STATE OF RHODE ISLAND

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

TOMAS CAMACHO)
)
VS.) W.C.C. No. 2019-02173
)
A & H DUFFY POLISHING)
AND FINISHING COMPANY

FINAL DECREE OF THE APPELLATE DIVISION

This matter came 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:

That the findings of fact and orders contained in a decree of this Court entered on August 13, 2021 be, and they hereby are, affirmed.

Entered as the final decree of this Court this 7th Day of **June, 2024**

PER ORDER:

/s/ Nicholas DiFilippo
Administrator

ENTER:

/s/ Olsson, J.

/s/ Pepin Fay, J.

/s/ Reall, J.

STATE OF RHODE ISLAND

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DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's appeal from the trial judge's decision and decree denying the employee's original petition for workers' compensation benefits. The employee alleged that on or about January 28, 2018, he injured his left foot while carrying over one hundred (100) pounds of metal bars at work resulting in total and/or partial incapacity commencing February 1, 2018, and continuing. After a thorough review of the record, and following consideration of the parties' respective arguments, we deny and dismiss the employee's appeal and affirm the trial judge's decision and decree.

Tomas Camacho (the employee) testified, with the aid of an interpreter, that he began working for A & H Polishing and Finishing Company (the employer) in 2010. His primary duties required him to hand polish metal pieces of various sizes. He related that sometime at the end of January 2018, while working with a large heavy piece of wood, he twisted and claimed to hear a sound emanating from his left foot. Although he thought that he may have been injured, he continued to work. The employee stated that Manuel, his manager, was nearby and asked him

if he was all right. The employee responded that he was "okay, that my foot was not bothering me." Trial Tr. 16:2. Despite denying any discomfort to his manager, the employee stated that his foot was bothering him "a little." Trial Tr. 16:4.

Several weeks later, the employee sought treatment at the emergency department of Rhode Island Hospital because his left foot "got inflamed." Trial Tr. 16:25. X-rays were taken, and medication was prescribed. He was referred to the hospital's orthopedic clinic for further treatment. He continued to treat at the clinic until April 2019. The employee was also examined by Nurse Practitioner Mark Clarke. At the time of his initial court testimony on October 24, 2019, the employee indicated that walking still caused pain which caused him to limp. He stated that he did not start limping until after he was seen in the emergency room, when he "felt that I couldn't – I couldn't walk right, and then I was having – I was having problems with my head." Trial Tr. 20-22.

The employee explained that he has not worked since he first went to the emergency room. The employer eventually terminated his employment. He did not believe that he was physically capable of performing his regular job, due to the amount of standing and pushing that was required.

On cross-examination the employee acknowledged that, while he did not know the exact date or time of his injury, he was certain that it occurred at work and that Manuel Gonzalez was with him at that time. He did not tell other co-workers about the incident. He acknowledged that he used vacation time to remain out of work from February 5, 2018 to February 17, 2018, but claimed he was out of work those weeks because his foot was bothering him. He appeared at the employer's premises on February 19, 2018 using crutches he had borrowed from a friend and spoke with a man named Mark with Cecilio, a co-worker, acting as interpreter. The employee

told Mark that, when he awoke that morning, his foot was inflamed. He did not tell Mark that he injured his foot at work. He agreed that about four (4) months later, he was terminated by the employer. He did not file his petition for workers' compensation benefits until April of 2019. The employee also acknowledged that a doctor at the Rhode Island Hospital clinic released him back to full duty in April 2018.

The matter was not heard again in court until March 29, 2021 due to the suspension of all in-court hearings for an extended period as a result of the COVID-19 pandemic. Prior to the start of the testimony of the employer's witnesses on that date, counsel for the employee informed the trial judge that he had requested the presence of an interpreter to translate the witnesses' testimony for his client, but the interpreter had not yet arrived. The trial judge then gave the employee's counsel the option of either waiting for an interpreter to arrive or the option to proceed with the employer witnesses' testimony and scheduling any rebuttal testimony of the employee for a later date, after the employee had a chance to review the transcript of that day's testimony. Counsel for the employee then responded, "It's been so long, Judge, let's just get started." Trial Tr. 37:20-21.

Mr. Sirois, a supervisor, stated that he had worked for the employer for twenty-five (25) years. During his testimony, he described in some detail the employee's job duties as a hand polisher and asserted that the job did not involve any heavy lifting. He learned that the employee was alleging a work injury only after he was informed in April 2019 that the employee had filed a petition with the court. Mr. Sirois stated that January 28, 2018, the date of the alleged injury, was a Sunday and the employer does not operate on Sundays.

Mr. Sirois testified that on February 19, 2018, the employee appeared at work using crutches wearing something like a slipper on his left foot and no sock. With Cecilio Pizzaro,

another supervisor, serving as the interpreter, the employee told Mr. Sirois that when he awoke that morning, he felt a pins and needles sensation in his left foot, and he could barely touch the foot. Mr. Sirois suggested to the employee that he may have gout and advised him to have his foot evaluated at a medical facility. Mr. Sirois did not observe any signs of injury to the left foot. He stated that the employee did not mention that he was injured at work.

At the conclusion of the direct testimony of Mr. Sirois, the court interpreter arrived. Prior to beginning cross-examination, the employee's attorney asked that any other witnesses that would be testifying that day be sequestered. The trial judge agreed that any witness intending to testify would be sequestered and should leave the courtroom. The employer's counsel stated that he planned to present Manuel Gonzalez as a witness, and so he vacated the courtroom. The employer's counsel informed the court that Cecilio Pizarro "will not be needed today," and so he remained in the courtroom. Trial Tr. 47:16-17.

During cross-examination, Mr. Sirois was questioned further about the conversation with the employee on February 19, 2018. He reiterated that the employee never stated that he injured his foot at work, but simply told Mr. Sirois that when he got up that morning and put his foot down on the floor, he felt pain. Mr. Sirois acknowledged that he did not speak Spanish and relied upon the translating skill of Mr. Pizarro who he believed spoke Spanish very well. It was Mr. Sirois' understanding that the employee was terminated by the employer after he failed to return to work despite a doctor's note indicating he was able to work. Mr. Sirois testified that the employee came back to the factory on February 21, 2018 with the first doctor's note indicating that he could return to work on February 23rd; however, he did not appear or call in on that date. The employee then returned at the beginning of March with a second note stating that he could return to work in April. Again, the employee did not appear on the date stated in the note and

Mr. Sirois did not have any further communication with the employee.

On redirect the two (2) doctor's notes the employee provided to Mr. Sirois were marked as full exhibits. The second note, dated March 2, 2018, states that the employee can return to work on April 2, 2018. Mr. Sirois testified that when the employee did not appear on April 2, 2018, he wrote on the note "did not hurt at work, 4/2/18 no call, no show at work." Trial Tr. 68:2-3. Mr. Sirois found out later that the employee was terminated by one of the owners in July of 2018.

Manuel Gonzalez, the employee's supervisor, testified through the interpreter that he had no knowledge of any work incident in which the employee was injured. He denied witnessing the employee's alleged left foot injury. He denied asking the employee if he was okay or in need of any assistance in January 2018. He stated that he learned from some of the other employees that the employee had been hurt, but he did not know if the injury occurred at work.

The employer's counsel then advised the court that he wished to call Mr. Pizarro as a witness because the employee's attorney had raised questions regarding the interpreting skills of Mr. Pizarro during his questioning of Mr. Sirois. The employee's attorney objected because based upon the representation by the employer's counsel that he would not be testifying, Mr. Pizarro had remained in the courtroom during the cross-examination of Mr. Sirois and the testimony of Mr. Gonzalez. Despite the objection, the trial judge allowed Mr. Pizarro to testify.

Mr. Pizarro, the supervisor in the machine polishing department, explained that he often served as an interpreter for the employer and recalled doing so on February 19, 2018, when the employee appeared at work using crutches. During the conversation with Mr. Sirois and the employee, the employee stated that he awoke that morning and when he put his foot on the floor, the pain was so severe that he was unable to put on his sock. Mr. Pizarro testified that the

employee never told Mr. Sirois that he was injured at work. Mr. Pizarro stated that he had no difficulty understanding what was said by either Mr. Sirois or the employee during this encounter. During the meeting, the employee did not provide any explanation for how his foot was injured. Mr. Pizarro related that Mr. Sirois told the employee that the problem may be gout and that he should go get it checked out.

Following the testimony of these witnesses, the employee was recalled to the witness stand to present rebuttal testimony. He acknowledged that he did not tell Mr. Sirois that the injury occurred at work, because at that time he did not "remember" the event. Trial Tr. 102:7-8. He stated that he never told anyone at work that he sustained a work injury "[b]ecause it took a year for me to recall." Trial Tr. 102:13. The employee then asked to correct his previous response because he recalled that he did tell the employer that he was hurt at work on the day he was terminated.

In support of his petition, the employee submitted the affidavit and medical records from Rhode Island Hospital. A more complete set of the hospital records was also attached as an exhibit to the deposition of Mark Clarke, a nurse practitioner, who saw the employee on one occasion. The hospital records reflect that the employee reported to the emergency department on February 20, 2018, and, with the assistance of an interpreter, he advised them that he sprained his left ankle approximately twenty (20) days ago while walking and experienced immediate pain and swelling. He further stated that since the original incident he had "reinjured" the ankle three (3) to four (4) times. Ee's Ex. 4 (page 16 – ED Provider Notes by Leslie C. Grey, PA). The notable physical examination findings were tenderness of the medial malleolus and surrounding soft tissues and some localized edema without ecchymosis. X-rays of the left ankle, left tibia, left fibula, and left knee revealed "small bony well-corticated fragments adjacent to the

medial malleolus" and some "mild adjacent soft tissue swelling." Ee's Ex. 4 (Page 27 – Imaging-All Results). The report states that these findings were consistent with a small avulsion fracture from an old injury. The x-ray report also noted that no significant abnormalities were found. The report questioned whether the fracture occurred during the initial trauma twenty (20) days previous. The employee was diagnosed with a closed avulsion fracture of the medial malleolus of the left tibia as well as a sprain of the deltoid ligament of his left ankle. Ee's Ex. 4 (Page 15). He was provided with a CAM boot to immobilize the ankle and advised to follow up with the orthopedic clinic at the hospital.

On March 2, 2018, the employee was seen by Dr. Steven Bokshan, a resident in the orthopedic clinic who recorded a history of the employee possibly slipping two (2) weeks earlier, although he noted that the employee was "unable to fully recount incident." Ee's Ex. 4 (Page 58 Progress Notes by Steven Bokshan, MD). After examination, the employee was advised to reduce the use of the CAM boot, take over-the-counter medication for pain, and attend physical therapy. At a follow-up appointment on April 2, 2018, Dr. Bokshan documented that the employee was able to fully weight bear on his left ankle, but that he could not stand for more than fifteen (15) minutes. The doctor noted that the employee was weaned out of the CAM boot and he expected a full recovery in a month. The employee had not yet tried physical therapy and was encouraged to do so. When the employee returned on April 27, 2018, he had complaints of ankle pain when walking long distances. His ankle had improved to the extent that he was released to return to his job without any noted restrictions. A year later, on April 22, 2019, the employee was seen again at the orthopedic clinic. He continued to complain of ankle pain when walking long distances. A lace-up brace was recommended, and the employee was advised to continue the use of over-the-counter medications for pain.

The deposition of Mark Clarke, a family medicine nurse practitioner, with attached records was also admitted as a full exhibit. Mr. Clarke examined the employee on October 15, 2019, at the request of the employee's attorney. The employee, through an interpreter, provided a history of twisting and fracturing his ankle while carrying a heavy load at work in January 2018. Mr. Clarke opined that the employee suffered a closed fracture of the left foot/ankle with continued left foot pain, that was caused by the incident at work as related to him by the employee. He stated that the employee was partially disabled and unable to perform his former job due to chronic pain. Mr. Clarke indicated that he had reviewed the Rhode Island Hospital reports and that he believed that those records reinforced his diagnosis as the x-ray did reveal an ankle fracture.

On cross-examination, Mr. Clarke acknowledged that the hospital records were not provided to him at the time of his examination, but that he first saw them on the day before the deposition. He was unaware of the positioning of the employee's ankle at the time of the incident, and he did not have specific details concerning the manner of the twist that the employee claimed was the cause of the alleged injury. He did understand that the employee was carrying a heavy load when he stated the injury occurred, but Mr. Clarke did not know the weight that was involved. His report did not describe the employee's job and he could not provide any details as to the employee's job duties. When questioned about his physical examination of the employee, Mr. Clarke indicated that his only finding was a subjective complaint of ankle pain with range of motion.

In his written decision, the trial judge reviewed in detail the testimony of the employee and the employer's witnesses, as well as the medical reports from Rhode Island Hospital and the records and deposition testimony of Mark Clarke. The judge observed the employee's demeanor

on the witness stand and the manner in which he responded to questions. He found significant inconsistencies between the employee's testimony and the information in the Rhode Island Hospital medical records regarding when and how the alleged injury occurred. The trial judge cited the employee's statements that a year transpired before he was able to recall the alleged work injury and the employee's subsequent proclamation that he did report the ankle injury as work-related only at the time of his termination. Furthermore, the trial judge referenced the testimony of the employer's witnesses who all contradicted the employee's allegations. For these reasons he did not find the employee's testimony to be credible and therefore did not find the history provided to Mr. Clarke to be credible. Consequently, the trial judge denied the employee's petition. The employee then filed a timely claim of appeal.

The Appellate Division standard of review is governed by R.I. Gen. Laws § 28-35-28(b) which states that "the findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." Under this deferential standard, the panel is prohibited from engaging in a *de novo* review of the evidence without first determining that the trial judge was clearly wrong or overlooked or misconceived material evidence. *Diocese of Providence v. Vaz,* 679 A. 2d 879, 881 (R.I. 1996).

In his reasons of appeal, the employee contends that there were two (2) errors committed by the trial judge which mandate a reversal of his decision. Initially, the employee asserts that the court failed in its obligation to provide appropriate translation services to assist him during the entire trial. As a limited English proficient person, he contends that the trial judge's decision to permit the testimony of Mr. Sirois to commence before the Spanish interpreter's arrival violated the employee's constitutional rights, the Civil Rights Act of 1964, and the intent of the 2012 Executive Order of Chief Justice Suttell regarding language assistance in our courts.

In support of this position, the employee cites the colloquy that took place prior to Mr. Sirois' testimony. The employee's attorney initially expressed concern that the employee would not be able to understand the testimony without the presence of the interpreter. Yet after being offered the opportunity to wait and see if an interpreter could be found, or the option of proceeding and then reviewing a transcript of the testimony with his client for the possibility of rebuttal testimony, the employee's counsel agreed not to wait, but to proceed with the testimony of the employer's witness. The employee cannot opt to allow the witness to testify without the presence of an interpreter and then allege a rights violation by the court for agreeing with his decision to proceed. By electing to go forward with the trial, instead of waiting for the interpreter to arrive, the employee waived any claim of error by the trial judge in commencing the hearing without the interpreter's presence.

The goal and spirit of the Order and the Voluntary Resolution Agreement between the Rhode Island Supreme Court and the United States Department of Justice were achieved by the actions of the court in this matter. Pursuant to Section I of Supreme Court Executive Order No. 2012-05, the appropriate remedy for an alleged violation of the Order is to file an administrative complaint with the Office of Court Interpreters. Moreover, as stated recently by the Appellate Division in *Mayic v. Mulch 'n More, Inc.*, W.C.C. No. 2018-06810 (App. Div. 2023) and by the Supreme Court in *Suncar v. Jordan Realty*, 276 A.3d 1274, 1278 (R.I. 2022), the Order and the Voluntary Resolution Agreement expired in 2016.

The employee's second argument for reversal concerns the decision of the trial judge to permit the testimony of Cecilio Pizarro, despite the court's previous order to sequester witnesses. The employee asserts that Mr. Pizarro was a crucial witness for the employer as only he was able to translate the statements of the employee on February 19, 2018, when he appeared at work with

crutches. For this reason, he argues that allowing the witness to testify was a prejudicial abuse of discretion so severe that it warrants a reversal of the trial decision.

When the employee's attorney requested that any witnesses be sequestered, the employer's counsel initially advised the court that Mr. Pizarro would not testify. The employer's counsel changed that decision only after the employee's attorney elected to attack the validity of Mr. Sirois' testimony by questioning whether Mr. Pizarro was able to accurately translate the conversation between Mr. Sirois and the employee. Because Mr. Sirois did not speak Spanish, he was unable to definitively answer the questions posed to him by the employee's counsel regarding this issue. Only Mr. Pizarro could state whether his interpreter skills were sufficient to provide an accurate translation of the discussion between the employee and Mr. Sirois.

We find that it was not an abuse of discretion for the trial judge to allow Mr. Pizarro to take the stand, as it was the questioning by the employee's counsel which raised the issue of Mr. Pizarro's translation ability. Also, at best, his testimony as to what was said during the conversation between the employee and Mr. Sirois was merely cumulative, as the employee *and* Mr. Sirois had both already testified that the employee did not tell the employer that his alleged injury was work-related when they spoke on February 19th. Furthermore, the request to sequester the witnesses by the employee's counsel was not made until *after* the direct testimony of Mr. Sirois, when all potential witnesses were present in the courtroom. Thus, even if Mr. Pizarro had been ordered to leave the courtroom, he would have already heard the substance of Mr. Sirois' testimony regarding the conversation with the employee. While Mr. Pizarro was also in the courtroom for the testimony of Mr. Gonzalez, that witness was not present during the meeting of February 19, 2018, nor was his testimony relevant to the questions posed to Mr.

Pizarro. For these reasons, we do not believe that the trial judge abused his discretion by allowing the witness to testify despite the earlier sequestration order.

Even if the trial judge's decision to allow the testimony was an error, the error was harmless. Some of the factors used to determine if an error was harmless include the relative degree of importance of the testimony, whether there was corroborating or contrary testimony, and the overall strength of the presenter's case. *State v. DeCosta*, 293 A.3d 297, 303 (R.I. 2023); *State v. Bustamante*, 756 A.2d 758, 766 (R.I. 2000). Admission of objectional evidence is harmless if such evidence would not reasonably influence the finder of fact. *State v. DeCosta*, 293 A.3d 297, 303 (R.I. 2023); *State v. Gomes,* 64 A.2d 125, 136-37 (R.I. 2001)(quoting *State v. Burns*, 524 A.2d 564, 568 (R.I. 1987)).

In the present matter, there was ample evidentiary support for the trial judge's determination that the employee was not credible. As cited by the judge, there were significant factual inconsistencies in the employee's testimony and between that testimony and the medical records. Not only did the employee fail to advise the Rhode Island Hospital staff that his injury was work-related, but on March 2, 2018, he told them that he was unable to fully describe the cause of his pain. At one point the employee stated that he did not recall the details of his alleged injury for over a year. The trial judge found the testimony of Mr. Sirois and Mr. Gonzalez to be believable. The testimony of Mr. Pizarro added little if anything to the evidence that had already been presented. In fact, the trial judge did not even reference Mr. Pizarro's testimony when he stated his reasons for denying the employee's petition. There is no indication that Mr. Pizarro's testimony had even the slightest impact on the decision of the trial judge.

Accordingly, the employee's reasons of appeal are denied and dismissed, and the decision and decree of the trial judge are affirmed. In accordance with Rule 2.20 of the Rules of

Practice of the Workers' Compensation Court, a final decree, a proposed version of which is enclosed, shall be entered on **June 7, 2024**

Pepin Fay, J., and Reall, J., concur.

ENTER:

/s/ Olsson, J.

/s/ Pepin Fay, J.

/s/ Reall, J.