STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

ALLEN GALLO	)	
	)	
VS.	)	W.C.C. 03-08423
	)	
J-D LEASING & HAULING	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the petitioner/employee's appeal from the decision and decree of the trial judge in which it was found that the employee was disabled from August 25, 2003 to March 9, 2004 as a result of a left knee injury sustained on August 16, 2003. The employee contends that he remained disabled beyond March 9, 2004. After careful review of the record and consideration of the arguments of the parties, we deny the employee's appeal, and affirm the findings and orders of the trial judge.

The employee testified that he had been employed by the employer since April or May of 2003 as a truck driver transporting dumpsters. Occasionally, as part of his job duties, he would have to empty the dumpsters. He explained that on Saturday, August 16, 2003, he stepped out of an excavator onto uneven ground on the employer's property and twisted his left leg. He felt a sharp pain immediately. No one witnessed the incident. Mr. Gallo did not report the injury to anyone and he finished his work day. He reported to work on Monday and worked a portion of the day before returning to the employer's premises where he had an argument with the owner. He has not returned to work in any capacity since that day.

On August 25, 2003, the employee went to the Westerly Hospital Emergency Room and was referred to Dr. Stephen Gross, an orthopedic surgeon. The doctor performed surgery to repair torn cartilage in the left knee and prescribed exercises.

The employee acknowledged that the owner yelled at him several times in the few months he worked there regarding perceived problems with his work performance. He denied that on August 18 or August 19 he told the owner he was quitting. Mr. Gallo asserted that he was sent home by the owner and told to call later in the week after a truck had been repaired.

The employee denied any prior injury to his left knee. On April 13, 2004, Mr. Gallo testified that he felt capable of returning to his former job as a truck driver with the employer.

Ronald Harkness, the president of J-D Leasing & Hauling and Rocky's Tree Service, testified that he had several problems with the employee's work performance, including absenteeism, and damage to the employer's equipment as well as to personal property of customers. He indicated that he was informed by his mechanics about an incident on August 16, 2003 when the employee damaged a truck part in the yard while doing some maintenance on the truck. On or about August 19, 2003, Mr. Harkness became engaged in a heated argument with the employee regarding Mr. Gallo's alleged failure to report some damage to his truck. After the employee stated "I've had enough; I'm out of here," Mr. Harkness told him to get his belongings and get off of the property. (Tr. p. 40) Over the next two (2) to three (3) days, the employee called several times requesting his job back, but Mr. Harkness refused to re-hire him.

Mr. Harkness testified that he found out about the employee's alleged knee injury when the hospital called him and asked if he was going to pay the bill for the employee's treatment.

Dr. Stephen B. Gross, an orthopedic surgeon, testified that he first evaluated Mr. Gallo's left knee on September 11, 2003. The employee reported to the doctor that he injured the knee

when he was getting out of an excavator at work and twisted his left leg. The doctor noted several positive findings on examination and diagnosed a left medial meniscus tear. He indicated that he did not recall discussing work restrictions because the employee had informed him that he had lost his job. An MRI done on October 14, 2003 confirmed the doctor's initial diagnosis. Dr. Gross stated that in his opinion, the incident on August 16, 2003, as described by the employee, was the cause of the condition.

The doctor performed a left knee arthroscopy on November 20, 2003 to repair the tear. After the surgery, he saw the employee once for suture removal and then again on December 23, 2003. On that date, the employee informed the doctor that he still had pain and did not feel that he could work. The doctor indicated in his report that he wrote a note that Mr. Gallo should be able to resume looking for work in about four (4) weeks. At the next visit on February 9, 2004, the employee reported continued complaints and the doctor recommended a course of physical therapy as well as an anti-inflammatory medication. There is no mention in his report regarding the employee's ability to work.

Dr. Gross testified that in his opinion the employee was totally disabled as of the date of the alleged incident and remained totally disabled until February 9, 2004. At that point, he indicated that the employee could work with restrictions of no repetitive bending, squatting, kneeling, or carrying greater than fifty (50) pounds. The doctor has not seen the employee since the February 9, 2004 office visit.

Dr. Gross testified that typically someone with this condition who underwent the same type of surgery would be back to work in about three (3) to four (4) weeks, but return to a physically demanding job may take four (4) to six (6) weeks. The doctor had no opinion as to

the employee's ability to work after February 9, 2004 as Mr. Gallo had not returned for any follow-up office visits.

The trial judge evaluated the conflicting testimony of the employee and Mr. Harkness and concluded that the employee was the more credible witness. She found that the employee had established that he injured his left knee at work on August 16, 2003. She noted that the employee's condition was improving at the office visit on February 9, 2004 and Dr. Gross had advised the employee to return in four (4) weeks. Citing the employee's own statement on April 13, 2004 that he felt capable of returning to work, the trial judge awarded weekly benefits for total incapacity from August 25, 2003 to February 9, 2004 and for partial incapacity from February 10, 2004 to March 9, 2004. The employee has appealed this ruling, arguing that there is insufficient evidence to establish that his disability has ended.

The role of the appellate panel in reviewing the findings of a trial judge is very deferential. Pursuant to R.I.G.L. § 28-35-28(b), the findings of fact made by a trial judge are final unless the appellate panel finds them 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 after concluding that the trial judge was clearly wrong. Id.; Grimes Box Co., Inc. v. Miguel, 509 A.2d 1002 (R.I. 1986). After examining the entire record of the trial below, we find no error in the trial judge's factual determinations in this matter.

The employee has filed four (4) reasons of appeal contending that the trial judge committed error in finding that the employee's incapacity ended as of March 9, 2004. On April 13, 2004, the employee testified that he was physically able to drive an automobile and perform such household chores as shopping and laundry. He then stated that he felt capable of returning to his former employment as a truck driver. (Tr. p. 25) The employee argues on appeal that,

regardless of the employee's testimony at trial as to his ability to work, the trial judge was wrong to rely on that testimony in the face of contradictory medical evidence.

The only medical evidence presented, other than the emergency room records, are the reports and testimony of Dr. Gross. As of February 9, 2004, the doctor was of the opinion that the employee could perform work that did not involve repetitive bending, squatting or kneeling, or lifting in excess of fifty (50) pounds. The doctor was never asked specifically about the employee's ability to perform the job he formerly held at J-D Leasing & Hauling. Dr. Gross stated that it was his understanding that Mr. Gallo operated heavy equipment.

In his testimony, the employee did not provide much detail about his job duties. In reviewing the testimony of the employee and Mr. Harkness, it is evident that the employer's business involved the delivery, retrieval, and emptying of dumpsters of different sizes. Mr. Gallo drove a truck used to deliver and pick up the dumpsters. (Tr. p. 9) He stated that at times he "had to handle the freight that was in the truck." (Tr. p. 7) This "freight" included construction material, grass, and giant boulders. The employee never stated that he lifted and carried these items by hand. Rather, these items might be dumped or transferred with other machinery to another location. (See Tr. p. 12)

Considering the restrictions placed on the employee's activities by Dr. Gross on February 9, 2004 and the employee's job duties, it appears that the restrictions would not prevent the employee from performing his former job duties as a truck driver with the employer. Therefore, the medical evidence does not contradict the employee's own testimony as to his ability to work.

The employee cites Union Smelting & Ref. Works v. Calhoun, 101 R.I. 655, 226 A.2d 498 (1967), in support of his argument on appeal. In that case, the Rhode Island Supreme Court concluded that the employee's testimony that he felt capable of returning to work was not

competent in the face of the medical opinions of two (2) physicians that he should not perform any heavy lifting or frequent bending, which was required in his former employment. The case presently before us is clearly distinguishable from Calhoun. As noted above, the restrictions placed upon the employee's activities by Dr. Gross do not preclude him from performing his former job duties as best we can discern them. The doctor never stated that those restrictions were permanent. In addition, Dr. Gross stated on May 6, 2004, that he had not seen Mr. Gallo since February 9, 2004 and had no opinion as to his present disability. Therefore, there is no medical opinion which would directly contradict the employee's own opinion in April 2004 that he could return to work as a truck driver.

The trial judge set the end of incapacity on March 9, 2004, about four (4) weeks after the last office visit with Dr. Gross. On February 9, 2004, the doctor had indicated in his report that he wanted to see the employee again in four (4) weeks. According to the doctor, as of May 13, 2004, Mr. Gallo had not scheduled a return appointment. All of these factors, taken together, support the trial judge's finding that the employee's incapacity ended on March 9, 2004.

In his final two (2) reasons of appeal, the employee argues that the trial judge erroneously considered the testimony and opinions of Dr. Gross to be stale and incorrectly determined that the seven (7) month gap between the doctor's last examination and the conclusion of the case rendered the doctor's opinions stale. We have reviewed the trial judge's decision and can find no reference to a determination that the doctor's opinions or testimony were stale and therefore rejected.

The trial judge referred to the fact that Dr. Gross had no opinion as to the employee's disability status after February 9, 2004. At the time of the doctor's testimony in May 2004, he had not seen the employee again, although he was to follow up with the doctor in March. The

employee testified in April that he saw Dr. Gross about a month ago and that he had another appointment in a few weeks. However, Dr. Gross had no record of seeing the employee in March or of any appointment scheduled after February 2004. The trial judge did not reject Dr. Gross's opinion regarding disability as of February 2004 as stale. She simply considered subsequent events in determining that the employee's incapacity had ended as of March 9, 2004.

For the reasons set forth above, 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

Bertness and Sowa, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Bertness, 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 petitioner/employee and upon consideration thereof, the employee's appeal is denied and it is:

ORDERED, ADJUDGED, AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on October 8, 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:

_____
Olsson, J.

_____
Bertness, J.

_____
Sowa, J.

I hereby certify that copies were mailed to John M. Harnett, Esq., and Lauren Motola-Davis, Esq., on

_____