STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

ADRIA ENGLISH	)	
	)	
VS.	)	W.C.C. 01-02508
	)	
R.I. HOSPITAL	)	

DECISION OF THE APPELLATE DIVISION

BERTNESS, J. This matter came on to be heard before the Appellate Division upon the respondent/employer's appeal from a decision and decree rendered by the trial court on August 13, 2002. This was heard as an Employee's Original Petition alleging a right hand carpal tunnel syndrome injury as a result of repetitive motion at work in 1999. The petition seeks partial disability benefits from September 1999 and continuing. In its decree, the trial judge found that the employee sustained a right carpal tunnel syndrome and right thumb carpometacarpal synovitis injuries resulting in incapacity on January 31, 2001 and continuing. The court further found that the right carpal tunnel syndrome is resolved.

The respondent/employer claims the following reasons of appeal:

> "1. The decision and decree are against the law and the evidence and the weight thereof since the trial court awarded the employee benefits based on an average weekly wage of $516.00. The trial court's

findings in this regard are clearly erroneous and are not supported by competent evidence in the record. In particular, the employer submits that the record contains no competent evidence of the employee's earnings for the thirteen weeks preceding her date of disability as required by R.I. Gen. Laws §28-33-20. Instead, the only evidence in the record regarding the employee's earnings is her testimony that she generally worked full time and earned $12.90 per hour.

2. The decision and decree are against the law and the evidence and the weight thereof since the trial court granted the employee's original petition and memorialized her injury as right carpal tunnel syndrome and right thumb carpometacarpal synovitis. The trial court's findings in this regard are erroneous as a matter of law. In particular, the trial court's memorialization of right thumb carpometacarpal synovitis is contrary to the well settled case law which holds that the description of the work-related injury should include only those injuries sustained at the time of the incident or injury and not so called 'flow from' injuries. There is absolutely no competent medical evidence in the record to demonstrate that the employee's right thumb complaints were directly related to her work activities.

3. The decision and decree are against the law and the evidence and the weight thereof since the trial court found that the employee's incapacity for work as a result of her right carpal tunnel syndrome commenced on January 31, 2001. The trial court's findings in this regard are clearly erroneous and are not supported by competent evidence in the record. In particular, the records of Dr. Zayas support a finding that the employee was first disabled due to carpal tunnel syndrome as early as January, 2000. Moreover, the employee's own testimony confirmed that the employee left her light duty position in April, 2000 due to right hand complaints.

> 4. The decision and decree are against the law and the evidence and the weight thereof since the trial court granted the employee's original petition and awarded her weekly workers' compensation benefits from January 31, 2001 and continuing. The trial court's findings in this regard are clearly erroneous and are not supported by competent evidence in the record. In particular, the record contains no competent evidence to demonstrate that the employee had a loss of earnings capacity attributable to her right carpal tunnel syndrome where she had no earnings during the thirteen weekly prior to January 31, 2001. Moreover, the record contains no evidence to support a finding that the employee's failure to earn wages during the pertinent time period was involuntary or otherwise nonvolitional.
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> 5. That decision and decree are against the law and the evidence and the weight thereof since the trial court found the employee's right carpometacarpal synovitis related to her right carpal tunnel syndrome. In so finding, the trial court overlooked or misconceived the medical evidence in the record. In particular, the trial court overlooked Dr. Akelman's report of December 12, 2001 in which he indicates that the employee's right thumb complaints are directly and causally related to her motor vehicle accident of April 26, 2001."

Pursuant to R.I.G.L. §28-35-28 (b):

> "[t]he findings of the trial judge on factual matters are final unless an appellate panel finds them to be clearly erroneous..."

The Appellate Division is entitled to conduct a *de novo* review only when a finding is made that the trial judge was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996); Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986).

The employee, Adria English worked as a phlebotomist at Rhode Island Hospital, which involved drawing blood from people, performing data entry, and transporting specimens. On an average day, Ms. English saw between twenty (20) and thirty (30) patients. Ms. English is right hand dominant. She drew blood from both adults and children. Drawing blood from children required restraining the children. She worked full-time at the hospital earning Twelve and 90/100 ($12.90) Dollars per hour.

In September 1999, Ms. English was restraining a child while another employee was drawing blood. The child lifted the employee, causing her to hit the wall with her back and shoulder three (3) times. She received workers' compensation benefits for injuries to her right shoulder, neck, and back which benefits ended in July 2001.

In January 2001, Ms. English began treating with Dr. Edward Akelman for pain, numbness, and tingling she was experiencing in her right hand. Her symptoms began in 1997 or 1998. The employee returned to work in a light duty capacity for one and one-half months. She was then out of work again in December and tried to return again in April 2000. She underwent right carpal tunnel surgery in February 2001. Following surgery, she experienced a lot of pain in her right thumb. She was also involved in a motor vehicle accident in April 2001, sustaining injury to her right wrist, neck, and back. In August 2001, the employee underwent a second surgery, a tendon release to the

right thumb. She underwent a subsequent surgery in April 2002. In total, the employee has undergone five (5) surgeries with Dr. Akelman.

The deposition of Edward Akelman, M.D., an orthopedic surgeon, was submitted as an employee's exhibit. He first treated the employee on January 31, 2001. He obtained a history of numbness, tingling, and difficulty with functional activities commencing before September 1999. The doctor also obtained a history of the incident at work in September 1999. Following examination, the doctor diagnosed the employee with a right carpal tunnel syndrome and right thoracic outlet syndrome. He causally related her right carpal tunnel syndrome to her work as a phlebotomist. He found the employee disabled for work as a phlebotomist on January 31, 2001.

Dr. Akelman performed a right carpal tunnel release on February 20, 2001. Following surgery, the doctor evaluated Ms. English on March 2, 2001, at which time she complained of pain in her right thumb which she described as being different from before her surgery. (Pet. Exh. 4 p.7) Dr. Akelman diagnosed her with a right thumb carpometacarpal synovitis. He opined that the cause of this diagnosis was due to surgery. Id. at 8. Dr. Akelman saw the employee in April 2001 following her motor vehicle accident. He noted that there was no change in her condition with the exception of a separate wrist pain. Dr. Akelman opined that the employee's carpal tunnel syndrome had reached a medical end point in August 2001. Id. at 12. Dr. Akelman performed a tendonitis surgical procedure on August 7, 2001. On January 3,

2002, the employee underwent another surgical procedure to her right thumb called a LRTI arthroplasty. Dr. Akelman opined at present the employee's carpal tunnel syndrome has resolved, nevertheless, she remains partially disabled as a result of her right thumb injury.

The deposition of Steven L. Blazar, M.D., was introduced as an employee's exhibit. Dr. Blazar's testimony concerns treatment for the employee's neck and shoulder as a result of the September 1999 incident at work. His treatment does not concern her right hand or wrist complaints.

The deposition of Steven Graff, M.D., was introduced as an employer's exhibit. The parties stipulated to the doctor's qualifications as an orthopedic surgeon with a qualification in hand surgery. He first saw the employee on March 1, 2002. He obtained a history of her working as a phlebotomist for twenty (20) years, the last five (5) of which she worked at Rhode Island Hospital. He obtained a history of the incident at work in September 1999. He also obtained a history of a bilateral carpal tunnel syndrome beginning in 1997 due to repetitive motion. The employee did not treat for her hand until she began treating with Dr. Akelman in January 2001.

Following the examination, Dr. Graff diagnosed the employee with status-post a right carpal tunnel release, status-post a right flexor carpi radialis release, status-post right thumb CMC LRTI arthroplasty, and left carpal tunnel syndrome. The doctor causally related the diagnoses to the employee's work as a phlebotomist. He did not believe the employee's

bilateral carpal tunnel syndrome was in any way related to her September 15, 1999, traumatic injury.

The deposition of Edward Feldmann, M.D., a Board certified neurologist, was admitted as an employer's exhibit. Dr. Feldmann saw the employee on two (2) occasions, on February 29, 2000, and on May 23, 2000. He obtained a history of the September 1999 incident at work. He also obtained a prior history of hand tendonitis on the right side. He knew the employee worked as a phlebotomist. He diagnosed the employee with a soft tissue injury to the neck from which she had recovered. He opined that the employee did not suffer a right carpal tunnel syndrome as a result of the September 1999 incident.

Medical records of John M. Conte, M.D., dated between August 1, 1995 and October 18, 2001, were introduced as an employer's exhibit. The records reveal that Dr. Conte treated the employee for a variety of unrelated medical problems. He also treated her for symptoms following the September 1999 incident at work.

On December 12, 2000, Dr. Conte found the employee had a positive Tinel Sign and a positive carpal tunnel compression test. He injected her in the right carpal tunnel. He then referred her to Dr. Akelman for treatment.

The reports of Viadislav Zayas, M.D., dated November 29, 1999 through March 11, 2002, were introduced as an employer's exhibit. At initial evaluation, Dr. Zayas diagnosed the employee with a soft tissue cervical and

trapezius injury. On January 4, 2000, Dr. Zayas diagnosed the employee with a right carpal tunnel syndrome. The doctor opined that it was unreasonable for her to return to her activities as a phlebotomist at that time.

Pursuant to R.I.G.L. §28-35-28 (b), a trial judge's findings on factual matters are final unless found to be clearly erroneous. See Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996). The Appellate Division is entitled to conduct a *de novo* review only when a finding is made that the trial judge was clearly wrong. Id.; Grimes Box Co. v. Miguel; 509 A.2d 1002 (R.I. 1986). Such review, however, is limited to the record made before the trial judge. Vaz, supra, citing Whittaker v. Health-Tex, Inc., 440 A.2d 122 (R.I. 1982).

Cognizant of this legal duty imposed upon us, we have carefully reviewed the entire record of this proceeding. For the reasons set forth, we find merit in the employer's appeal. We, therefore, reverse in part and remand the matter to the trial court.

In its first reason of appeal, Rhode Island Hospital argues that the trial court erred in calculating the employee's average weekly wage because there was "no competent evidence of the employee's earnings for the thirteen weeks preceding her date of disability as required by R.I. Gen. Laws §28-33-20."

Rhode Island General Laws §28-33-20 provides calculating the average weekly wage by dividing the gross wages, inclusive of overtime pay, during the

13 calendar weeks immediately preceding the week in which the employee was injured. In the instant petition, the employee was not working for the 13 calendar weeks immediately preceding her incapacity in January 2001. Nevertheless, Lambert v. Stanley Bostitch, Inc., 723 A.2d 777 (R.I. 1999), provides an exception to the statute where an employee suffers an involuntary hiatus to employee immediately prior to incapacity. The Lambert court held that in these circumstances the employee's average weekly wage is calculated based on the amount earned during the 13 weeks immediately preceding his last day of employment.

In the instant petition, the trial court noted that Ms. English had suffered an involuntary hiatus in that she was out of work for injuries suffered in the September 1999 work incident where she was receiving workers' compensation benefits through July 2001.

The trial court calculated the employee's average weekly wage based on the employee's testimony that she worked full-time at the hospital earning Twelve and 90/100 ($12.90) Dollars per hour. We find that it was error for the trial court to calculate the employee's average weekly wage based on this testimony. Indeed, the court has previously found that determining average weekly wage based on such testimony rather than calculating the wage in accordance with R.I.G.L. §28-33-20 is error. Forte v. Fernando Originals, Ltd., 667 A.2d 780 (R.I. 1995).

The last time Ms. English worked, she incurred a separate workers' compensation injury in September 1999. She apparently received workers' compensation benefits for this injury according to her testimony. Her average weekly wage should have been based on the 13 weeks prior to her last date of employment. We, therefore, remand the instant petition to the trial court to determine the correct average weekly wage.

The employer next argues that it was error to memoralize the employee's right thumb carpometacarpal synovitis injury because this injury was not sustained at the time of the incident. We agree, the employee sustained the right thumb carpometacarpal synovitis injury as a result of surgery for her carpal tunnel syndrome. Therefore, this injury is classified as a so-called "flow from" injury. The court has jurisdiction to grant relief for incapacity arising out of an injury or illness which flows from a compensable work injury, Amick v. National Bottle, 507 A.2d 1352 (R.I. 1986); Leviton Mfg. Co. v Lillibridge, 120 R.I. 283, 387 A.2d 1034 (R.I.1978). It is error to include a flow from injury in a memorandum of agreement. Peters v. Monowatt Elec. Corp., 78 R.I. 134, 79 A.2d 922 (R.I. 1951); Leste v. ITT Royal Electric Co., W.C.C. No. 92-12032 (App. Div. 1994). While the trial court did not err in memoralizing the employee's right thumb injury, the trial court should have memoralized that particular injury as a flow from injury.

The employer next argues that the trial court erroneously determined the employee's incapacity for work commencing January 31, 2001. The

court should have found the employee disabled for work as early as January 2000 based in part on reports of Dr. Zayas. We disagree, the trial court pointed out that although medical records of Drs. Conte and Zayas indicate that the employee had symptoms of right carpal tunnel syndrome which appeared on an EMG that was performed in January 2000, that Dr. Feldmann examined the employee on two occasions on April 30, 2000 and July 2, 2000 and found that a diagnosis of carpal tunnel syndrome was equivocal. (Pet. Exh. A p.28) It was not until January 2001 that Dr. Akelman conclusively diagnosed the employee with a right carpal tunnel syndrome and conclusively found the employee partially disabled as a result. The court was justified in accepting Dr. Akelman's opinion over the opinions of Drs. Zayas and Conte in this regard. Parenteau v Zimmerman Eng'g., Inc., 111 RI 68, 299 A.2d 168 (1973). For this reason, the employer's third reason of appeal must fail.

The employer's fourth reason of appeal argues that the record contains no evidence to support a finding that the employee's failure to earn wages during incapacity was involuntary or otherwise volitional. We disagree. The employee testified that she was receiving workers' compensation benefits for an unrelated work injury during her period of incapacity. Therefore, this reason is denied and dismissed.

Finally, the employer argues in its fifth reason of appeal that the trial court erred in finding that the employee's right thumb carpometacarpal synovitis related to her right carpal tunnel syndrome. The employer relies on

Dr. Akelman's report of December 12, 2001 which indicates that the employee's right thumb complaints are directly and causally related to the motor vehicle accident of April 26, 2001. Dr. Akelman clarified his opinion on the cause of the employee's right thumb problem on pages 25 and 26 of his deposition. He states that the employee experienced a problem related to his surgery and it was made better with cortisone. The problem then "just came back". (Pet. Exh. 4 p. 26) He further states that it's his "best medical opinion" that her thumb injury " more related to the surgery I did to her thumb than it is that she's evolving with degenerative arthritis or it relates to motor vehicle accidents." Id. at 26-27. For these reasons, the employer's fifth reason of appeal is denied and dismissed.

Based on the foregoing, the respondent/employer's appeal is sustained. The trial court decree is reversed in part and the case is remanded to the trial court for further proceedings consistent with this opinion.

In accordance with Sec. 2.20 of the Rules of Practice of the Workers' Compensation Court, an order, a copy of which is enclosed, shall be entered on

Rotondi and Healy, JJ. concur.

ENTER:

_____
Rotondi, J.

_____
Healy, J.

_____
Bertness, J.

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R.I. HOSPITAL)

ORDER OF REMAND OF THE APPELLATE DECISION

This cause came on to be heard by the Appellate Division upon the appeal of the respondent/employer's, and upon consideration thereof, the appeal is sustained in part and it is:

ORDERED, ADJUDGED AND DECREED:

That the case is remanded to the trial court for further proceedings consistent with this opinion.

Entered as an Order of this Court this day of

BY ORDER:

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ENTER:

_____
Rotondi, J.

_____
Healy, J.

_____
Bertness, J.

I hereby certify that copies were mailed to Marc Gursky, Esq. and James Hornstein, Esq. on

_____