

NOT DESIGNATED FOR PUBLICATION

JOHN B. GARNER * **NO. 2000-CA-0602**
VERSUS * **COURT OF APPEAL**
GRIMALDI CONSTRUCTION, * **FOURTH CIRCUIT**
INC. * **STATE OF LOUISIANA**

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APPEAL FROM
THE OFFICE OF WORKERS' COMPENSATION
NO. 99-00511, DISTRICT "EIGHT"
Honorable Clara E. Toombs, Worker's Compensation Judge

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Judge Dennis R. Bagneris, Sr.
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(Court composed of Judge Dennis R. Bagneris, Sr., Judge Max N. Tobias,
Jr., and Judge David S. Gorbaty)

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AFFIRMED

Grimaldi Construction, Inc., appellant, seeks to reverse the decision of a hearing officer of the Office of Worker's Compensation.

FACTS

On July 7, 1998, John B. Garner was injured during the scope of his employment as a carpenter with Grimaldi Construction, Inc., ("Grimaldi"). Garner was injured while running to assist a co-worker who had injured himself with a staple gun. Garner continued to work with Grimaldi after the incident but left his employment on August 10, 1998 due to right knee pain. On January 22, 1999, Garner filed a "Disputed Claim for Compensation" against Grimaldi.

On January 25, 1999, Dr. Ralph Katz, an Orthopedic Surgeon with Westside Orthopedic Clinic, saw Garner. Dr. Katz concluded that, as a result of his clinical examination and his review of the diagnostic x-rays, Garner had experienced effusion of his right knee with some degenerative changes. Dr. Katz recommended a conservative treatment of drawing fluid off Garner's knee and injecting the knee with steroids. Dr. Katz further recommended after the completion of treatment that Garner undertake a

rehabilitation program.

On May 11, 1999, Garner went to see Dr. Timothy Finney, an Orthopedic Surgeon. After conducting an exam of Garner's knee, Dr. Finney concluded that Garner was suffering from a torn meniscus and recommended arthroscopic surgery. Dr. Finney classified Garner as disabled pending arthroscopic surgery. He recommended rehabilitation after the surgery.

On December 29, 1999, the matter proceeded to trial. The trial court rendered judgment in favor of Garner and against Grimaldi and its insurer, awarding Garner temporary total disability benefits at the rate of \$350 per week from the date of the injury (July 7, 1998) through trial and judgment (December 29, 1999). Garner was awarded all past and present medical benefits. The trial court found Grimaldi and its insurer arbitrary and capricious in denying Garner's worker compensation benefits. Grimaldi appealed from the decision. **DISCUSSION**

On appeal, Grimaldi contends the trial court erred in awarding Garner temporary total disability benefits as a result of the work related accident on July 7, 1998. Further, Grimaldi contends that the trial court erred in determining that the evidence presented supported its finding that Garner was temporarily totally disabled as of the date of the trial court's judgment

of December 29, 1999. Also, Grimaldi contends that the trial court erred in finding its failure to pay Garner's worker compensation claim was arbitrary and capricious and in assessing penalties and attorney's fees against them. We disagree.

The applicable standard of review to factual findings of district courts is also applicable to factual findings in worker's compensation cases. In Worker's Compensation, the appropriate standard of review to be applied by appellate courts is the "manifest error-clearly wrong" standard. *Seal v. Gaylord Container Corp.*, 97-0688, p.4 (La. 12/02/97), 704 So.2d 1161; *Banks v. Industrial Roofing & Sheet Metal Works*, 96-2840, p.7 (La. 7/01/97), 696 So.2d 551, 556. For an appellate court to reverse a hearing officer's factual finding, it must find from the record that a reasonable factual basis does not exist for the finding of the hearing officer or that the record establishes that the finding is clearly wrong. *Stobart v. State through Department of Transportation and Development*, 617 So. 2d 880, 882 (La. 1993). Thus, the reviewing court must do more than simply review the record for some evidence that supports or controverts the hearing officers finding. The reviewing court must review the record in its entirety to determine whether the hearing officer's finding was clearly wrong or manifestly erroneous.

The issue to be resolved by the reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. Where the fact finder's conclusions are based on determinations regarding credibility of the witness, the manifest error standard demands great deference to the trier of fact, because only the trier of fact can be aware of the variations in demeanor and tone of voice that bear heavily on the listener's understanding and belief in what is said.

Rosell v. ESCO, 549 So2d 840, 844 (La. 1989). Even though an appellate court may feel its own evaluations and inferences are more reasonable than the factfinder's, reasonable evaluation of credibility and reasonable inferences of fact should not be disturbed upon review where conflicts exist in the testimony. Where two permissible views of the evidence exist, the factfinder's choice between them cannot be clearly wrong. *Stobart, supra*.

A plaintiff who seeks worker's compensation benefits on the basis that he is temporarily totally disabled bears the burden of proving such disability by clear and convincing evidence. *LSA-R.S. 23:1221(1)(c)*. While the worker's compensation laws are to be construed liberally in favor of the claimant, that interpretation cannot lessen the plaintiff's burden. *Prim v. City of Shreveport*, 297 So.2d 421 (La.1974). Disability can be proved by medical and lay testimony. The trial court must weigh all evidence, medical, and lay, in order to determine if the plaintiff has met his burden. *Simpson v. S.S. Kresge Co.*, 389 So. 2d 65 (La. 1980). The factual finding should be given great weight and should not be overturned absent manifest error. *See also, Thomas v. Highlands Insurance Company*, 617 So. 2d 877 (La. 1993). In the instant case, Garner testified that on July 7, 1998 he was working at a construction site when a co-worker injured himself with a staple gun. The co-worker began to run and Garner gave chase in order to offer his assistance.

The injured co-worker was taken to the hospital and Garner returned to work. Garner later noticed that he injured his leg. He mentioned the injury to another co-worker but he did not know how he injured himself because he had not fallen or hit his leg against anything.

Garner testified that he did not have any previous injuries or problems with his knees prior to the July 7, 1998 incident or any subsequent injuries or problems. He stated that his knee was improving and was almost back to normal except for a twisting motion, when his knee would “give out on him”. Also, he stated he was not experiencing any pain in his knee.

Garner testified that he initially wore an ace bandage on his right knee but it did not eliminate the swelling. He stated that he was able to do some yard work and work around his house but he had to limp to get around.

Joan Garner, Garner’s daughter, testified that she drafted a letter to Grimaldi regarding the July 7, 1998 incident that her father dictated to her. She recalled her father had difficulties with his right knee after the July 7, 1998 incident. She stated that her father did not have any previous injuries or problems with his right knee or any subsequent injuries to his right knee. Jean Garner, Garner’s wife, corroborated her testimony.

Dr. Ralph P. Katz testified by deposition at the trial. The parties stipulated to Dr. Katz as an expert in Orthopedic Surgery. Dr. Katz stated

that he examined Garner on January 25, 1999. Garner's chief complaint was an injury to his right knee that occurred on July 7, 1998. He stated that Garner related to him that he injured his knee while running to assist a co-worker who had injured himself with a nail gun.

Dr. Katz stated that Garner ambulated with no evidence of any difficulty, including limping or favoring that extremity. He stated he did not find any quadriceps atrophy, any discoloration or abnormal marks, but he observed some swelling in the right knee. Upon palpating Garner's knee he found a moderate size effusion. Garner had some crepitus with motion over his patellofemoral joint with some pain and discomfort with his terminal flexion. Garner was able to completely extend his knee without pain along his medial and lateral joint lines.

Garner's x-rays were reviewed by Dr. Katz, who noted some mild joint space of Garner's medial and lateral compartments of his right knee with some osteophytes medially. Dr. Katz opined that Garner suffered effusion in his right knee with mild degenerative changes. Dr. Katz concluded that Garner had a pre-existing degenerative arthrosis in his right knee and subsequently developed an effusion.

Dr. Katz recommended a conservative treatment for Garner which consisted of extracting fluid off the right knee and injecting it with steroid

medications, and an anti-inflammatory with a rehabilitation program to strengthen his quadriceps muscle.

Dr. Timothy P. Finney, an Orthopedic Surgeon, testified by deposition at the trial. Dr. Finney testified that he examined on May 11, 1999. Garner's chief complaint was an injury he suffered to his right knee that had occurred on July 7, 1998. Dr. Finney examined Garner and found that he had full range of motion of his right knee but had swelling in it. Garner had some lateral joint line pain upon touch with crepitation or popping when he moved his right knee around. Dr. Finney stated that Garner had no ligamentous instability detectable upon his examination. Dr. Finney concluded that the effusion Garner suffered was due to the July 1998 injury to his right knee. Dr. Finney reviewed Garner's x-rays and stated that Garner had some mild arthritic change in his right knee.

Dr. Finney diagnosed Garner with a right knee chondromalacia with a degenerative tear of the meniscus. Dr. Finney explained that chondromalacia is a wear and tear process of the articular cartilage that can occur under the kneecap or the weight-bearing surface also. Dr. Finney stated that Garner's disability and recovery period after surgery would be from four to twelve weeks depending what was discovered during the arthroscopic procedure and how much arthritic changes or chondromalacia

was present in the right knee.

After review of the record, we find that both the medical and lay testimony presented at the hearing establish that Garner suffered a work-related injury on July 7, 1998. Further the evidence presented was sufficient to establish Garner' s prima facie showing. Thus, we find the evidence presented at trial supports the hearing officer's ruling. Therefore, the burden shifts to the employer to show that the employee is physically able to perform work offered to him or available to him in the community.

Hickman v. City of New Orleans, 95-0210 (La. App. 4 Cir. 12/28/95), 666 So.2d 696, *writ denied*, 96-0264(La.4/19/96), 671 So.2d 927.

In the instant case, the Hearing Officer rendered judgment at the conclusion of the trial and stated that:

It is the judgment of this court that the claimant because of his injury of July 7, 1998, was temporarily and totally disabled. He was unable to perform his duties as a carpenter or engage in any other form of employment but self-employment, as such, he is entitled to worker's compensation indemnity benefits at the maximum amount, which at the time was \$350 per week, together with legal interest on each past due payment from the date due until paid.

Claimant is to be paid benefits and to be placed on worker's compensation benefits, and shall continue to receive the same until he is able to re-enter the work force. Therefore, it is ordered that Claimant is to receive continued medical treatment with Dr. Finney and treatment shall be as Dr. Finney

recommended.

Plaintiff is entitled to any and all past, present and future medical associated with his knee injury of July 7, 1998.

The court also finds that the defendant has failed to present any reasonable reasons why benefits were not paid in this case. There were no reasons given to the court why benefits were not paid. Basically, why his claim was ignored and as such, the court finds that their actions were, or their inactions in this case, was arbitrary and capricious. The Claimant is entitled to penalty of 12% of all the benefits due or \$2,000.00 whichever is greater. He is entitled to an attorney fee of \$2,000.00.

In reviewing the hearing officer's reason for judgment, we find that the hearing officer determined that Garner met his burden of proof and that the burden then shifted to Grimaldi. Grimaldi failed to establish that Garner is physically able to perform work offered to him or available to him in the community. Further, the testimony presented at the trial revealed that no one at Grimaldi offered Garner another job, nor did Grimaldi establish that there were other jobs available in the community or reasonable geographic area. Therefore, we find that a reasonable basis existed for the hearing officer's findings and the judgment was not manifestly erroneous or clearly wrong.

CONCLUSION

For the foregoing reasons, the judgment of the hearing officer is affirmed. Appeal costs are assessed against Grimaldi.

