

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

BROWN UNIVERSITY)

)

VS.)

W.C.C. 00-07079

)

MANUEL SANTOS)

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division upon the appeal of the petitioner/employee from the decision and decree of the trial judge in which it was found that the employee had abandoned and, effectively, terminated his suitable alternative employment position. As a result, his weekly benefits were reduced as a result of including the wages he would have earned in that position in the computation of his weekly compensation rate. After thoroughly reviewing the record and considering the arguments of the parties, we deny the employee's appeal and affirm the findings and orders of the trial judge.

The employee sustained a laceration to his right thumb on May 1, 1995 and was paid weekly benefits for total incapacity pursuant to a Memorandum of Agreement. On October 11, 1995, the employee underwent surgery on the right thumb. During the surgery, it was found that he had an almost complete rupture of the flexor polices longus tendon which necessitated an interphalangeal joint fusion. In August 1997, the employee's condition had reached maximum medical improvement and he was awarded

specific compensation for both loss of use and disfigurement. On June 15, 1999, his weekly benefits were modified to those for partial incapacity.

Melissa Moore, an insurance specialist employed by Brown University, testified that she put together an offer of suitable alternative employment after consulting with Dr. Steven Graff. The position was a bookstore/campus shop assistant. The offer, dated April 10, 2000, was sent in English and Portuguese by certified mail return receipt requested. Ms. Moore stated that she received the return receipts indicating that the employee had received the letters. In a letter dated April 17, 2000, the employee's attorney stated that the employee accepted the job offer and would report to work on April 24, 2000. Mr. Santos worked from April 24, 2000 to August 10, 2000.

On August 11, 2000, Ms. Moore received notification that the employee was out of work. She later learned that Mr. Santos had seen Dr. Graff that day and the doctor had ordered a functional capacity evaluation to determine if there was any change in the employee's condition. In the meantime, the employee did not return to work. The functional capacity evaluation was performed on October 18th and October 23rd. Sometime in November 2000, Ms. Moore was informed that a report from Dr. Graff dated November 16, 2000 had been received by the third party administrator for Brown University in which he stated that Mr. Santos could continue to work in the suitable alternative employment position. When the employee did not contact the employer and did not return to work, the decision was made to file the present petition, which was filed on November 24, 2000.

On November 29, 2000, the employee's attorney sent a letter to counsel for Brown University with copies to Ms. Moore and the third party administrator, stating that

his client was ready and willing to resume the suitable alternative employment. In the letter, the attorney acknowledged that he was aware of the petition filed by the employer seeking suspension of the employee's weekly benefits.

On November 30, 2000, Mr. Santos went to see Ms. Moore. He showed her a note from Dr. Graff dated November 16, 2000 and asked her what he should do. Due to the pending litigation, she simply told him that someone would get in touch with him. Ms. Moore never had any further contact with the employee and he did not return to work at Brown University.

Michael Cloutier worked as an adjustor and investigator for Cambridge Integrated Services, which was the third party administrator for Brown University during the periods relevant to this matter. Mr. Cloutier conducted surveillance of the employee at different times between March and September of 1999. He observed the employee using his right hand for various tasks including driving, using his right hand to open and close the doors of his vehicle and of stores, handling small items with his right hand, and using both hands to take his jacket off and place it over the back of his vehicle's seat. Mr. Cloutier noted that it was obvious that the employee's thumb was stiff, but there was no other restriction or hesitancy in the use of the thumb.

The employee testified through an interpreter that he saw Dr. Graff on November 16, 2000 and the doctor told him there was nothing more he could do for him. The doctor's office had called Mr. Santos and told him to come in and see Dr. Graff. The doctor gave him a note stating that he could return to the suitable alternative employment position. After meeting with his attorney, the employee went to Brown University on November 30, 2000 and presented the doctor's note to Ms. Moore. He never heard from

anyone from Brown University and he never returned to work there. Mr. Santos stated that he felt the same on August 11, 2000 as he did on November 16, 2000.

Dr. Steven N. Graff, an orthopedic surgeon specializing in hand and upper extremity surgery, treated the employee since May 12, 1995 for the injury to his right thumb. He performed surgery on the employee's right thumb on October 11, 1995. In April 1996, the employee underwent a functional capacity evaluation which led the doctor to determine certain permanent restrictions on the employee's activities. These restrictions included limiting frequent lifting and carrying to about twenty (20) pounds.

On March 26, 2000, Dr. Graff signed a Job Analysis form from Brown University agreeing that the employee was capable of performing the job of a bookstore/campus shop assistant as described in the form with his handwritten restrictions. He testified that performance of that job would not be injurious to the employee's health. The doctor next saw the employee on August 11, 2000. At that time, Mr. Santos complained that opening boxes and unloading books at his job at the Brown University bookstore were causing too much pain in his thumb. With regard to the physical examination at that time, Dr. Graff testified:

“The examination was identical to the examination of April 28, 2000 which was effectively identical to the examination of virtually every time I've seen him for the past several years prior to that.” (Pet. Exh. 11, p. 17)

Despite the lack of any change in the physical examination, Dr. Graff ordered a functional capacity evaluation because the employee had not had one (1) in a long time and he wanted to determine whether his functional level had changed. He acknowledged that he ordered the evaluation simply based upon the employee's subjective complaints. The doctor also recommended that the employee remain out of work pending the results

of the evaluation. After receiving the results of that evaluation, the doctor had a discussion with the employee on November 16, 2000 with the aid of a friend of the employee acting as interpreter. The doctor explained that there was nothing physically preventing the employee from working and that it was an issue of mind over matter. Dr. Graff then discharged the employee from his care. The doctor completed a form dated November 16, 2000 stating that the employee was capable of performing the duties of the suitable alternative employment position.

Dr. Graff testified that during his examinations, the employee held the right thumb upright very stiffly, like a hitchhiker, and demonstrated almost no function of the thumb. Based on the type of injury and the subsequent surgery, the doctor expected that the employee would have regained a greater degree of function of the thumb than he ever demonstrated.

The trial judge found that the employee had “abandoned and effectively terminated” the suitable alternative employment. He questioned the employee’s credibility, pointing out the inconsistency in the employee’s presentation to Dr. Graff and the observation of the employee’s activities by Mr. Cloutier, the private investigator. He then ordered that the employee’s weekly compensation benefits shall be reduced in accordance with R.I.G.L. § 28-33-18.2(d). The employee has appealed from that decision.

Our review of a trial judge’s decision is very narrow. Section 28-35-28(b) of the Rhode Island General Laws states that the findings of fact made by a trial judge are final unless the appellate panel finds them to be clearly erroneous. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). In particular, findings based upon a trial judge’s

determination that the employee is not credible is entitled to even greater deference and will not be disturbed on appeal so long as there is legally competent evidence to support it. Poisson v. Comtec Information Systems, 713 A.2d 230, 232 (R.I. 1998); Rocha v. State, 705 A.2d 965, 968 (R.I. 1998).

The employee has submitted eighteen (18) reasons of appeal which we have consolidated into five (5) issues. In the first five (5) reasons of appeal, the employee argues that the employer failed to prove that there was an offer and acceptance of suitable alternative employment. He seems to cite the fact that there was no court order or decree, nor any Department of Labor and Training form presented that documented the offer and acceptance of suitable alternative employment. However, there is no such requirement under our statute.

The evidence in the record establishes that the employer has satisfied all of the statutory criteria required to prove an offer and acceptance of suitable alternative employment. Those elements are mutual assent, suitability, alternateness, and notice to the director of the Department of Labor and Training. Riffenburg v. Kent County Mem. Hosp., 715 A.2d 1281, 1282 (R.I. 1998); Pion v. Bess Eaton Donuts Flour Co., 637 A.2d 367, 372 (R.I. 1994). The employer sent a letter dated April 10, 2000 to the employee containing the job offer and specifying that they were offering suitable alternative employment. A copy of the offer was sent to the Department of Labor and Training. The job duties had been designed in accordance with the restrictions set forth by Dr. Graff and was certainly suitable. The position was alternate employment as it was obviously different than the employee's regular job. In a letter dated April 17, 2000, the employee's attorney specifically stated that the employee was accepting the job offer. A copy of this

letter was forwarded to the Department of Labor and Training as well. The employee did in fact report for work and worked for over three (3) months. Based on this evidence, we find that the employer established that there had been an offer and acceptance of suitable alternative employment. Therefore, the first five (5) reasons of appeal are denied.

In the sixth, tenth, eleventh, twelfth and thirteenth reasons of appeal, the employee contends that the employer had an obligation to offer the suitable alternative employment position to him again in November 2000 after he saw Dr. Graff. We find no authority for the imposition of such an obligation on the employer in this situation. As the trial judge noted, the issue in this case is whether the employee was capable of performing the bookstore/campus shop assistant position on August 11, 2000 when he stopped working. Apparently, Dr. Graff gave the employee a note to stay out of work pending the results of the functional capacity evaluation. However, the doctor never stated in his reports or his testimony that the employee was physically incapable of performing the duties of the suitable alternative employment position. Dr. Graff did testify that the employee's physical examination was the same on August 11, 2000 as it had been for several years. After he received the results of the functional capacity evaluation, the doctor again stated that there was no change in the employee's physical restrictions.

Based upon the testimony of Dr. Graff, the employee did not have any valid grounds for leaving the suitable alternative employment position on August 11, 2000. Absent some evidence that the employee's medical condition had changed such that he was no longer physically capable of performing the job, the employee's status is no longer protected. The fact that the employer resumed the payment of weekly benefits is

of no consequence. The employer was not entitled to simply stop paying the employee absent a court order or agreement of the parties. The resumption of payments does not constitute an acknowledgement or agreement that the employee was no longer able to perform the job.

In this situation, the employee walks out on the suitable alternative employment position at his own peril. He takes the chance that the court may conclude that he was still capable of performing the job, resulting in the reduction of his benefits. Just as an employer has no obligation to keep a position available to an employee while the court decides whether it is suitable alternative employment, an employer has no obligation to re-offer a position after an employee unjustifiably walks away from it. See Oladapo v. Charlesgate Nursing Corp., 590 A.2d 405 (R.I. 1991). Consequently, we deny the aforementioned five (5) reasons of appeal.

In the seventh reason of appeal, Mr. Santos asserts that the trial judge committed error in allowing the private investigator to testify and then allowing four (4) videotapes of his observations into evidence, because none of that information was relevant, material or pertinent to the issue before the court. First, it should be noted that the employee's attorney did not object to the private investigator taking the stand, even after it became obvious that he was testifying to observations he made in 1999, quite some time before the periods involved in this case. The attorney only raised the objection of relevancy and materiality to the introduction of the videotapes, after the investigator had testified as to their content in detail.

An objection to the admission of testimony or evidence cannot be raised for the first time on appeal. The employee clearly waived any objection to the investigator's

testimony by not raising it during the course of the trial. Once the testimony was in, the videotapes were basically cumulative and simply a live action version of the events the investigator had already described. This information was presented to impeach the credibility of the employee. For a number of years, the employee has told his doctor that he basically has no use of his entire right hand and arm. The observations of the investigator tended to contradict the employee's assertions regarding his physical capabilities, thereby raising the question of the employee's credibility. Under the circumstances, we find no error on the part of the trial judge in allowing the videotapes to be introduced into evidence.

The employee, in his eighth and ninth reason of appeal, basically alleges that there is no competent and probative medical evidence to support the employer's contention that the employee was capable of performing the suitable alternative employment position in August 2000 or November 2000. We strongly disagree. As we noted previously, the issue is whether the employee unjustifiably terminated the position on August 11, 2000. Dr. Graff testified that he examined the employee on April 28, 2000, a few days after he started working in the bookstore position. He stated that employment in that position would not be injurious to the employee's health. (Pet. Exh. #11, pp. 14-15.) The doctor further testified that his opinion regarding the employee's ability to do that job never changed thereafter. (Pet. Exh. #11, p. 16.) When Dr. Graff saw the employee on August 11, 2000, the day the employee stopped working, he found that the employee's physical examination was identical to his examination in April 2000 and in years before that.

The testimony of Dr. Graff is more than sufficient to establish that Mr. Santos was capable of performing the job requirements of the suitable alternative employment position on August 11, 2000, the relevant date for this petition. The doctor further stated that it was not injurious for the employee to perform those duties. There is no requirement for any additional medical evidence to support the petition.

The final five (5) reasons of appeal, numbers fourteen (14) through eighteen (18), state general allegations that the trial judge's decision thwarts the benevolent purposes of the Workers' Compensation Act and ignores that the employee did not speak English well and was perhaps unaware of his obligations under the Act. First, the employee erroneously argues that the Act is to be liberally construed in favor of the employee. A general principle of workers' compensation law is that because the act is social legislation, it should be construed liberally so as to achieve its benevolent purposes. We are unaware of any authority stating that the Act should be construed in favor of one party over another.

The employee alleges a lack of cooperation and communication on the part of the employer which the trial judge ignored. However, the trial judge specifically found that it was the employee who was not cooperative and did not communicate. The employee stopped working on August 11, 2000. Apparently, the functional capacity evaluation was ordered at that time. For whatever reason, it was not completed until October 23, 2000. Dr. Graff's office then contacted the employee to come in and see the doctor to discuss the results. That office visit took place on November 16, 2000. The employee never made any contact with the employer until after receiving a copy of the employer's petition to reduce his benefits and seeing his attorney on November 29, 2000. We

believe the record supports the trial judge's conclusions regarding the lack of credibility and cooperation on the part of the employee. The contention that his decision thwarts the purpose and intention of the Act is unfounded.

Based upon the foregoing discussion, we deny and dismiss the employee's appeal and affirm the decision and decree of the trial judge. In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, a copy of which is enclosed, shall be entered on

Healy, C.J., and Sowa, J. concur.

ENTER:

Healy, C.J.

Olsson, J.

Sowa, J.

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the respondent/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 November 29, 2002 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

John A. Sabatini, Interim Administrator

ENTER:

Healy, C.J.

Olsson, J.

Sowa, J.

I hereby certify that copies were mailed to Thomas M. Bruzzese, Esq., and
Michael T. Wallor, Esq., on