Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NOS. 2006-244 & 2006-245

FEBRUARY TERM, 2007

Randy Degraff	}	APPEALED FROM:
	}	
v.	}	Chittenden Superior Court
	}	
Pizzagalli Construction	}	
	}	DOCKET NOS. S1043-05 & S0449-04 Cnc

Trial Judge: Ben W. Joseph

In the above-entitled cause, the Clerk will enter:

Employer Pizzagalli Construction appeals from the superior court=s order in these consolidated worker=s compensation cases. The court concluded that claimant Randy Degraff had a 20% permanent partial disability rating, and that he was required to have surgery in February 2005 as the result of a June 1999 work-related injury. Employer argues that the court erred by relying on improperly admitted evidence in reaching its conclusion, and it erred in finding that claimant=s surgery was related to his work injury. We vacate the court=s decision and remand for a new hearing.

Claimant worked for employer as a construction laborer between November 1998 and June 1999. On June 28, 1999, he fell off of a ladder, and a 75-pound bucket of cement fell on his right elbow as his arm

struck the ground. As a result, claimant fractured the head of his radial bone and dislocated his right elbow. After an administrative hearing before the Department of Labor and Industry, the Commissioner of Labor assigned a 7% permanent impairment rating to claimant. The Commissioner also determined that claimant=s subsequent ulnar nerve compression surgery performed in 2005 was necessitated by his 1999 work-related injury. Claimant appealed the first determination to the superior court, employer appealed the second, and the cases were consolidated.

In December 2005, approximately three months after employer filed its notice of appeal, claimant filed a motion in limine asking the court to admit a transcript of the administrative hearing into evidence. Claimant supplemented this request in January 2006, focusing specifically on Dr. Davignon, a physician-expert who testified on his behalf at the administrative hearing, and who opined that claimant=s impairment rating was 20%. Claimant asked the court to accept Dr. Davignon=s testimony into evidence Ain the interests of justice,@ explaining that he could not afford to hire both his treating physician, Dr. Patrick Mahoney, and Dr. Davignon for trial, yet he needed both. Employer opposed claimant=s request.

In a written order, issued after trial, the court admitted the entire administrative hearing transcript into evidence, and it relied on this evidence in reaching its decision on the merits. The court reasoned that given claimant=s lack of financial resources, his failure to call Dr. Davignon as a live witness constituted Aexcusable neglect.@ The court also noted that Dr. Davignon was subject to cross-examination by defense counsel during the administrative hearing. On the merits, the court found Dr. Davignon=s evaluation of claimant=s permanent impairment rating credible, and it adopted the impairment rating of 20 %. It also

concluded that claimant=s February 2005 surgery was the direct result of the June 1999 work-related accident. The court rejected employer=s suggestion that other incidents, such as a fall claimant took in September 2001, contributed to claimant=s permanent impairment or his need for surgery. Employer appeals.

Employer first argues that Dr. Davignon=s transcribed testimony was inadmissible, and the court=s adoption of a 20% impairment rating was tainted by its reliance on this evidence. We agree. Rule 43(a) of

the Vermont Rules of Civil Procedure provides that A[i]n all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules, the Vermont Rules of Evidence, or other rules adopted by the Supreme Court.@ The trial court has no discretion in enforcing this requirement unless the parties have agreed to allow testimony in a different form. Simpson v. Rood, 2003 VT 39, & 9, 175 Vt. 546 (mem.). There was no such agreement here, and there is no basis in the rules for admitting the transcript. The concept of Aexcusable neglect@ found in Rule 60(b) has no application in this case. See V.R.C.P. 60(b)(1) (on motion, and upon such terms as are just, court may relieve party from a final judgment, order, or proceeding for Amistake, inadvertence, surprise, or excusable neglect@). Among the many reasons for rejecting this argument, there was no Afinal judgment, order, or proceeding@ in this case from which claimant could, or did, seek relief under Rule 60(b). Contrary to claimant=s assertion, his motions in limine do not constitute an Aindependent action.@ Cf. V.R.C.P. 60(b) (Athe procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action@). The transcript was plainly inadmissible.

Dr. Davignon=s testimony was crucial to the case, being the only medical expert offering an opinion as to the impairment rating supporting employee=s claim of a 20 % impairment. By admitting the transcript, the court denied employer the opportunity to cross-examine this witness. It is immaterial that employer had the opportunity to cross-examine Dr. Davignon at the administrative hearing. The proceeding before the superior court was de novo, and by rule, claimant was not entitled to rely on Dr. Davignon=s testimony unless Dr. Davignon testified Aorally in open court.@ V.R.C.P. 43(a). The court=s error affected employer=s substantial rights. See V.R.C.P. 61; Rood, 2003 VT 39, & 13 (concluding that trial court committed reversible error in allowing expert witness to testify at trial via telephone, rather than Aorally in open court,@ where testimony was critical to case and plaintiffs were deprived of opportunity to conduct cross-examination). We therefore vacate the court=s decision and remand for a new hearing. Because this case will be retried, we do not address employer=s assertion that the court committed clear error in finding that claimant=s 2005 surgery was a direct result of his work-related injury.

The court=s decision is vacated and the case is remanded for a new trial.

BY THE COURT:

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice