STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

BROWN UNIVERSITY	)	
	)	
VS.	)	W.C.C. 02-08511
	)	
MANUEL SANTOS	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division pursuant to an order directing the parties to show cause why the employee's appeal should not be summarily decided. After considering the arguments of counsel and reviewing the record, we find that cause has not been shown and we will proceed to render a decision without further oral argument or memoranda.

Mr. Santos has a rather lengthy history with the workers' compensation system in Rhode Island. He sustained a laceration to his right thumb on May 1, 1995 and began receiving weekly benefits for total incapacity pursuant to a Memorandum of Agreement. The injury turned out to be more serious than originally thought and he underwent surgery, specifically a right thumb interphalangeal joint fusion, in October 1995. In August 1997, the employee was awarded specific compensation for a thirty percent (30%) loss of use of his right arm and also compensation for disfigurement. On June 15, 1999, his weekly benefits were modified to those for partial incapacity.

Sometime in early 2000, the employer offered the employee a suitable alternative employment position. He performed this job for several months but left work on August 11,

2000. This situation led the employer to petition the court to set an earning capacity based upon the employee's voluntary termination of suitable alternative employment. The petition was granted by the court and an earnings capacity was set in an amount equal to the wages the employee would have earned if he was still working in the suitable alternative employment position. The earnings capacity set by the court was still less than the employee's average weekly wage, thereby entitling him to some small amount of weekly workers' compensation benefits.

The petition presently before the Appellate Division is an employer's petition to review alleging that the employee's incapacity has ended. On January 6, 2003, an interlocutory order was entered suspending the employee's weekly benefits. A pretrial order was entered on June 26, 2003 discontinuing weekly benefits as of January 6, 2003. The employee filed a claim for trial. After considering the medical evidence presented by both sides, the trial judge chose to rely upon the expert medical opinions put forth by Dr. Arnold-Peter Weiss, and concluded that the employee's incapacity had ended. He then affirmed his pretrial order discontinuing benefits as of January 6, 2003. The employee claimed an appeal from this decision. We have reviewed the record and considered the arguments of counsel and find no error on the part of the trial judge in this matter.

The employee did not testify during the trial. The medical evidence consisted of the deposition and reports of Dr. Arnold-Peter C. Weiss, the affidavits and reports of Drs. Edward Akelman and Gregory J. Austin, and the depositions and reports of Drs. Charles F. Johnson and Steven N. Graff.

Dr. Austin, an orthopedic surgeon specializing in hand surgery, examined the employee on July 27, 1999, at the request of the insurer. The doctor agreed with Dr. Graff's assessment at

the time that the employee was limited in his ability to return to work. Dr. Graff had imposed restrictions of no lifting in excess of fifteen (15) pounds with the left hand, no lifting in excess of twenty (20) pounds with both hands, and no lifting at all with the right hand alone.

Dr. Akelman, an orthopedic surgeon specializing in hand surgery, evaluated the employee on November 8, 1999 at the request of the insurer. Initially, he concluded that the employee's condition had reached maximum medical improvement and he was not able to return to his regular job as a custodian because Mr. Santos was restricted from using his right thumb and index finger in any activities and he had to wear a splint as needed. However, after viewing four (4) videotapes depicting Mr. Santos using his right hand in various daily activities, Dr. Akelman stated that he could use his right hand for light duty activities and did not need to wear a splint. He did not provide any further clarification as to what he considered to be "light duty activities."

The employee submitted a deposition of Dr. Graff, an orthopedic surgeon specializing in hand surgery, which had been introduced into evidence in the prior litigation involving the suitable alternative employment position, W.C.C. No. 00-07079. The deposition was taken on August 9, 2001. Dr. Graff had not seen the employee since November 16, 2000. At that time, he maintained the same restrictions noted above which were acknowledged by Dr. Austin. He also testified that he was surprised by the total lack of motion of the thumb demonstrated by the employee because the surgery, which was done over five (5) years ago, only involved one (1) joint in the thumb and the others should be fine. The doctor could not understand why Mr. Santos did not have a better outcome after this injury.

Dr. Graff saw the employee again on October 30, 2003, almost three (3) years after his last visit. The doctor reiterated to the employee that he had nothing more to offer him for his

ongoing complaints of pain. Dr. Graff stated that he believed there was a psychological component to the professed inability to use the thumb at all and the employee's pain focus. The doctor testified that he was unable to determine any anatomical reason for the employee's complaints. Dr. Graff did not comment upon the employee's ability to work in this most recent report.

Dr. Johnson, a plastic surgeon, examined Mr. Santos on June 12, 2002 for the purpose of evaluating any disfigurement and permanent impairment of the right upper extremity. The employee returned to see Dr. Johnson on January 14, 2003 so that the doctor could obtain more information about the employee's job duties at the time he was injured. The doctor did not perform a physical examination on that date. He stated his opinion regarding the employee's ability to work as follows:

> "Lifting heavy bags of garbage may present a problem in terms of aggravating symptoms of pain in the right upper extremity but other than that he should be able to perform the remaining job activities without injury to his health." (Emphasis added.) (Ee's Exh. 3, att. report 2/4/03)

Dr. Weiss, an orthopedic surgeon specializing in hand and wrist surgery, conducted a records review regarding the employee on January 3, 1997 and then examined Mr. Santos on three (3) occasions thereafter. After the most recent evaluation on July 23, 2002, Dr. Weiss concluded that the employee was capable of full work activities without any restrictions regarding his right thumb and a return to his normal job as a custodian would not be injurious to his health. He indicated that he found no explanation in the records or his examinations for the employee's complaints of pain in the entire right arm.

The trial judge chose to rely upon the opinions expressed by Dr. Weiss. He granted the employer's petition and discontinued the employee's weekly benefits as of January 6, 2003. The

employee claimed an appeal from that decision.

The scope of our review of findings and orders made by a trial judge is strictly circumscribed by statute and case law. The factual findings of a trial judge are final absent a determination that they are clearly erroneous. R.I.G.L. § 28-35-28(b). The Appellate Division may undertake a *de novo* review of the evidence only after finding clear error on the part of the trial judge. Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996); Grimes Box Co., Inc. v. Miguel, 509 A.2d 1002 (R.I. 1986).

The employee has filed five (5) reasons of appeal which may be condensed to three (3) issues. The employee's first contention is that the trial judge erred in relying upon the opinions of Dr. Weiss because they did not establish a substantial improvement in Mr. Santos' condition after the doctor had previously found the employee's condition had reached maximum medical improvement. We find no merit in this argument.

It is true that a finding of maximum medical improvement by the court cannot be reviewed unless it can be established that the employee's condition has substantially improved or deteriorated. *See* R.I.G.L. § 28-29-2(8). However, in the present matter, there has never been a finding by the court that Mr. Santos' condition reached maximum medical improvement. Therefore, proof by comparative evidence of substantial improvement in the employee's condition was not necessary.

Furthermore, Dr. Weiss never put forth a definitive opinion that the employee's condition had reached maximum medical improvement as defined in the statute. In the report of his records review dated January 3, 1997, Dr. Weiss stated his opinion that the condition of Mr. Santos' thumb had reached maximum medical improvement, based upon the information made available to him at that time. However, on March 6, 1997, Dr. Weiss examined the employee in

his office and concluded that he was suffering from reflex sympathetic dystrophy as a result of the work injury. He stated that the condition was not at maximum medical improvement unless Mr. Santos tried sympathetic nerve blocks and failed to improve after that treatment. In May 1997, Dr. Weiss authored a letter regarding an impairment rating for Mr. Santos and stated that the functional impairment had reached maximum medical improvement. However, he reiterated his opinion that the employee's overall condition had not reached maximum medical improvement in a report dated September 23, 1997. Finally, in the report of his examination which took place on July 23, 2002, Dr. Weiss concluded that Mr. Santos could return to work without restrictions and his condition had reached maximum medical improvement.

In addition, Dr. Weiss testified that as of his July 23, 2002 examination, the employee's condition had changed dramatically because he no longer suffered from reflex sympathetic dystrophy. In 1997, the doctor believed Mr. Santos would likely not be able to use his thumb at all on a permanent basis due to the effects of reflex sympathetic dystrophy. However, in 2002, the objective physical findings on which the doctor had based that opinion were no longer present on examination. As a result, Dr. Weiss concluded that Mr. Santos' condition had improved to such an extent that he was able to return to his former employment without restrictions.

In his second contention, the employee argues that the trial judge erred when he did not appoint another impartial medical examiner when the initial appointment, citing a conflict, declined to examine Mr. Santos. We disagree with the employee's assertion that the trial judge was required to make a second appointment under the circumstances.

The Workers' Compensation Act grants the trial judge the discretion to appoint an impartial medical examiner to evaluate the employee; there is nothing in the Act which mandates

such an appointment. *See* §§ 28-33-35; 28-35-22; 28-35-24. The burden rests with the employee to establish that the trial judge abused his discretion when he declined to make a second appointment in this case. *See* Perfetto v. Fanning & Doorley Const. Co., 114 R.I. 624, 337 A.2d 791 (1975).

There was discussion during the course of the trial, as well as in the trial judge's written decision, regarding the circumstances surrounding the initial decision to appoint an impartial medical examiner and the decision not to appoint a second doctor. At the initial pretrial conference in January 2003, the employer presented the medical report of Dr. Weiss regarding a July 2002 examination in which he stated that the employee could return to his regular job. The employee did not have available any recent medical evidence to refute that opinion. Counsel for the employee proposed that his client be examined by an impartial medical examiner, specifically Dr. A. Louis Mariorenzi. Counsel for the employer initially objected, but then agreed to the appointment only if the examiner was, in fact, Dr. Mariorenzi. Although there was no real conflict of medical opinions, the trial judge stated that he would make the appointment based upon the parties' agreement. It should be noted that pending the expected examination by Dr. Mariorenzi, the trial judge actually suspended the payment of weekly benefits to the employee by interlocutory order issued on January 6, 2003.

Dr. Mariorenzi declined to accept the appointment because a colleague in his office, Dr. Gregory J. Austin, had previously examined the employee for the same injury. The trial judge then denied a request to appoint another impartial medical examiner and entered a pretrial order on June 26, 2003 discontinuing the employee's weekly benefits as of January 6, 2003. During the course of the trial, the trial judge again denied a request by employee's counsel to appoint an impartial medical examiner.

It is clear from the record that the trial judge acquiesced in the parties' agreement to appoint Dr. Mariorenzi. When Dr. Mariorenzi was not able to perform the impartial medical examination, counsel for the employer withdrew his consent to the appointment of a different physician and the trial judge chose not to appoint another doctor. We do not find that this action constitutes an abuse of discretion. The circumstances under which Dr. Mariorenzi was appointed were no longer present and the trial judge was free to exercise his discretion in deciding whether to appoint another doctor in his stead.

The third contention of the employee is that the trial judge committed error in not allowing the employee additional time to take the deposition of Dr. Graff and not utilizing "the influence and power of the Court to correspond with Dr. Graff to urge that he make himself available to testify." (Reasons of Appeal, p. 2) We have carefully reviewed the record of this proceeding and find no merit in this argument.

The petition was filed on December 10, 2002. The initial pretrial conference took place on January 6, 2003 and an interlocutory order was entered. Because of the delay surrounding the situation with the appointment of Dr. Mariorenzi, a pretrial order was not entered until June 26, 2003. At that time, Dr. Graff had not seen the employee since November 2000. At the initial hearing on August 6, 2003, during which the attorneys were to advise the court of the evidence they intend to present at trial, counsel for the employee did not mention taking the deposition of Dr. Graff. The first notice of a deposition of Dr. Graff in the court file indicates it was sent out on February 6, 2004, more than a year after the petition was filed. The doctor had finally re-examined the employee in October 2003, but his report was not particularly favorable to the employee.

On October 20, 2004, the employer rested, but counsel for the employee requested a one

(1) week continuance in order to assemble an affidavit and reports of Dr. Graff and possibly to attempt to take his deposition. After an extensive discussion, the trial judge granted a one (1) week continuance. However, on October 27, 2004, counsel did not have a deposition, a deposition date, or the doctor's affidavit. At that time, there were no further requests for any continuances in order to take the deposition of Dr. Graff. We find no abuse of discretion or error on the part of the trial judge since he granted counsel's request for additional time and did not actually deny his request to depose Dr. Graff.

As to the contention that the trial judge should have contacted the doctor in some way to urge him to testify, we have combed the record and cannot find that such a request was ever made by counsel for the employee. It is not the duty of the court to assist the parties in producing their evidence. The employee also mentions that the trial judge should have issued a subpoena to Dr. Graff. Again, we cannot find where such a request was ever made. Furthermore, the court cannot compel an expert witness to provide an opinion in court. Ondis v. Pion, 497 A.2d 13, 18 (R.I. 1985).

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 Hardman, J. concur.

ENTER:

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Healy, C. J.

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Olsson, J.

_____
Hardman, J.

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MANUEL SANTOS)

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 December 22, 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.

_____
Olsson, J.

_____
Hardman, J.

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

_____