Rhode Island Worker Compensation
November 2000 - October 2001.

98-03586 (2001). JOHN D. BROWN VS. MCLAUGHLIN and MORAN, INC

Term: November 2000 - October 2001

W.C.C. 98-03586

JOHN D. BROWN VS. MCLAUGHLIN and MORAN, INC.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT APPELLATE DIVISION DECISION OF THE APPELLATE DIVISION

ROTONDI, J.

This matter came on to be heard before the Appellate Division on the employee's appeal from an adverse decision and decree entered on August 2, 2000. The trial court heard this matter as an Employee's Petition to Review seeking the continuation of compensation benefits pursuant to R.I.G.L. Sec. 28-33-18.3. At a pretrial conference conducted on September 14, 1998, the trial judge denied the petition and indicated as follows:

"There is not sufficient evidence to indicate relief under 28-33-18.3 is applicable.

"Employer complied with the notice provisions in 28-33-18, by continuing to pay benefits for 26 weeks after the initial notice. (i.e. -andgt; notice: 4/15/98 termination 10/27/98)"

The employee duly claimed a trial. At the conclusion of that proceeding, the trial judge entered a decree which contained the following finding and order:

"1. That the petitioner/employee has failed to prove by a fair preponderance of the probative and credible evidence that his work related partial incapacity poses a material hinderance to obtaining employment suitable to his limitations.

"It is, therefore, ordered:

"That the petition is hereby denied and dismissed." The employee claimed a timely appeal and filed five (5) reasons of appeal in support thereof.

At trial, the employee, John Brown, testified that he was sixty-two (62) years old (Tr. 6-7) and had worked for McLaughlin and Moran on and off for ten (10) or twelve (12) years. (Tr. 7) Prior to that, Mr. Brown worked for Joseph P. Schlitz Company. (Tr. 7) His job duties at both places of employment were to drive the delivery trucks and deliver cases and kegs of beer with another employee. (Tr. 7) Mr. Brown made deliveries to restaurants and liquor stores. He was injured on May 13, 1992 while delivering beer barrels when a beer barrel fell off the back of the delivery truck and struck Mr. Brown on the neck and shoulders. (Tr. 7, 9-10) Mr. Brown testified that prior to that he never had any problems with his neck nor did he have any trouble driving a truck or delivering beer. (Tr. 10) Mr. Brown treated with Dr. Stanley Stutz for this injury and also attended physical therapy at the Donley Center. (Tr. 10-11) In addition, Mr. Brown visited the Veterans Administration Hospital Pain Clinic and the Rhode Island Hospital Pain Clinic. (Tr. 11) At various times, Mr. Brown had the use of a TENS Unit, received injections in his neck, and took pain medication; however, none of these treatments alleviated the pain in his neck and shoulders. (Tr. 11-12) Mr. Brown testified that he is no longer able to fish or hunt as he did before he was injured. (Tr. 13)

During the course of his testimony, Mr. Brown stated that he attended school through the fifth grade. (Tr. 8) He never obtained a GED nor did he receive any special training other than delivery of beer. (Tr. 8) Mr. Brown has been blind in his right eye since birth, and at the time of trial was receiving federal social security disability benefits. (Tr. 8) Moreover, Mr. Brown had received radiation treatments for cancer for three (3) months and had his prostate removed in July 1998. (Tr. 9)

During cross-examination, Mr. Brown admitted that he has not sought employment since he was injured in 1992. (Tr. 14) He did, however, meet with Albert Sabella, a vocational counselor, on one occasion in 1997. (Tr. 15, 16) Mr. Brown last saw Dr. Stutz three (3) months prior to trial and last received physical therapy in 1992. (Tr. 14) In further support of this petition, the affidavits and reports of Dr. Stutz were entered as exhibits. (Ee. Exh. 1 and 2) Dr. Stutz diagnosed Mr. Brown with cervical disc disease with intermittent neuropathy and opined that the employee was partially disabled for work. (Ee. Exh. 1, affidavit and note 10/7/98) Dr. Stutz stated that Mr. Brown is unable to perform any heavy lifting or repetitive pushing and pulling, and he has reached maximum medical improvement. (Ee. Exh. 1, note 10/7/98)

A Pretrial Order in W.C.C. No. 92-12327 which established partial incapacity from July 13, 1992 as a result of a work-related cervical and lumbar strain that occurred on May 13, 1992 was entered as an exhibit. (Ee. Exh. 3) The employee introduced an Appellate Division Decree, order of remand and decision in W.C.C. No. 93-05031, wherein the Panel affirmed the trial judge's findings that the employee had recovered from the effects of a lumbar strain and that the employee remained partially disabled as the result of a C5 radiculopathy which flowed from his work-related cervical strain. (Ee. Exh. 5) The employee also introduced a decree in W.C.C. No. 97-04783 entered on May 20, 1998 which found that the employee remained partially disabled due to his May 13, 1992 work-related injury. (Ee. Exh. 4) The employer entered the transcript from said matter of which a detailed rendition of its content was not necessary for this appeal. (Er. Exh. 1)

The employer also entered the deposition and reports attached thereto of Dr. Stephen Saris. (Er. Exh. 2) Dr. Saris is board certified and specializes in neurosurgery. Id. at 3. On behalf of the employer, Dr. Saris performed an assessment of the employee on September 10, 1998. Id. at 5. Dr. Saris examined his gait and performed a complete neurological examination of his upper and lower limits. Id. Dr. Saris's physical evaluation of the employee revealed a normal examination. Id. With respect to the employee's previous employment, Dr. Saris understood that he was a truck driver and was injured while loading or unloading cases or kegs of beer. Id. at 7. Based upon the September 1998 evaluation, Dr. Saris opined that the employee could return to his previous job without restrictions and without said return being injurious to his health. Id. at 7-8.

During cross-examination, Dr. Saris stated that he recalled that the employee had undergone treatment for prostate cancer. Id. at 9. Any pain medication taken by the employee for his surgery on July 20, 1998 would not have affected the neurological findings. Id. Dr. Saris testified that pain medication in general does not affect a neurological exam. Id.

After thoroughly reviewing all of the evidence, the trial judge found that the employee failed to demonstrate that his work-related partial incapacity poses a material hinderance to his obtaining employment suitable to his limitations. The trial judge relied upon the medical testimony of Dr. Saris and Dr. Stutz. Dr. Saris placed no limitations on the employee's activities due to his neck injury and opined that he was able to return to his previous employment. Dr. Stutz, however, restricted the employee from heavy lifting and repetitive pushing and pulling, but those were the only restrictions on the employee's activities. The trial judge reasoned that based upon the extent of the employee's work-related incapacity, he failed to show that said incapacity would present a material hinderance to his obtaining employment.

Pursuant to R.I.G.L. Sec. 28-35-28(b), the Appellate Panel is charged with the initial responsibility to review the record to determine whether the decision and decree properly respond to the merits of the controversy. The role of the Appellate Division in reviewing factual matters is, however, sharply circumscribed. Rhode Island General Laws Sec. 28-35-28(b) states, "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

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review only when 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 (R.I. 1986). Such review, however, is limited to the record made at the trial level. Whittaker v. Health-Tex, Inc., 440 A.2d 122 (R.I. 1982).

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

In support of his appeal, the employee filed five (5) reasons of appeal. In reasons of appeal 1, 2, 3 and 4, the employee essentially argues that the trial judge erred in failing to consider the employee's complete personal profile in determining whether his work-related partial incapacity posed a material hinderance to obtaining employment suitable to his limitations. The employee's fifth reason of appeal alleges that the trial judge erred as a matter of law because the employer failed to present any evidence to establish that it notified the employee and the Director of Labor of its intention to terminate benefits as required by R.I.G.L. Sec. 28-33-18(d). We find no merit in any of the employee's reasons of appeal.

First, the employee argues that the trial judge erred in failing to consider the employee's complete personal profile in determining whether his work-related partial incapacity posed a material hinderance to obtaining employment suitable to his limitations. We disagree.

Rhode Island General Laws Sec. 28-33-18.3 (1992) Enactment states the following in pertinent part:

"(A) For all injuries occurring on or after September 1, 1990, in those cases where the employee has received a notice of intention to terminate partial incapacity benefits pursuant to Sec. 28-33-18, the employee or his or her duly authorized representative may file with the workers' compensation court a petition for continuation of partial incapacity benefits, where the

employee demonstrates by a fair preponderance of the evidence that his or her partial incapacity poses a material hinderance to obtaining employment suitable to his limitation, partial incapacity benefits shall continue. The term 'material hinderance' is hereby defined to include only compensable injuries causing a greater than sixty-five percent (65%) degree of functional impairment and/or disability. Any period of time for which the employee has received benefits for total incapacity shall not be included in the calculation of the three hundred and twelve (312) week period." (Emphasis added).

Our Rhode Island Supreme Court has long held that when a Court construes a statutory provision, if the language is clear on its face, the plain and ordinary meaning of the statute must be given effect. Krikorian v. R.I. Dept. of Human Services, 606 A.2d 671 (R.I. 1992).

When the enactment's language is clear and unambiguous, the statute must be applied literally, without extension or construction. Pizza Hut of America, Inc. v. Pastore, 519 A.2d 592 (R.I. 1987). A reading of R.I.G.L. Sec. 28-33-18.3 reveals quite clearly that the legislature placed the burden on the employee to demonstrate that his partial incapacity posed a material hinderance to his obtaining employment suitable to his limitations.

In this matter, the employee contends that the employee's personal profile should have been considered by the trial judge. We disagree. Rhode Island General Laws Sec. 28-33-18.3 clearly states for compensation benefits to continue, the employee must demonstrate that his partial incapacity poses a material hinderance to his obtaining employment. This statute does not direct the trial judge to examine the employee's age, education, background, abilities and training like R.I.G.L. Sec. 28-33-17, the so-called Odd Lot section. The employee suggests that these factors be considered in determining "material hinderance;" however, the employee cites no authority for this proposition. Our Supreme Court has long held the Workers' Compensation Court is a statutory creation. The rights and responsibilities of the parties in compensation cases are to be found in the plain meaning of the language of the statute or by necessary inference. Woods v. Safeway Sys. 102 R.I. 493, 232 A.2d 121 (R.I. 1967). Accordingly, we cannot find the trial judge clearly erroneous for failing to consider the employee's personal profile in this matter.

Moreover, the medical evidence in the record clearly supports the trial judge's finding. Dr. Saris's September 10, 1998 evaluation of the employee states in pertinent part as follows:

"I base the majority of my opinion on my objective findings, and in the case of Mr. Brown his examination and MRI are entirely unremarkable. I could

find no abnormalities and as such, from a neurosurgical standpoint, no limitations on what he can do. In my opinion, beyond a reasonable degree of medical certainty, he can return to any activity without restriction at this time." (Er. Exh. 2, attach. 9/10/98 evaluation)

Dr. Stutz opined that the employee remained partially disabled; however, the only restrictions he would impose on the employee's activities were no heavy lifting or repetitive pushing and pulling. Clearly, the employee could obtain employment which does not require heavy lifting or repetitive pushing and pulling. Consequently, his partial incapacity does not pose a material hinderance to obtaining employment. While the employee faces other personal and medical obstacles that may prevent him from obtaining employment, these factors are not work-related and cannot be compensated through the workers' compensation system. Our Supreme Court has long held that the Workers' Compensation Act will not be construed to require the employer to act as a general health insurer for an injured employee. DeLallo v. Queen Dyeing Co., 73 R.I. 325, 56 A.2d 174 (1947); see Geigy Chem. Corp. v. Zuckerman, 106 R.I. 534, 261 A.2d 844 (1976); Wright v. Rhode Island Superior Court, 535 A.2d 318 (R.I. 1988). Accordingly, we deny and dismiss the employee's reasons of appeal and affirm the trial judge's decision and decree in this regard.

Next, the employee argues that the trial judge erred as a matter of law because the employer failed to present any evidence to establish that it notified the employee and the Director of Labor of its intention to terminate benefits as required by R.I.G.L. Sec. 28-33-18(d). We disagree.

This court has long followed the traditional rule of the Rhode Island Supreme Court that the failure to pose an objection or to raise an issue before the trial court constitutes a waiver of the issue on appeal. Cousineau v. ITT Royal Elec. Co., 484 A.2d 884 (R.I. 1984); Da Rosa v. Carol Cable Co., 121 R.I. 194, 196-97, 397 A.2d 506, 507 (1979); Providence Newport Distributing v. Patalano, W.C.C. No. 93-11623 (App. Div. 1999). In this matter, the employee never litigated the issue of notice during the trial. Accordingly, we shall not address this reason of appeal.

For the aforesaid reasons, the employee's reasons of appeal are hereby denied and dismissed. We, 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 decree, copy of which is enclosed, shall be entered on

Sowa and Connor, JJ. concur.

FINAL DECREE OF THE APPELLATE DIVISION

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT APPELLATE DIVISION

JOHN D. BROWN VS. MCLAUGHLIN and MORAN, INC. W.C.C. 98-03586

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 August 2, 2000 be, and they hereby are affirmed.

Entered as the final decree of this Court this day of ,

BY ORDER: _____ Dennis I. Revens, Administrator

ENTER:

_____

Rotondi, J.

_____ Sowa, J.

_____ Connor, J.

I hereby certify that copies were mailed to Tedford Radway, Esquire and James Hornstein, Esquire on _____