

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS APPELLATE COURT

Rex Smith v. Sault Ste. Marie Tribe of Chippewa Indians
APP-08-02

Decided August 4, 2008

BEFORE: GABLE*, HARPER, KRONK, JUSTIN and NOLAN, Appellate Judges.

ORDER AND OPINION

Kronk, Chief Appellate Judge, who is joined by Appellate Judges Harper, Justin and Nolan.

Appellant appealed under Tribal Code Sections 82.114(2)(b),(d) the trial court's affirmation of the Worker's Compensation Committee's decision to end worker's compensation payments to Appellant. This Court holds that the trial court's decision was not clearly erroneous and therefore upholds the decision of the trial court.

DISCUSSION

I. Factual and Procedural Background

The present matter is a worker's compensation case and involves an appeal by Rex Smith from the trial court's decision. Appellant has a pre-existing back condition that involves a congenitally small spinal canal and degenerative changes in the lumbar spine. In January 2004, Appellant injured his back while employed by the Sault Ste. Marie Tribe of Chippewa Indians (Tribe) as a maintenance worker. At the time of the injury, Appellant was engaged in lifting and moving heavy objects and furniture. Beginning with the date of the injury, Appellant received worker's compensation benefits paid for by the Tribe. His benefits included both coverage of his medical bills and surgery, and also wage replacement payments in an amount calculated to cover his lost wages related to his employment with the Tribe and the State of Michigan. Appellant received payments until September 14, 2004, when the Tribe's Insurance Department determined that he was no longer eligible for payment as his work-related injury was healed and he was capable of returning to work.

Appellant appealed the Insurance Department's decision to the tribal Worker's Compensation Committee (Committee). The Committee upheld the decision of the tribal Insurance Department, as it was determined that the Appellant had recovered fully from the work injury and that any residual pain or disability he experienced was related to congenital and degenerative conditions of his back.

* Although Judge Gable heard oral argument in this matter, she unfortunately passed away on July 18, 2008 before being able to participate in this opinion. Accordingly, only appellate judges Harper, Justin, Kronk and Nolan participated in this opinion.

Appellant appealed from the Committee's decision to the trial court. On January 2, 2008, the trial court entered a judgment after a June 13, 2006 de novo hearing finding that the Committee "acted within its power and has correctly construed the law and found the facts, its decision must be affirmed." Tribal Court Opinion and Order on Appeal, File No. W-05-01, 1 (January 1, 2008). In reaching its decision, the trial court made several findings of fact.¹ Notably, the trial judge determined that: (1) Appellant's "surgery has adequately healed and that they [Drs. Coccia and Lelvis] placed no [sic] restrictions on his activity"; (2) "his inability to return to work was based on a degenerative condition of his back and not by an injury suffered at work"; (3) "[o]n October 20, 2004, Dr. Lelvis authored a report, which states that the spine has healed and that Mr. Smith will not damage it through lifting or any other activity"; and, (4) "[o]n March 8, 2005, she [Dr. Lelvis] stated that the degenerative disc at L5-S1 is the cause of his pain not any injury he suffered at work was the cause of his pain." *Id.* at 1-2.

In his Notice of Appeal, Appellant appealed the trial court's decision apparently on the basis of Tribal Code Sections 82.114(2)(d) and 82.114(2)(b), as the Notice of Appeal stated the appeal was based on the "irregularity of proceedings in that Plaintiff was deprived of a de novo hearing since the trial judge who heard the proofs did not render the judgment. Further, there is insufficient evidence to support the judgment and errors of law. ..." Appellant's appeal primarily seems to focus on the sufficiency of the trial judge's findings of facts and would therefore fall under Tribal Code 82.114(2)(d), which allows for appeals where there is "insufficient evidence to support the verdict, decision, order or judgment of the jury or the Tribal Court." Additionally, Appellant's Notice of Appeal seems to raise an issue under Tribal Code Section 82.114(2)(b), which states that appeals are allowed where there are "[i]rregularities or improprieties in the proceedings, or by the Tribal Court ... substantially prejudicial to the rights of the petitioner." Each of these reasons for appeal shall be addressed below.

This Court has jurisdiction to determine the present matter under Tribal Code Sections 82.109 and 82.111(1). Tribal Code Section 82.109 grants this Court exclusive jurisdiction to review the decisions of the trial court. Furthermore, Tribal Code Section 82.111(1) states that "[a]n appeal is properly before the Court of Appeals if it concerns ... a final judgment or order of the Tribal Court. ..."

II. Standard of Review

This Court will review the trial court's determination under the "clearly erroneous" standard of review. In reviewing a trial court's decision, this Court will apply the standard applicable to each element of the appeal. Tribal Code Section 82.124(7). In matters involving a finding of fact by the trial court, this Court will review to determine whether the trial court's determination was "clearly erroneous." Tribal Code Section

¹ This Court assumes that the findings listed were the findings of fact upon which the trial judge based his decision. The trial judge's very short opinion in this matter does not state which his findings of fact are. Tribal Code Section 81.215 states that "[t]he Tribal judge shall issue written findings of fact, conclusions of law and judgment." The trial judge is encouraged in the future to comply with Tribal Code Section 81.215 by clearly stating what are his findings of fact, conclusions of law and judgment.

82.124(1). Any conclusion of law shall be reviewed without deference to the trial court's determination. Tribal Code Section 82.124(5). Because Appellant's Notice of Appeal and brief focused on alleged insufficient evidence to support the trial court's decision, it is assumed that Appellant disagrees with the trial court's finding of fact, therefore making the "clearly erroneous" standard of review applicable in this matter.

At oral argument, Appellant argued that the clearly erroneous standard was equivalent to the "great weight standard." When discussing a custody matter in a previous case, this Court stated that "[t]he great weight standard of review allows a meaningful yet deferential review by the Court of Appeals ... The great weight of the evidence standard applies to all findings of fact. Thus, a Trial Court's findings on each factor should be affirmed unless the evidence 'clearly preponderate[s] in the opposite direction.'" *In the Matter of Christa S. Downs*, APP-04-01, 6 (Nov. 14, 2005) (citing *Fletcher v. Fletcher*, 447 Mich. 871, 878-879 (1994)). However, Appellant's attorney failed to provide any case law supporting his assertion that the "great weight standard" and "clearly erroneous" standard are one in the same. Alternatively, in its brief and at oral argument, Appellee argued that "a finding of fact is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" Brief of Appellee, APP-08-2, 7 (June 19, 2008) (citing *Tuttle v. Department of State Highways*, 397 Mich. 44, 46 (1976)). Both Appellant and Appellee failed to provide either tribal or federal case law defining the clearly erroneous standard of review to this Court.

In civil matters, such as this matter, the Court shall only apply the laws of the State of Michigan if there is no tribal or federal law that applies. Tribal Code Section 81.105. This Court has not had the opportunity in the past to explain what the "clearly erroneous" standard of review requires. Accordingly, given the apparent absence of tribal law on this point, before adopting the law of the State of Michigan, as suggested by Appellee, it is necessary to first explore whether federal law defines "clearly erroneous." *Id.* The United States Supreme Court has provided ample guidance on the meaning of "clearly erroneous." In *Easley v. Cromartie*, the United States Supreme Court held that under the "clear error" standard for reviewing trial court's fact findings, an appellate court will not reverse simply because it would have decided the case differently. 532 U.S. 234, 242 (2001). Furthermore, the United States Supreme Court went on to explain that the court of appeals must ask whether based on the entire evidence it is left with a "definite and firm conviction" that a mistake has been made. *Id.*

Accordingly, as Appellant primarily challenges the findings of fact of the trial court, this Court will apply the clearly erroneous standard of review. Tribal Code Section 82.124(1). In applying the clearly erroneous standard of review, the Court will determine whether it is left with a "definite and firm conviction" that the trial court made an error in its findings of fact.

III. Sufficiency of Evidence

The primary issue raised by Appellant on appeal is whether there is sufficient evidence to support the trial court's findings of fact. Tribal Code Section 82.114(2)(d). As explained above, in making this determination, this Court will apply the clearly erroneous standard of review to determine whether it is left with a "definite and firm conviction" that the trial court erred.

At oral argument, Appellant argued that the trial court committed clear error for several reasons. First, appellant argued that the trial judge erred by failing to refer to any of the evidence presented in his opinion. Second, Appellant argued that both the trial court and Committee demonstrated clear error in their failure to discuss Appellant's annular tear, which occurred in January of 2004. Additionally, Appellant argued that the Court needs to infer that Appellant had not healed from his work injury by the fact that Dr. Coccia referred Appellant to a pain specialist. Ultimately, Appellant's assertions that the trial court committed clear error do not leave this Court with a definite and firm conviction that the trial court erred. Each point shall be addressed in turn.

First, Appellant argued that the trial judge erred by failing to refer to any evidence from the record in his opinion. However, this assertion is incorrect. The trial judge's apparent findings of fact are replete with references to the evidence presented in the record.² For example, the trial judge referred to the October 20, 2004 report from Dr. Elvis indicating that Appellant's spine was healed and that Appellant would not suffer any damage to the spine through lifting or other activity. Tribal Court Opinion and Order on Appeal, File No. W-05-01, 2 (January 1, 2008). Moreover, the trial court referred to Dr. Elvis' March 29, 2005 report indicating that Appellant's degenerative disc was the cause of his pain and not his work injury.³ *Id.* Accordingly, the trial judge did in fact refer to evidence from the record in reaching his findings of fact in this case. The evidence that the trial judge did refer to in his opinion supports the conclusion that Appellant had healed from his work-related injury, was capable of returning to work, and that any remaining pain was related to his pre-existing degenerative condition. None of this evidence leaves this Court with a definite and firm conviction that the trial court erred.

Next, Appellant argued that the Committee and trial court demonstrated clear error by failing to refer to the Appellant's annular tear in their determinations. Appellant's work-related injury was the annular tear he suffered in January of 2004. On May 7, 2004, Dr. Coccia performed surgery, a decompressive lumbar laminectomy and related procedures, to repair the annular tear. Accordingly, the central issue in this matter is whether the surgery (and subsequent healing process) healed Appellant's work-related

² Notably, the record in this case appears to be incomplete and the Court received little to no direction in either the briefs or at oral argument as to what evidence from the record was of particular relevance in this matter. In the future, the parties are encouraged to fully developed the record below and provide the Court clear direction on what evidence within the record is particularly important.

³ The trial judge's Opinion and Order on Appeal refers to the "March 8, 2005" statement from Dr. Elvis. However, this Court assumes this is a typographical error, as it is the March 29, 2005 memorandum where Dr. Elvis states that "I think that the degenerated disc at L5-S1 is likely the major cause of this pain."

injury, the annular tear. The trial judge specifically addressed this point by referring to Dr. Lelvis' October 20, 2004 report that stated that the Appellant's spine had healed following the surgery and that he would not damage his spine through lifting or any other activity. *Id.* Accordingly, the trial judge indirectly addressed Appellant's annular tear by finding that the surgery had successfully repaired the injury. Furthermore, the record is replete with additional evidence to suggest that Appellant's annular tear was healed and he was capable of returning to work. For example, on March 8, 2004, Dr. Coccia wrote a letter to Boyd Manges regarding the Appellant, where Dr. Coccia stated that "[h]e [Appellant] certainly can return to work and may be able to work without repeated injury." Letter from Dr. Craig Coccia to Dr. Boyd Manges (March 8, 2004). On March 29, 2005, Dr. Lelvis wrote that "I think that the degenerated disc at L5-S1 is likely the major cause of this pain." Memorandum from Dr. Kristin Lelvis (March 29, 2005). The record therefore supports the trial judge's apparent findings of fact that Appellant's annular tear had healed and "that the degenerative disc at L5-S1 is the cause of his pain not any injury he suffered at work ..." Tribal Court Opinion and Order on Appeal, File No. W-05-01, 2 (January 1, 2008). This Court is therefore satisfied that the trial court had enough evidence to support a conclusion that Appellant's work-related injury was healed and there was no affirmative duty for the trial judge or Committee to specifically discuss the annular tear.

Next, Appellant argued that it could be inferred that his work-related injury, the annular tear, was not in fact healed, as Dr. Coccia referred Appellant to a pain specialist. However, such an inference would be inappropriate. Whether Appellant is currently in pain is not at issue here. Rather, the cause of the Appellant's pain is at issue. The trial judge referred to Dr. Lelvis' March 29, 2005 finding that Appellant's pain was likely due to his degenerative condition, and not the work-related annular tear. Memorandum from Dr. Kristin Lelvis (March 29, 2005). It may in fact be the case that Appellant still suffers pain, but the trial court concluded that this pain is related to his degenerative condition and not his work injury. Therefore, the fact that Dr. Coccia recommended that Appellant see a pain specialist is not helpful without an explanation of whether or not the pain complained of is related to Appellant's degenerative condition. Again, Dr. Coccia's referral does not leave this Court with a definite and firm conviction that the trial court erred.

Ultimately, Appellant's assertions that the trial court committed clear error are not enough to leave this Court with a definite and firm conviction that the trial court erred. The trial judge's Opinion and Order on Appeal addresses the crucial points in this matter. Notably, the trial judge found that Appellant's work-related injury had healed, that lifting and other activity would not damage his spine, and that any lingering pain was likely due to his pre-existing degenerative condition. Accordingly, it appears that Appellant is capable of returning to work and the Committee held correctly (as did the trial court) that the Tribe was therefore no longer required to provide Appellant worker's compensation payments.

IV. Deprivation of a Fair Hearing

In addition to his claims based on Tribal Code Section 82.114(2)(d), it appears that Appellant intended to appeal the trial court's determination on the basis of Tribal Code Section 82.114(2)(b). In his Notice of Appeal, Appellant requested an appeal on the basis of the "irregularity of proceedings in that Plaintiff was deprived of a de novo hearing since the trial judge who heard the proofs did not render the judgment." It would therefore appear that Appellant suggested in his Notice of Appeal that the trial court proceedings, which resulted in one judge presiding over the trial and another rendering the opinion, were "substantially prejudicial" to his rights.

However, in his brief and at oral argument, Appellant failed to develop this point and explain how the alleged "irregularities or improprieties" had been "substantially prejudicial" to him. Because Appellant neither discussed this issue in his brief nor at oral argument before this Court, this Court does not have the authority to render a decision in this matter. Tribal Code Section 82.125(2) provides that "[a]n issue raised before the Tribal Court, but not argued either by brief or orally, shall not be reviewed by the Court of Appeals." Given the Court has received neither a written, outside of the Notice of Appeal, nor verbal explanation of the basis of Appellant's appeal under Tribal Code Section 82.114(2)(b), this Court is incapable of rendering a decision on this issue, as no issue has been preserved on appeal. Tribal Code Section 82.125(2).

CONCLUSION AND ORDER

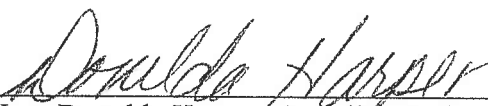
The issues raised on appeal primarily go to the validity of the trial court's findings of fact. Therefore, this Court reviewed the trial court's decision to determine whether the trial court's actions were clearly erroneous. Tribal Code Section 82.124(1). The trial court's decision will only be overturned if this Court reaches a definite and firm conviction that the trial court erred. This Court cannot reach such a conclusion, as the trial court's Opinion and Order on Appeal contains sufficient support to affirm the Committee's decision. Therefore, this Court denies Appellant his requested relief and it is ORDERED that:

- 1) The trial court's Opinion and Order on Appeal is affirmed.
- 2) Each party is to bear its own fees.



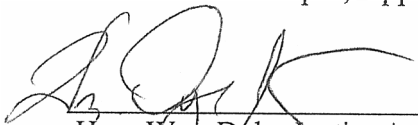
Hon. Elizabeth A. Kronk, Chief Appellate Judge

08/04/08
Date



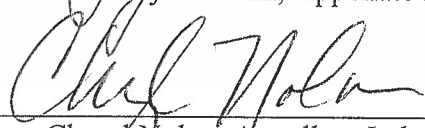
Hon. Donelda Harper, Appellate Judge

08/04/08
Date



Hon. Wm. Dyke Justin, Appellate Judge

08/04/08
Date



Hon. Cheryl Nolan, Appellate Judge

8-4-08
Date