw his work cart parked outside the bathroom and the door was locked.

On July 20, 2011, the employee returned to the hospital to meet with Mr. Arroyo and Ms. Rosilino. Ms. Rosilino, advised the employee that he was going to be fired, but the hospital was offering him the option of resigning in exchange for not contesting his claim for unemployment. Mr. Badessa testified that he resigned "under duress." He collected TDI from July 20 through November 26, 2011, and thereafter collected unemployment benefits beginning in February of 2012, after his workers' compensation claim was denied at the pretrial conference.

Hector Arroyo testified that at the July 19th and July 20th meetings he advised the employee that they were concerned with the employee stealing time in that he was spending inordinate periods of time in the bathroom when he was supposed to be working. Mr. Arroyo stated that he had received complaints from people on the 10th floor of the APC building about the employee always being in their bathroom. The 10th floor of the APC building was leased out by the hospital to another business. The employees on that floor stated that they saw the employee's cart in front of the bathroom when they arrived in the morning, and that the

employee would visit the bathroom three (3) times per day for more than an hour each visit. When the employee was asked why he was in the bathroom so often, Mr. Badessa told Mr. Arroyo that he had a stomach condition that caused him to use the bathroom frequently but he did not realize he was in there for a long time. Mr. Arroyo admitted that he confronted the employee with the bag of materials retrieved from the bathroom ceiling, and that the employee emphatically denied ownership. He also acknowledged that the hospital offered the employee the option of resigning in exchange for not contesting his application for unemployment benefits.

Jay Hewitt, the supervisor of the carpentry shop and the employee's direct supervisor, testified that he did not recall the employee ever telling him that he sustained an injury on the job lifting sheetrock. Mr. Hewitt said that if an employee reported an injury on the job, he would send him to the employee health clinic. He also indicated that an employee would not be assigned to light duty work unless they had a doctor's note. He did acknowledge that if an employee was injured outside of work, he might tell them to take it easy that day. He asserted that Mr. Badessa was working full duty when he resigned. Mr. Hewitt recalled the employee complaining in the past about arm and wrist pain prior to the time of his surgeries, but he did not make any such complaints after returning to work following his surgeries.

Robert Connors testified that on Friday, July 15, 2011, he received an e-mail from the Vice President of the hospital stating that a carpenter was spending excessive amounts of time in the APC building, that a work cart with a "B" on it had been parked outside the bathroom, and that the people in the APC building thought the name of the employee they were complaining about was "Steve." On July 18, 2011, Mr. Connors received an e-mail from his supervisor telling him to go to the 10th floor of the APC building to find out who was in the bathroom. Mr. Connors found the door locked at 10:23 a.m. and was told by his supervisor to wait outside until

someone came out. He stated that a little bit after 11:00 a.m. the employee came out of the men's room. The two spoke in the stairwell and the employee told Mr. Connors that he did not feel well, and did not realize he was in the bathroom that long.

Mr. Connors was told by workers on the tenth floor that the employee's pushcart with the letter "B" on it would be outside the door when he was occupying the bathroom, and that his extended visits caused a problem as it was the only men's room on the floor. Some workers on the floor were able to observe the employee entering and exiting the bathroom because a work station was located directly across the hallway.

Jacqueline Parrillo, the manager of the employee and occupational health services at the hospital, testified that on July 7, 2011, the employee stopped in to obtain a copy of the preferred provider network of the hospital because he was having persistent left hand pain since the surgery and he wanted to see another doctor. Ms. Parrillo stated that she did not recall the employee stating that he had banged his wrist on the job, and that if he had reported any type of work injury, she would have completed a report to document it.

Rebecca Cardillo, an adjuster employed by Claims Strategies which is the administrator for Rhode Island Hospital's workers' compensation claims, testified that she received a request for a left wrist MRI for the employee in July, 2011. She called Dr. Hubbard's office because the doctor's office notes from April and June stated the employee was doing well and had no problems. Ms. Cardillo stated she received a report of an MRI done on July 22, 2011 which stated that the employee had "[l]eft wrist pain, status post trauma in April." Resp.'s C, MRI report 7/22/11. When she spoke to the employee in July, 2011, he told her that was not true, that it was not a new injury, and that the pain in his wrist had not resolved from the previous surgery.

Ms. Cardillo testified that she spoke to Mr. Badessa several times during that time period and he denied that he sustained any new injury at work.

The employee took the stand once more to testify in rebuttal. He asserted that he had spoken with Mr. Hewitt at least six (6) times between January and July, 2011, telling him that he was having problems with his hand and was going to see a doctor to find out what was wrong. He also stated that Mr. Hewitt told him not to worry and that he would give the employee lighter jobs to do because he did not want to lose him. Mr. Badessa testified that he told both Ms. Parrillo and Dr. Hubbard that he injured his wrist in February, 2011 while carrying sheetrock.

The affidavit and reports of Dr. Leonard F. Hubbard, an orthopedic surgeon, were introduced into evidence. Dr. Hubbard began treating the employee in December 2006, and initially performed endoscopic carpal tunnel release surgery on both of his wrists in 2007. Mr. Badessa returned in 2010 with renewed symptoms in his wrists and the doctor performed open carpal tunnel releases on both wrists in 2010. On January 10, 2011, Dr. Hubbard released the employee to return to work.

On March 23, 2011, Dr. Hubbard noted in his report that Mr. Badessa had been "successfully re-employed since February with little discomfort," and no further treatment was needed. These same statements were repeated in an office note dated April 5, 2011; however, another note dated April 5, 2011, entitled "CORRECTED NOTE," states that the employee "is back to most of his activities but still continues to complain of significant left wrist pain." In subsequent reports from June 25, 2011 and September 28, 2011, Dr. Hubbard notes that he has reviewed the employee's history in detail with him and the employee did not recall any new injury to his wrist, but told the doctor that since returning to work he experienced progressively worsening pain in his left wrist. After an MRI study and CT scan, Dr. Hubbard diagnosed

scapholunate dissociation with a possible non-displaced fracture of the scaphoid. As to causal relationship, the doctor stated, "[b]ased on his history, although the condition was pre-existing, his symptoms were exacerbated in the course of his employment, and there is causal relationship." Resp. C, 9/28/11 report.

Dr. Manuel F. DaSilva, an orthopedic surgeon, conducted an impartial medical examination of the employee on January 23, 2012 at the request of the trial judge. The employee advised Dr. DaSilva that he injured his left wrist on February 18, 2011when he hit the dorsal aspect of his wrist on a railing while carrying a piece of sheetrock. Although Mr. Badessa indicated that he did not hit it with any significant force, he began to have pain in the wrist thereafter. After examining the employee and reviewing the diagnostic testing, the doctor's diagnoses were scaphotrapeziotrapezoid (STT) arthritis of the left wrist, and scapholunate advanced collapse (SLAC) of the left wrist. Dr. DaSilva opined that neither of these diagnoses was caused by the alleged incident on February 18, 2011 because it takes at least ten (10) years to develop the arthritic changes shown on the diagnostic tests. The doctor did state that "[t]echnically, the incident of February 18, 2011 aggravated either diagnosis or both, but there wasn't significant energy to really cause a real injury." Ct.'s 1 at 2. He also noted that the carpal tunnel surgery altered the architecture of the wrist thereby increasing the employee's subjective pain with a fairly insignificant trauma.

The appellate standard of review is very limited and is clearly delineated in R.I.G.L. § 28-35-28(b), which dictates that "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." In accordance with this standard, we are precluded from engaging in a de novo review of the evidence and substituting our judgment for that of the trial judge without first determining that the trial judge was clearly

wrong. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). After a thorough review of the record, we find no error on the part of the trial judge and deny the employee's appeal.

The employee filed seven (7) reasons of appeal, some of which can be consolidated due to similarities in the subject matter. In his first, second, and sixth reasons of appeal, the employee alleges that the trial judge erred as a matter of law and violated the employee's due process rights when he entered a trial decree reversing an issue which was stipulated to and resolved at the pretrial conference. Specifically, the employee argues that the trial judge's order violated R.I.G.L. § 28-35-20, and this constitutes a violation of the employee's due process rights because he prepared for trial on the issue of earnings capacity alone since the issue of causation had been resolved.

Section 28-35-20(e) states, in pertinent part, "All trials shall be de novo, except that issues resolved by agreement at the pretrial conference may not be reopened." The pretrial order entered in this case is devoid of any mention of an agreement or stipulation between the parties as it would relate to resolved issues. The trial judge did make a finding that the employee sustained a disablement on July 20, 2011 due to STT arthritis and SLAC of the left wrist, but there is no notation that this was agreed to by the parties. The pretrial order also contained a handwritten note by the trial judge which stated, "10. Question of Earnings Capacity requires a trial." Ee's 1. It is this panel's view that the trial judge's handwritten addition to the pretrial order does not constitute a stipulation of the parties that all other issues surrounding the matter at bar were resolved.

On March 2, 2012, the first day of live testimony, the attorney for the employee stated, "Your Honor, it's my understanding at least from the pretrial order that the issue with regard to today's testimony has to do with establishing earnings capacity and that was the issue." Tr. at

3:19-22. The attorney for the employer responded, "The only issue at this juncture is whether the employee is entitled to a weekly benefit." Tr. at 3:25-4:2. The employee then proceeded to testify and at the conclusion of the employee's testimony on that same day, the trial judge attempted to recite a proposed stipulation of undisputed facts which included a statement that Mr. Badessa sustained an injury to his wrist in February 2011 while carrying a piece of sheetrock. There was a brief exchange between the attorneys and trial judge after counsel for the employer indicated that he could not agree to the facts as recited. *See* Tr. at 50:25-53:6. In particular, the employer indicated that the employee had never reported an injury in February. The trial judge then stated:

> "In light of the colloquy about the nature of his employment through February and July of 2011 it's obvious that there is additional testimony required, and in light of that the proposed statement of facts is essentially vacated…"

Tr. at 53:8-12.

At this point, the employee was on notice that there were no agreements on any of the issues before the trial judge. The employee's due process rights were not violated because the employee's attorney had ample time to prepare for further testimony and the trial judge specifically stated that he would allow the employee to reopen to present rebuttal testimony. In fact, live testimony followed on March 19, March 29, April 5, and May 9, 2012, and the employee was called to the witness stand a second time to testify in rebuttal to all of the employer's witnesses. Based upon our review of the record, we find that the trial judge did not violate R.I.G.L. § 28-35-20, and he did not violate the due process rights of the employee, as counsel had ample time to prepare for a trial on all of the issues before the court.

In his third, fourth, and fifth reasons of appeal, the employee alleges that the trial judge erred as a matter of law when he found credibility issues with parts of the employee's testimony. Specifically, the employee contends that the trial judge was clearly wrong when he stated,

> "I specifically find as a fact that the history of an incident in February 2011 was a recent fabrication made by Mr. Badessa following his termination from the hospital for reasons unrelated to a workers' compensation problem."

Tr. at 130:13-17. The employee further argues that the trial judge was wrong in this finding because the report of an MRI dated April 11, 2011 indicates that the employee injured his wrist carrying sheetrock on February 18, 2011.

It is well-established that "[t]he petitioner in a workers' compensation proceeding has the burden of adducing 'credible evidence of probative force' to support his or her petition." Delage v. Imperial Knife Co., 121 R.I. 146, 148, 396 A.2d 938, 939 (1979), *quoting* Botelho v. J.H. Tredennick, Inc., 64 R.I. 326, 331, 12 A.2d 282, 284 (1940). It is the function of the trial judge to weigh the evidence and determine the credibility of the witnesses at the conclusion of a trial. Mazzarella v. ITT Royal Electric Div., 120 R.I. 333, 338, 388 A.2d 4, 7 (1978). On appeal, those factual determinations and credibility assessments are afforded great deference by the appellate panel. *See* Almeida v. Red Cap Construction, Inc., 638 A.2d 523, 524 (R.I. 1994); In the Matter of the Dissolution of Anderson, Zangari & Bossian, 888 A.2d 973, 975 (R.I. 2006). Before disturbing any findings of the trial judge which are based upon credibility determinations, we must initially conclude that the trial judge was "clearly wrong either because the [trial judge] was obviously mistaken in his or her judgment of the credibility of the witnesses or overlooked or misconceived material evidence in arriving at the conclusion reached." Mulcahey v. New England Newspapers, Inc., 488 A.2d 681, 683 (R.I. 1985).

We acknowledge that the trial judge erred in stating that the employee fabricated the story of the incident on February 18, 2011with the sheetrock after he was essentially terminated from his employment with the hospital in July 2011; however, the trial judge's determination that the employee's testimony was not credible is well-supported in the record. Consequently, we find that this misstatement does not constitute reversible error.

The employee was referred by Dr. Hubbard for an MRI which was done on April 9, 2011. The report of the MRI study states it was performed to evaluate the left wrist for a TFC tear and that the patient injured the wrist carrying sheetrock on February 18, 2011. In Dr. Hubbard's report of April 5, 2011 and the "CORRECTED REPORT" of the same date, there is no mention of any incident in February 2011. In fact, there is no mention in <u>any</u> report of Dr. Hubbard regarding an incident in February 2011, despite the doctor's notation on at least two (2) occasions that the history was reviewed in detail with the employee and Mr. Badessa denied any significant injury. *See* Er's C, office notes of 9/28/11 and 6/25/11. Dr. Hubbard referred the employee for a second MRI which was performed on July 22, 2011. The report of that MRI study indicates it was for "left wrist pain, status post trauma in <u>April</u>" (emphasis added). Er's C, MRI report 7/22/11.

In addition to these inconsistencies, several witnesses testified that the employee never notified them of an injury occurring in February 2011and specifically denied he sustained any trauma to his left wrist in February 2011. Mr. Hewitt testified that he did not recall the employee ever telling him he injured himself lifting sheetrock, and if he had, he would have sent the employee to the employee health clinic and a report would have been filed. Ms. Parrillo similarly testified that when she spoke with the employee in July 2011 he never mentioned an injury at work and if he had, she would have documented such an injury. Ms. Cardillo had

several conversations with the employee in July 2011 during which he specifically denied any new injury or trauma to his wrist and indicated that the pain in his left wrist had never fully resolved from the carpal tunnel surgery.

The only other evidence substantiating the employee's assertion of a February 2011 injury is the report of Dr. DaSilva dated January 23, 2012, in which the doctor recorded the employee's own statement that he sustained an injury to his wrist while carrying sheetrock. It is clear in the face of the significant amount of evidence and testimony contradicting the employee's assertion that his current condition arose from an injury at work in February 2011, the trial judge determined that his testimony was unworthy of belief. Although the trial judge's classification of the employee's version of events as a "recent fabrication" may have been erroneous, we find that his underlying determination that the employee's testimony was not credible is amply supported by the record. The rejection of the employee's testimony, that his current condition is due to a work-related injury he sustained in February 2011, then leads to a rejection of the only medical opinion in any way connecting his condition to the alleged injury, that of Dr. DaSilva. *See* Mazzarella v. ITT Royal Elec. Div., 120 R.I. 333, 339, 388 A.2d 4, 7 (1978). Consequently, we find the phrase utilized by the trial judge constitutes harmless error and does not affect the ultimate outcome in this matter.

In his final reason of appeal, the employee argues that the trial judge's decision is erroneous because the employee's resignation from the employer was involuntary, under threat of termination, and his disability from his employment was undisputed. The employee specifically contends that his choice to resign or be fired cannot be regarded as voluntarily surrendering his capacity to earn wages, and it is only a voluntary retirement that will preclude an employee from demonstrating a loss of earning capacity. *See* Lambert v. Stanley Bostitch,

Inc., 723 A.2d 777 (R.I. 1999); Mullaney v. Gilbane Building Co., 520 A.2d 141 (R.I. 1987). As noted above, we find that the trial judge was not clearly wrong in finding that the employee failed to prove that he sustained a work-related injury on February 18, 2011 and failed to establish that he sustained an aggravation of a preexisting condition as a result of his work activities. Therefore, we need not address the employee's argument as to whether he can establish a loss of earning capacity resulting from a work-related injury.

In conclusion, we find no error in the trial judge's decision to deny the employee's original petition and consequently, we deny the employee's claim of appeal and affirm the trial judge's decision and decree. 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

Ricci and Hardman, JJ., concur.

ENTER:

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Olsson, J.

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Ricci, J.

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Hardman, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the claim of appeal of the petitioner/employee and upon consideration thereof, the employee's claim of 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 May 17, 2012 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

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Olsson, J.

_____
Ricci, J.

_____
Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Dennis J. Tente, Esq., and James T. Hornstein, Esq., on

_____