STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

LAUREANA S. SICAJAN	)	
	)	
VS.	)	W.C.C. 02-05140
	)	
IMPULSE PACKAGING, INC.	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the petitioner/employee's appeal from the trial judge's order granting the respondent/employer's motion to dismiss on the grounds of *res judicata*. After thoroughly reviewing the record in this matter and considering the arguments of the parties, we deny the employee's appeal and affirm the decision of the trial judge.

This case involves an employee's petition to review requesting "pre-approval for surgery per medical request of Dr. Charles F. Johnson." On November 25, 1997, Ms. Sicajan sustained amputations at the distal phalanx of the left third and fourth fingers. She underwent surgery to repair or close the amputations and subsequently underwent additional surgery by Dr. Edward Akelman involving revision of the amputation sites and excision of neuromas in August 1998. In March 1999, the employee received specific compensation for loss of use and disfigurement based upon a finding that her condition had reached an end result. In a pretrial order entered on December 9, 1999 in W.C.C. No. 99-05891, it was found that her condition had reached maximum medical improvement.

Ms. Sicajan was most recently involved in further litigation before the Workers' Compensation Court regarding two (2) additional petitions. On May 10, 2006, the Appellate Division entered final decrees regarding those matters which denied the employee's appeals. W.C.C. No. 00-05447 was an employer's petition to review alleging refusal of suitable alternative employment and, in the alternative that the employee's incapacity had ended. The trial judge's decision that the employee was capable of returning to her regular employment was affirmed by the Appellate Division. W.C.C. No. 00-07268 was an employee's petition to review requesting permission for surgery, specifically "disarticulation and excision of neuromas to left middle finger and left ring finger" as recommended by Dr. Leonard F. Hubbard. The trial judge denied the request for surgery and her decision was upheld on appeal.

In the present matter, the employee testified that she wanted to have the surgery proposed by Dr. Johnson done because the palm and the top of her left hand always hurt. She acknowledged under cross-examination that her fingers and her hand have always hurt since the accident at work. However, she still cooks, washes dishes, washes clothes and cares for her five (5) year old granddaughter. She also indicated that her attorney sent her to Dr. Johnson.

The employee presented the deposition and reports of Dr. Johnson, a plastic surgeon, who first evaluated the employee on April 5, 2002. In a report of his initial examination, he noted that Ms. Sicajan experienced exquisite tenderness at the amputation sites. It was his opinion that this was caused by an inadequate amount of soft tissue covering the tips and that surgery was necessary to shorten the bony part of the fingers and provide more soft tissue covering the tips.

The doctor acknowledged that he never had the opportunity to review the reports of the physicians who examined and/or treated the employee previously. However, Dr. Johnson asserted that the additional information would not affect his opinion that the surgery he proposed

was necessary. He further indicated that the tenderness at the tips of the fingers was the only positive finding he noted.

The trial judge granted the employer's motion to admit for the court's review the record and all of the evidence presented in the prior two (2) cases, W.C.C. Nos. 00-05447 and 00-07268 pursuant to the "seamless robe" doctrine enunciated in Proulx v. French Worsted Co., 98 R.I. 114, 123, 199 A.2d 901 (1964). After reviewing all of that information, the trial judge concluded that neither the employee's testimony nor the deposition testimony of Dr. Johnson established any change in circumstances that would warrant reconsideration of the prior trial judge's denial of permission for surgery and, therefore, the doctrine of *res judicata* was applicable. He then granted the employer's motion to dismiss.

In reviewing the trial judge's decision, the appellate panel is guided by the standard set forth in R.I.G.L. § 28-35-28(b) which states:

> "The findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous."

In applying this standard, the appellate panel is precluded from undertaking a *de novo* review of the review of the evidence absent an initial finding that the trial judge was clearly wrong or misconceived or overlooked material evidence. Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996); Blecha v. Wells Fargo Guard-Company Serv., 610 A.2d 98 (R.I. 1992). Guided by this standard of review, we have examined the decision and record in this matter and conclude that the findings of fact made by the trial judge are not clearly erroneous. Therefore, we deny the employee's appeal and affirm the dismissal of her petition.

The employee filed two (2) reasons of appeal. In the first reason, she contends that the trial judge erred in applying the doctrine of *res judicata* in dismissing the petition because a final judgment on the merits had not been rendered in the previous litigation. This argument has now

been rendered moot by the issuance of the decision of the Appellate Division effective May 10, 2006 in the two (2) prior cases, W.C.C. Nos. 00-07268 and 00-05447. That decision addressed the merits of the employee's appeals in those matters and resulted in a denial of her claims.

In the second reason of appeal, Ms. Sicajan argues that the trial judge erred in dismissing her petition because she presented an unrebutted *prima facie* case. She points out that the employer presented only the medical testimony from the previous case which was well over a year old, and contends that this was not sufficient to rebut the more recent medical opinion of Dr. Johnson regarding the need for surgery. However, the lapse in time between the examinations and rendering of medical opinions is not the only factor in considering the probative value and weight to be attributed to the testimony.

In Leviton Manufacturing Co. v. Lillibridge, 120 R.I. 283, 387 A.2d 1034 (1978), the Rhode Island Supreme Court commented on this issue.

> "[t]he lapse of a period of 7 months, per se, between the medical examination and the hearing under the circumstances of the whole record does not so attenuate the relevance of the report as to make it inadmissible or unworthy of consideration by the full commission in light of the absence of any evidence showing that the employee's condition had changed since the date of the examination." (Emphasis added.) Id. at 293, 387 A.2d 1039-40.

In a subsequent decision, the Court reversed a decision in which the trial judge relied upon medical opinions which were based upon examinations which took place at least one (1) year prior to the hearing on the case. Parkway IGA v. Lyon, 649 A.2d 1024 (R.I. 1994). That medical evidence was rejected as stale only because a subsequent examination and opinion established that the employee's condition had worsened. Id. at 1025.

In the present matter, the trial judge clearly pointed out that he found nothing in the testimony of Dr. Johnson or the employee which would establish that Ms. Sicajan's condition

had changed in any manner since the decision rendered in the prior litigation denying permission for the same surgery. In her reasons of appeal and accompanying documents, the employee has not indicated any testimony which would tend to show a change in circumstances. She simply points to the fact that Dr. Johnson's opinion is the most recent. Based upon the case law cited above, the fact that the opinion is the most recent in time is not enough. Thus, the evidence in this matter does not present an unrebutted *prima facie* case in favor of the employee.

Absent some evidence that the employee's condition or circumstances had changed since the entry of the decree in the prior litigation, the trial judge's conclusion that the doctrine of *res judicata* was applicable is not clearly erroneous. We, therefore, deny and dismiss the employee's appeal and affirm the decision and order 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 Rotondi, J., concur.

ENTER:

_____
Healy, C.J.

_____
Rotondi, J.

_____
Olsson, 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 petitioner/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 an order of this Court entered on February 11, 2004 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Healy, C. J.

_____
Rotondi, J.

_____
Olsson, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq., and George E. Furtado, Esq., on

_____