STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
PATRICIA JASPERS	)	
	)	
VS.	)	W.C.C. 2005-05940
	)	
UNIVERSITY ORAL & MAXILLOFACIAL SURGERY ASSOCIATES, LTD.	)	
UNIVERSITY ORAL & MAXILLOFACIAL SURGERY ASSOCIATES	)	
	)	
VS.	)	W.C.C. 2004-08174
	)	
PATRICIA JASPERS	)	
PATRICIA JASPERS	)	
	)	
VS.	)	W.C.C. 2004-01728
	)	
UNIVERSITY ORAL & MAXILLOFACIAL SURGERY ASSOCIATES, INC.	)	
UNIVERSITY ORAL & MAXILLOFACIAL SURGERY ASSOCIATES	)	
	)	
VS.	)	W.C.C. 2004-00390
	)	
PATRICIA JASPERS	)	

AMENDED DECISION OF THE APPELLATE DIVISION

OLSSON, J. In accordance with Rule 1.5 of the Rules of Practice of the Workers' Compensation Court, an amended decision is hereby issued to award a counsel fee and costs to the employee's attorney for the successful defense of the employer's petition in W.C.C. No. 2004-00390.

These four (4) matters were consolidated for trial and remain consolidated before the Appellate Division for purposes of addressing the employee's appeals from the denial of her request for approval of a rehabilitation program and the granting of the reduction of her worker's compensation benefits to seventy percent (70%) of her weekly compensation rate pursuant to R.I.G.L. § 28-33-18(b). After review of the record and consideration of the arguments of counsel, we deny the appeals in W.C.C. Nos. 2005-05940, 2004-08174, and 2004-01728. In W.C.C. No. 2004-00390, we grant the employee's appeal and enter a new decree denying the employer's request for approval of a rehabilitation plan.

W.C.C. No. 2004-00390 is an employer's petition to review requesting approval of a rehabilitation program pursuant to R.I.G.L. § 28-33-41. The petition was denied at the pretrial conference on October 14, 2004 and the employer claimed a trial.

W.C.C. No. 2004-01728 is an employee's petition to review requesting approval of a rehabilitation plan pursuant to R.I.G.L. § 28-33-41. On April 14, 2004, the trial judge entered an interlocutory order stating that the employee could enroll in two (2) courses at the University of Rhode Island (hereinafter "URI"), the cost of which the employer's workers' compensation insurer, Beacon Mutual Insurance Company (hereinafter "Beacon"), would reimburse her. The order also referred the employee to the Dr. John E. Donley Rehabilitation Center (hereinafter "Donley Center") for vocational evaluation and recommendations, if appropriate, regarding a

rehabilitation plan. On October 14, 2004, the trial judge entered a pretrial order denying the employee's request for approval of her proposed rehabilitation plan, affirming the orders contained in the interlocutory order, and ordering the employee to return to the Donley Center for further vocational services tailored so as not to interfere with the employee's participation in additional courses at URI at her own expense. The employee claimed a trial from this order.

W.C.C. No. 2004-08174 is an employer's petition to review requesting a reduction in the employee's weekly benefits to seventy percent (70%) of her weekly compensation rate pursuant to R.I.G.L. § 28-33-18(b). Under the terms of a consent decree entered into by the parties on August 18, 2004 in W.C.C. No. 2003-06485, it was agreed that the employee's condition had reached maximum medical improvement and she remained partially disabled. On January 11, 2005, the trial judge granted the request for the reduction, but delayed the effective date to September 1, 2005. Both parties filed a claim for trial from this order.

W.C.C. No. 2005-05940 is an employee's petition to review requesting an extension of the effective date of the reduction of her benefits due to her active participation in vocational rehabilitation. An interlocutory order was entered on September 26, 2005 delaying the implementation of the reduction until November 2, 2005. A pretrial order affirming that order was entered on January 13, 2006. A timely claim was filed by the employee for a trial de novo.

The employee was injured in the course of her employment as an anesthesia assistant for oral surgeries on August 15, 2002. She tripped over a plug on the floor and hit her head against a wall resulting in lacerations to the bridge of her nose and forehead, a bruised right forearm, injuries to the lower back and neck, a right ankle strain and headaches. The injury was memorialized in a memorandum of agreement dated September 3, 2002 which provided for the payment of weekly benefits for partial incapacity beginning August 16, 2002. Ms. Jaspers had

two (2) brief periods of total incapacity in 2002 and 2003 and has been partially disabled since March 20, 2003. A consent decree was entered on August 18, 2004 which found that her condition had reached maximum medical improvement.

The employee testified that she graduated in 1976 from Johnston High School. Approximately fifteen (15) years ago, she had taken two (2) college courses, as well as courses resulting in her certification as an anesthesia assistant. She has maintained that certification by taking twelve (12) continuing education credits per year. Ms. Jaspers is currently enrolled at the University of Rhode Island (hereinafter "URI") with the goal of obtaining a degree in elementary education and becoming employed as an elementary school teacher. She applied and obtained various forms of financial aid to pay for her education, including a Pell Grant and a state grant.

Ms. Jaspers attempted to return to her regular occupation in December 2002, working only two (2) days a week, from 8:00 a.m. to 5:00 p.m. Her regular job duties included preparing the medications and gathering the instruments needed for the surgeries scheduled for that day, as well as assisting in the procedures which required her to be bent over the patient for extended periods of time. If she was not directly assisting in the procedure, she was required to hold the patient's head from behind in order to maintain an open airway during the procedure, which could last 45 to 90 minutes. In February 2003, Ms. Jaspers found that she could no longer tolerate the position of holding the patient's head and had to excuse herself from a procedure. Shortly thereafter she stopped working and has not returned to work since that time.

After a court-ordered vocational assessment by Robert Reall of the Donley Center in April 2004, the employee applied for a position as a medical secretary with several offices during July and August of 2004 but was not hired. Since beginning the program at URI in the fall of 2004, she has not made any further attempts to find employment.

Ms. Jaspers testified that she has had no treatment for the laceration to her nose and forehead, her right forearm and her right ankle since the date of the injury. She also receives no treatment for her low back. She continues to have chronic neck pain with shooting pains into her right shoulder and arm, as well as debilitating headaches. She takes Imitrex to control the migraine headaches.

The medical evidence consisted of the reports and deposition of Dr. Robert A. L'Europa, a chiropractic physician licensed in the state of Rhode Island, and the reports and deposition of Dr. Randall Updegrove, who specializes in occupational medicine.

Dr. L'Europa began treating the employee shortly after the injury and has continued to provide treatment to her about once a month. The doctor agreed that Ms. Jaspers' symptoms and physical findings have been relatively consistent over the course of several years. The employee had some discussion with the doctor regarding her efforts to find alternative employment. In a letter to the employee's attorney dated May 26, 2004, Dr. L'Europa stated that in his opinion the duties required of a medical secretary, such as typing, operating a telephone, and charting, would likely aggravate the employee's condition because they would require that she maintain her neck in one position for prolonged periods of time. He did indicate in the letter that she was capable of working as an instructor training dental surgery anesthesia assistants and teaching CCD classes.

Dr. L'Europa testified that Ms. Jaspers was capable of attending classes at URI and performing the duties of an elementary school teacher because she would be able to change position as needed. The doctor acknowledged that his opinion is based in part upon the employee's report to him of her daily activities, what aggravates her symptoms, and her

perceived limitations, and he did not know specifically what she did daily in class or at home and how long she could perform certain activities.

Dr. L'Europa referred the employee to ErgoScience to undergo a functional capacity evaluation which would more specifically determine her physical capabilities. The report of that evaluation states that the employee is capable of performing medium level work for an eight (8) hour day. The report provides details as to her ability to perform certain tasks, including how much weight she can lift, and how often she can do those tasks.

Dr. Updegrove first saw the employee on November 20, 2002, on referral from Beacon. Due to the employee's failure to improve with conservative treatment, the doctor ordered a repeat MRI study which was done on February 5, 2003. The results were similar to the previous MRI of September 5, 2002, revealing fairly severe multi-level degenerative disc disease, particularly at the C5-6 level where there was moderate to severe right and moderate left neuroforaminal encroachment. After experiencing no significant improvement with physical therapy, the employee tried a series of acupuncture treatments which did not result in any sustained change in her condition.

Dr. Updegrove recommended facet injections and at the time of his last examination on November 24, 2003, he discharged the employee to pursue a course of injections with another physician. With regard to the employee's physical restrictions, Dr. Updegrove testified that she should avoid repetitive lifting and reaching and prolonged posturing of her neck, particularly extension and lateral rotation. He also recommended no lifting in excess of twenty (20) pounds. The doctor stated that if Ms. Jaspers complied with these restrictions she could work a full day in any occupation.

Leslie Brown, the practice manager for the employer who oversees the operation of the business, including staffing, testified that she was familiar with the job duties of the office billing and secretarial staff. She indicated that both positions involved entering data into a computer, utilizing the telephone, and filing documents. She also noted that both positions alternated between sitting, standing, and walking during the course of the day. Ms. Brown testified that there was on the job training for many new employees to acquaint them with the computer system among other things, and noted that the employee in this case would have some prior knowledge of the forms and terminology used from her pre-injury job duties.

Several vocational rehabilitation counselors testified during the trial regarding the appropriateness of Ms. Jaspers' proposed plan to retrain herself as an elementary school teacher. One point of discussion was the protocol for an initial vocational assessment and the Hierarchy of Vocational Rehabilitation (hereinafter "the Hierarchy"), copies of which were introduced into evidence. *See* Er's Ex. G. Pursuant to R.I.G.L. § 28-30-22(b)(1)(i), the Medical Advisory Board of the Workers' Compensation Court has adopted protocols for the treatment of compensable injuries. In 2001, the Initial Vocational Assessment Protocol Guidelines with the accompanying Appendix A – Hierarchy of Vocational Rehabilitation, were adopted by the Medical Advisory Board. The protocol guidelines state that

> Progression in the hierarchy of vocational rehabilitation is a sequential process based on the injured worker's functional status, transferable skills, and established average weekly wage. It is presumed that each level of the hierarchy will be addressed when establishing vocational recommendations.

The Hierarchy sets out seven (7) steps to follow in attempting to return an injured worker to employment: (1) Return to work, same employer, same job; (2) Return to work, same employer, different job; (3) Return to work, different employer, same job; (4) Return to work,

different employer, different job; (5) On-the-job training for three (3) to six (6) months; (6) Skills enhancement, which involves taking a course to develop a particular skill prior to a job search, but not a full retraining program; and (7) Retraining, after determining that none of the previous options are feasible, which may involve participation in a short-term certificate program or up to a two (2) year associate degree program.

Edmond Calandra, a self-employed vocational counselor, met with Ms. Jaspers at the request of her attorney on December 8, 2003, and prepared a vocational assessment dated December 19, 2003. The employee advised him that any exertion or use of her arms to any degree aggravated her neck symptoms and she also experienced severe headaches. Mr. Calandra cited the restrictions placed on the employee's activities by Dr. L'Europa in November 2003 and by Dr. Updegrove in March 2003 in formulating his assessment. On November 12, 2003, Dr. L'Europa wrote that the employee should be able to perform medical secretarial work. On March 19, 2003, Dr. Updegrove indicated that Ms. Jaspers could do sedentary work with the ability to sit and stand as tolerated, as long as she avoided maintaining her neck in one position for prolonged periods and did no heavy lifting.

Ms. Jaspers advised Mr. Calandra that she was interested in becoming an elementary school teacher. Without commenting in his report as to any other potential occupations that she may already be qualified to perform, Mr. Calandra simply concluded that this would be compatible with her vocational interests and physical capabilities and would likely result in earnings exceeding her pre-injury wages. He therefore produced a rehabilitation plan outlining the costs of a four (4) year college education resulting in a bachelor's degree in elementary education.

On cross-examination, Mr. Calandra stated that he based his opinion as to her retraining on the opinion of Dr. L'Europa that the employee is no longer capable of performing the job duties of a medical secretary. Dr. L'Europa stated this in a deposition taken after Mr. Calandra originally suggested the retraining. He admitted that Dr. L'Europa's report gave no reason for the change from his opinion in his original report which stated the employee was capable of performing the job duties of a medical secretary. Mr. Calandra also acknowledged that the employee was capable of more than sedentary work and that he had not viewed the job of a medical secretary in deciding that she could not perform this job. Mr. Calandra asserted that he did take into consideration the Hierarchy of Vocational Rehabilitation (hereinafter Hierarchy) in recommending retraining for the elementary school teacher position, despite the fact that he made no mention of it in his report and did not perform the task outlined in each step of the Hierarchy. He also admitted that a transferable skills analysis showed that during the employee's twenty-five (25) years at her job she acquired skills she might utilize in other positions in a medical office facility, but noted the pay variance as a concern.

Robert Reall, a vocational counselor working as a consultant at the Dr. John E. Donley Rehabilitation Center (hereinafter "Donley Center"), conducted a vocational assessment of Ms. Jaspers at the request of the court in April 2004. In preparation for his meeting with the employee, Mr. Reall reviewed some medical records of the employee's treatment, Mr. Calandra's report, and a vocational rehabilitation plan prepared by Ms. Jeanne McCluskie, a vocational rehabilitation specialist hired by Beacon. He also contacted the employer to confirm the employee's pre-injury job duties. During the meeting, Ms. Jaspers informed Mr. Reall that she was planning to begin taking some courses at the University of Rhode Island with the goal of becoming an elementary school teacher.

In his evaluation dated April 29, 2004 and his accompanying cover letter to the trial judge, Mr. Reall stated that based upon the employee's twenty-five (25) years of experience as a dental anesthesia assistant, "she has transferable skills to other occupations within the medical field that would be within both her skill level and functional capacity and would provide her with wages similar to what she was earning at the time of her injury." Er's Ex. I. He indicated that taking into consideration the Hierarchy, the plan for Ms. Jaspers to attend college was premature because she had transferable skills that she could apply to jobs such as a medical secretary, dental office manager or dental treatment coordinator, and these options had not yet been explored. Mr. Reall also testified that the employee's prior job and the position of elementary school teacher were both categorized as light work; while a medical secretary position was categorized as sedentary work. He noted in his report that there was no indication as to whether Ms. Jaspers would be capable of performing the physical demands of an elementary school teacher.

Jean Mandell, a vocational counselor employed by the Donley Center, testified that after Mr. Reall's evaluation, the employee was referred back to the Donley Center by the court for vocational services, with the condition that the "services may be tailored so as not to interfere with educational retraining, which is to be undertaken at the employee's expense,…" Ee's Ex. 5. Ms. Mandell met with the employee on December 23, 2004 at which time Ms. Jaspers advised her that she is not able to participate in vocational services due to her class schedule at URI and the amount of time she must spend studying in addition to classroom time. Ms. Mandell expressed concern that the employee may not be physically capable of performing the position of an elementary school teacher based upon her review of reports from Dr. L'Europa and Dr. Smith; however, Ms. Jaspers appeared adamant about pursuing this goal. She also noted that

engaging in a four (4) year college program at this stage without first exploring employment in a different capacity with a different employer was not in compliance with the Hierarchy.

On cross-examination, Ms. Mandell stated that the Hierarchy is followed by vocational rehabilitation counselors in the United States as an industry standard, but acknowledged that she was not specifically directed to utilize it by any provision of the Workers' Compensation Act.

Audrey Bell, a nationally certified rehabilitation counselor, conducted a vocational rehabilitation assessment at the request of Beacon in 2005. She was provided with the reports of several vocational rehabilitation counselors who had previously evaluated the employee, as well as extensive medical records. In her report, Ms. Bell indicated that Ms. Jaspers' work experience provided her with transferable skills which she could utilize to obtain employment in the dental/medical field where she could expect higher wages than if she made a wholesale career change. Ms. Bell stated that because "there is no documentation to support unsuccessful participation in the direct job placement level of the hierarchy, academic training can not be supported at this time." Er's Ex. N. Subsequently, Ms. Bell reviewed the deposition testimony of Drs. L'Europa and Updegrove, and also met with Ms. Brown at one of the employer's facilities to discuss and observe the positions of a medical biller and medical office receptionist.

Ms. Bell explained that each step in the Hierarchy must be reviewed and attempted before moving on to the next step. She noted that the last step, which involves retraining the employee, usually allows a maximum of two (2) years of retraining. This time period was deemed to represent the most effective use of time and resources necessary to return an injured worker to employment. Ms. Bell stated that a person "should do what she wants to do" in terms of the effect of an employee's interest level, however, within the scope of the Workers'

Compensation Act, the goal of rehabilitation is to expedite the employee's return to work since the longer they are out the longer their loss of wages.

Upon conclusion of the trial, the trial judge found that a further extension of time beyond November 2, 2005 for implementation of the reduction in benefits to seventy percent (70%) of the weekly rate was not warranted due to the employee's refusal to participate in rehabilitative programs. He also determined that the employee's vocational rehabilitation plan was not reasonable or necessary as required under §28-33-41 of the Workers' Compensation Act. In arriving at this decision, the trial judge relied on the opinion of Dr. Updegrove as to the employee's physical capabilities over that of Dr. L'Europa, who was not able to explain the basis of the change in his opinion that the employee could not perform the physical functions of a medical secretary. The trial judge also accepted the testimony of Mr. Reall, Ms. Mandell and Ms. Bell regarding the appropriateness of the employee's pursuit of a college degree at this time over Mr. Calandra's testimony, because he simply produced a plan based upon the employee's expressed goal of becoming an elementary school teacher, rather than attempting to utilize her existing skills.

The trial judge entered decrees affirming the pretrial orders in W.C.C. Nos. 2004-08174 and 2005-05940 regarding the implementation of the reduction in weekly benefits. The decree entered in W.C.C. No. 2004-01728 denied the employee's request for approval of her rehabilitation plan; however, the trial judge entered a decree in W.C.C. No. 2004-00390 stating that the employer's request for approval of a rehabilitation plan was granted.

The employee filed multiple reasons of appeal in each of the cases which can be summarized as two (2) fundamental issues. The employee first contends that the trial judge erred in denying her an extension of the implementation of the reduction in her benefits because he

failed to recognize her pursuit of a college degree as evidence of her performance of her duty to actively seek employment. Secondly, the employee argues that the trial judge erred in rejecting the testimony of Mr. Calandra and accepting the opinions of Mr. Reall, Ms. Mandell, and Ms. Bell, and also committed error by relying on the Hierarchy and protocol regarding vocational rehabilitation assessments as a basis for rejecting the employee's rehabilitation plan.

In reviewing the decision of a trial judge, we adhere to a very deferential standard. The Workers' Compensation Act dictates that the findings of fact made by the trial judge are entitled to great weight on appeal. *See* R.I.G.L. § 28-35-28(b). Absent a determination by the appellate panel that a finding on a factual matter is clearly erroneous, the findings of fact made at the trial level are final. R.I.G.L. §28-35-28(b); Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996).

In her appeals from the decrees entered in W.C.C. Nos. 2004-08174 and 2005-05940, the employee contends that the trial judge failed to recognize that her attendance at classes at URI with the goal of obtaining a degree in elementary education is evidence of her performance of her duty to actively seek employment and justifies a delay in the implementation of the reduction in her benefits, presumably until she graduates and finds a job as a teacher. We find that the trial judge did not abuse his discretion in delaying the implementation for approximately eleven (11) months and declining to extend that delay any further.

Section 28-33-18(b) of the Rhode Island General Laws states:

> "[W]here an employee's condition has reached maximum medical improvement and the incapacity for work resulting from the injury is partial…the employer shall pay the injured employee a weekly compensation equal to seventy percent (70%) of the weekly compensation rate…The court may, in its discretion, take into consideration the performance of the employee's duty to actively seek employment in scheduling the implementation of the reduction." (Emphasis added.)

The language of R.I.G.L. §28-33-18(b) allows the trial judge broad discretion as to what impact, if any, the employee's efforts to seek employment may have on the determination as to when the reduction should be implemented. After reviewing the record in this matter, we find no basis for concluding that the trial judge abused that discretion.

Pursuant to a consent decree entered by the parties on August 18, 2004, a finding was made that Ms. Jaspers' condition had reached maximum medical improvement. The employer filed the petition requesting the reduction pursuant to § 28-33-18(b) on December 13, 2004. On January 11, 2005, the trial judge entered a pretrial order in W.C.C. 2004-08174 granting the petition and ordering implementation of the reduction as of September 1, 2005, a delay of almost nine (9) months.

On September 19, 2005, the employee filed a petition to review requesting that the implementation of the reduction be further delayed because the "employee is still actively engaged in vocational rehabilitation." The trial judge entered an interlocutory order on September 26, 2005 delaying implementation of the reduction until November 2, 2005, an additional two (2) months. On January 13, 2006, the trial judge entered a pretrial order affirming the implementation of the reduction as of November 2, 2005.

As noted by the trial judge, there was some evidence presented by the employee that she had initially attempted to seek employment in other medical offices as suggested by Ms. McCluskie in October of 2003 and Mr. Reall in April 2004. *See* Ee's Ex. 11. These perfunctory efforts ended in August 2004. The trial judge, however, continued to attempt to engage Ms. Jaspers in vocational services designed to assist her in securing employment by referring her back to the Donley Center in October 2004. The letter dated January 4, 2005 from Ms. Mandell to the court made clear that Ms. Jaspers was not going to make herself available in any manner to

engage in any type of employment search because she was already fully engaged in pursuing her stated goal of obtaining a college degree. Ms. Jaspers testified that she has not looked for any type of work since she began attending URI.

Based on these facts, it is clear that Ms. Jaspers voluntarily stopped performing her "duty to actively seek employment" at least as of December 2004. We believe that the trial judge was more than generous in delaying the reduction of her benefits until November 2, 2005, almost a year after she admittedly stopped looking for work.

The employee contends that her active pursuit of a college degree which will hopefully enable her to secure employment as an elementary school teacher should be considered performance of her duty to actively seek employment and justified delaying the reduction in her benefits. As noted above, the trial judge has broad discretion as to whether to consider the employee's job search efforts at all in implementing the reduction. Furthermore, the employee's attendance at college cannot be equated to actively seeking employment. Such an interpretation would be a distortion of the plain meaning of the language utilized in the statute. We would note that employees engaged in vocational rehabilitation programs which have been approved by the court or agreed to by the parties are protected from reduction in their benefits while participating in the program. *See* R.I.G.L. § 28-33-41(c). Ms. Jaspers' enrollment in a college degree program was not approved by the court or agreed to by the employer. Consequently, she was not entitled to any protection from reduction of her weekly benefits.

The employee has presented a number of arguments with regard to the denial of her request for approval of a rehabilitation plan, specifically participation in a four (4) year degree program in elementary education at URI. She initially contends that the plan she presented is the only rehabilitation plan which will restore her to her optimum vocational and economic

usefulness in accordance with R.I.G.L. § 28-33-41. We believe the employee has distorted the intent of the statute by focusing on one phrase rather than addressing the statute as a whole.

Section 28-33-41(a)(2) of the Rhode Island General Laws defines "rehabilitation" as

> "[T]he prompt provision of appropriate services necessary to restore an employee who is occupationally injured or diseased to his or her optimum physical, mental, vocational, and economic usefulness. This may require medical, vocational, and/or reemployment services to restore an employee who is occupationally disabled as nearly as possible to his or her pre-injury status." (Emphasis added.)

One of the components, vocational restorative services, is defined as those "services needed to return the employee with a disability to his or her pre-injury employment or, if that is not possible, to a state of employability in suitable alternative employment." R.I.G.L. § 28-33-41(a)(2)(ii). Rehabilitation may also include reemployment services which are "[s]ervices used to return the employee who is occupationally disabled to suitable, remunerative employment as adjudged by his or her functional and vocational ability at that time." R.I.G.L. § 28-33-41(a)(2)(iii).

The goal of rehabilitation, as delineated in this statute, is to restore the employee as nearly as possible to her pre-injury status both physically and economically in an expeditious manner. Ideally, this will result in the injured worker returning to her previous employment. If that is not possible due to residual physical restrictions, then services should be provided to restore the employee to "a state of employability in suitable alternative employment." R.I.G.L. § 28-33-41(a)(2)(ii). Similar to the provision of medical services, the court must consider what vocational rehabilitative services are reasonable and necessary to achieve the goal of expeditiously returning the employee to some type of alternative employment.

There is nothing in the statute obligating the employer to provide the employee the opportunity to maximize her economic and educational potential beyond her previous employment. A person with the intelligence level of a genius may be injured while employed as a dishwasher. We are unwilling to construe the language of § 28-33-41 to conclude that the employer is obligated to support him while he attends college and perhaps graduate school, even though such an opportunity would certainly "optimize" his skills and aptitudes. We applaud Ms. Jaspers for undertaking a lengthy training process in a new career at this time in her life, but we cannot approve the program as appropriate rehabilitative services under the Workers' Compensation Act at this time.

Ms. Jaspers believes that she should be free to choose whatever occupation she wishes and the employer should be held responsible for supporting her until she achieves her goal of employment in her desired vocation; however, the statute does not provide the employee unrestricted freedom to choose whatever vocational goal she desires. Ms. Jaspers rejected any efforts to provide services which would assist her in obtaining alternative employment utilizing her existing skills and background. She chose to make a wholesale career change which requires a significant investment of time and money which may or may not result in employment. We conclude that the language of the statute does not require approval of such a plan as appropriate rehabilitation services.

In her third and fourth reasons of appeal regarding the denial of her rehabilitation plan, the employee faults the trial judge's rejection of Mr. Calandra's proposed rehabilitation plan and his reliance upon the testimony and reports of Mr. Reall, Ms. Mandell, and Ms. Bell. In her petition seeking approval of the rehabilitation plan proposed by Mr. Calandra, the employee bears the burden of presenting credible evidence establishing that the proposed rehabilitative

services are reasonably necessary to expeditiously restore the employee to "a state of employability in suitable alternative employment." R.I.G.L. § 28-33-41(a)(2)(ii). After reviewing the evidence presented in this matter, we find ample support for the trial judge's determination that the employee did not sustain her burden.

After meeting with Ms. Jaspers on December 8, 2003, Mr. Calandra prepared a document dated December 19, 2003 entitled "Vocational Assessment." He specifically states the purpose of the meeting was to "assess Mrs. Jaspers [sic] vocational potential." Ee's Ex. 15 at 1. The document contains information as to the employee's injury and treatment, a summary review of medical reports made available to Mr. Calandra, and an extensive section regarding transferable skills and abilities. It is clear from this document that Ms. Jaspers has significant transferable skills from her lengthy experience in the dental/medical field and her activities outside of work, including teaching CCD classes and developing computer skills. Without any discussion of any other potential job opportunities, Mr. Calandra simply goes on to recommend development of a plan to allow Ms. Jaspers to pursue her stated goal of becoming an elementary school teacher.

Mr. Calandra acknowledged that he did not ask Ms. Jaspers' employer if there were any potential job opportunities for her there, nor did he investigate potential job opportunities with a different employer. He did not look into any potential jobs which would require less additional training than a four (4) year college degree program. He admitted that there were probably jobs which Ms. Jaspers was capable of performing without additional education or training, but he expressed concern that those positions may not duplicate her pre-injury earnings, yet he did not produce any information to substantiate that concern. We believe it is clear from Mr. Calandra's report and his testimony that the rehabilitation plan was developed solely with Ms. Jaspers' pre-

determined goal of becoming a teacher in mind, rather than what services were reasonable and necessary to place Ms. Jaspers in some type of suitable alternative employment.

The trial judge also pointed out that Mr. Calandra attempted to cite Dr. L'Europa's opinion that the employee could not do medical secretarial work in support of his decision not to investigate any employment options other than the teaching position promoted by the employee; however, Dr. L'Europa expressed this opinion in a deposition taken after Mr. Calandra produced his report. *See* Tr. at 284. In his December 19, 2003 report in documenting the employee's physical capabilities, Mr. Calandra cites a report of Dr. L'Europa dated November 12, 2003 stating that the doctor considers Ms. Jaspers capable of medical secretarial work. Obviously, the doctor's subsequent change in opinion (for which he offered no explanation) could not have been any part of the reason that Mr. Calandra did not explore employment opportunities for Ms. Jaspers in the medical secretarial field.

In addition to these questions raised regarding Mr. Calandra's report and testimony, the trial judge was presented with the testimony of three (3) other vocational rehabilitation counselors who all disagreed with Mr. Calandra's proposed plan. These experts noted that Ms. Jaspers had significant transferable skills and aptitudes and recommended that efforts should initially be focused on finding work in the medical/dental field with a different employer and, if necessary, participating in some additional computer training in that field. They considered the proposal to obtain a four (4) year college degree in elementary education to be premature and not necessary at this time for the employee to secure alternative employment. In addition, they expressed concern that an evaluation had not been done to determine whether Ms. Jaspers was physically capable of performing the duties of an elementary school teacher with the residual physical problems she claims to suffer from. It is within the trial judge's discretion to accept the

opinions of these expert witnesses over the opinions expressed by Mr. Calandra, and his reasoning in doing so is supported in the record. *See* Parenteau v. Zimmerman Eng'g, Inc., 111. R.I. 68, 78, 299 A.2d 168, 174 (1973).

The employee argues that the trial judge's acceptance of Mr. Reall, Ms. Mandell, and Ms. Bell was error because their testimony fails as a matter of law to establish that their proposals would restore the employee's earning capacity and the health insurance benefits available to her in her previous employment. We would reiterate that the burden of proof in the employee's petition for approval of her rehabilitation proposal is on the employee. The employer is not seeking approval of the alternative proposals presented by Mr. Reall, Ms. Mandell, and Ms. Bell. The testimony of these witnesses was presented as evidence of why Mr. Calandra's proposal was premature and that other less time-consuming and less costly options to secure suitable employment for Ms. Jaspers were available which should be explored first. Mr. Reall did testify as to some preliminary research he did regarding medical secretary positions and stated that experienced medical secretaries could earn more than the employee's pre-injury wages. The trial judge properly relied on the testimony of these three (3) experts, along with the concerns noted previously, in rejecting Mr. Calandra's testimony and denying the proposed rehabilitation plan.

In her final two (2) reasons of appeal regarding the denial of approval of her rehabilitation plan, the employee contends that the trial judge erred in utilizing the Hierarchy as grounds for denying her petition. She first argues that because cost is a factor in determining the extent of rehabilitation services provided at each step of the Hierarchy, her proposed plan should not be considered in that context because she is financing her college education through sources other than the employer. Ms. Bell testified that cost is a factor in determining vocational services

and that consideration of retraining and education programs are the last step in the Hierarchy because they are the most costly.

It is not clear from the record whether the grants obtained by Ms. Jaspers were sufficient to pay all of the expenses associated with her college program at URI. Pursuant to Rhode Island General Laws § 28-33-41(d), the employer shall bear the expense of any rehabilitation program agreed to or ordered by the court. In February 2004, Mr. Calandra estimated the cost of Ms. Jaspers college program, including tuition, fees, books and mileage, at Thirty Thousand Five Hundred Four and 00/100 ($30, 504.00) Dollars. In addition, pursuant to § 28-33-41(c), the employer cannot reduce or terminate the employee's weekly compensation payments while she is participating in an approved rehabilitation program. The employer would, therefore, be obligated to pay Ms. Jaspers her full weekly benefits while she attended college and, arguably, while she looked for a teaching position after graduation. The employee's contention that cost is not a factor to be considered in determining the reasonableness and necessity of such a program absent any other efforts to seek employment is without merit under the circumstances.

Ms. Jaspers also argues that the Workers' Compensation Court lacked the statutory authority to adopt any protocols regarding the provision of vocational rehabilitation services because § 28-30-22 refers only to the adoption of protocols regarding medical treatment. She contends, therefore, that the trial judge erred in referencing and utilizing the Hierarchy to deny approval of her rehabilitation plan. Without specifically addressing whether § 28-30-22 authorizes the adoption of a protocol regarding vocational rehabilitation services, we find that the trial judge's reference to the Hierarchy as a guideline in assessing whether the employee's rehabilitation plan was appropriate at this time was proper.

In his discussion of the employee's rehabilitation plan, the trial judge specifically refers to the statute regarding rehabilitative services, § 28-33-41, and the notes that rehabilitative services must be designed to restore an employee as nearly as possible to her pre-injury status in an expeditious manner. *See* Dec. at 21. He cites the Hierarchy as providing "a good roadmap to reach that status." Id. Both Ms. Mandell and Ms. Bell indicated that the Hierarchy is an industry standard utilized across the country by vocational rehabilitation counselors involved in returning people to work. *See* Tr. at 372, 388-389. Consequently, the trial judge was entitled to evaluate the vocational experts' opinions and recommendations in conjunction with this nationally recognized standard, regardless of whether it has been adopted by the Medical Advisory Board as part of the protocols. In doing so, he determined that the employee's rehabilitation plan was not appropriate at this time because she had not demonstrated that the previous steps of the Hierarchy had been attempted without success before requesting re-education and retraining in a four (4) year degree program.

We find that in this case it was proper for the trial judge to use the Hierarchy as a guideline in deciding whether the rehabilitation plan created by Mr. Calandra was necessary and reasonable to rehabilitate the employee and return her to the workforce. Here, the trial judge used the Hierarchy as a guide to determine whether less extreme measures of rehabilitation had been exhausted before Mr. Calandra made the recommendation for the employee to attend the University of Rhode Island. The trial judge concluded from Mr. Calandra's testimony that, although he claimed he reviewed and relied on the Hierarchy in coming to his conclusion, there was no documentation of the steps considered prior to reeducation, step seven (7), and he did not exhaust the first six (6) steps prior to making his recommendation.

The trial judge may have inartfully worded one of his findings of fact in stating that the employee's plan "fails to meet the protocols under the Workers' Compensation Act," but we do not find this to be a fatal flaw. Dec. at 23. As noted above, the trial judge was entitled to consider the Hierarchy as an industry standard of good practice for vocational rehabilitation counselors in evaluating what services were appropriate under § 28-33-41. Mr. Reall, Ms. Mandell, and Ms. Bell all testified that efforts should have been made to return Ms. Jaspers to the workforce in alternative employment utilizing her existing skills and possibly expanding on those skills with some short term training before leaping to the conclusion that a four (4) year degree program was the only feasible option. The trial judge found their testimony to be more persuasive than that of Mr. Calandra and it formed the basis for his finding that the employee's rehabilitation plan was not appropriate under the Act.

Lastly, the employee argues that the trial judge erred in entering a decree in W.C.C. No. 2004-00390 which is inconsistent with the decision rendered by the court. W.C.C. No. 2004-00390 is an employer's petition to review requesting a "Rehabilitation Program Review per R.I.G.L. 28-33-41and W.C.C. Rules of Practice." The statute referenced in the petition and the rules regarding that statute provide for a party to request that the court approve a proposed rehabilitation plan. The employer attached to its petition a document entitled "Individual Vocational Rehabilitation Plan" authored by Jeanne McCluskie. Ms. McCluskie never testified during the trial of this matter, nor was the plan she authored introduced into evidence.

In his decision, the trial judge stated that it was his intention to "affirm the denials of the petitions filed by both the employee and the employer relative to their respective rehabilitation plans." Dec. at 17. In the decree entered, the trial judge made a finding that "[t]he employer's request for a Rehabilitation Program Review was reasonable and appropriate under the Workers'

Compensation Act," and granted the employer's petition. As noted above, there was no rehabilitation plan proposed by the employer in evidence and, therefore, nothing to approve. Therefore, new decrees shall be entered in each of the other three (3) matters deleting finding of fact number seven (7) which references the employer's rehabilitation plan. We will enter a new decree in W.C.C. No. 2004-00390 denying and dismissing the employer's petition and awarding counsel fees and costs to the employee's attorney for services rendered at the appellate and trial levels with regard to the defense of the employer's petition.

Based upon the foregoing, the employee's claims of appeal in W.C.C. Nos. 2004-01728, 2004-08174, and 2005-05940 are denied and dismissed. The employee's appeal in W.C.C.2004-00390 is granted and a new decree shall enter denying the employer's petition and awarding appropriate counsel fees and costs to the employee's attorney. In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, final decrees, copies of which are enclosed shall be entered on

Salem and Hardman, JJ., concur.

ENTER:

_____
Olsson, J.

_____
Salem, J.

_____
Hardman, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
UNIVERSITY ORAL & MAXILLOFACIAL SURGERY	)	
	)	
VS.	)	W.C.C. 2004-00390
	)	
PATRICIA JASPERS	)	

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division pursuant to the claim of appeal of the respondent/employee from a decree entered on February 28, 2007. Upon consideration thereof, the appeal of the employee is granted, the decree entered by the trial judge is vacated, and, in accordance with the Decision of the Appellate Division, the following findings of fact are made:

1. That the employer filed a petition requesting approval of a rehabilitation plan prepared by Ms. Jeanne McCluskie on October 23, 2003.

2. That the petition was denied at the pretrial conference and the employer filed a claim for trial.

3. That during the trial, the employer never introduced any evidence of the rehabilitation plan for which it sought the approval of the court.

It is, therefore, ORDERED:

1. That the employer's petition to review requesting approval of a rehabilitation plan is denied and dismissed.

2. That the employer shall reimburse Gregory L. Boyer, Esq., attorney for the employee, the sum of One Thousand Five Hundred Eighty-eight and 00/100 ($1,588.00) Dollars for the cost of providing a transcript of the trial to the Appellate Division and the cost of filing the claim of appeal.

3. That the employer shall reimburse Gregory L. Boyer, Esq., attorney for the employee, the sum of Two Hundred Eleven and 60/100 ($211.60) Dollars for costs incurred in defense of this petition at the trial level.

4. That the employer shall pay to Gregory L. Boyer, Esq., attorney for the employee, a counsel fee in the sum of Two Thousand Five Hundred and 00/100 ($2,500.00) Dollars for services rendered at the appellate level and the sum of Six Thousand Three Hundred Ninety-six and 00/100 ($6,396.00) Dollars for services rendered in defense of this petition at the trial level.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Salem, J.

_____
Hardman, J.

I hereby certify that copies of the Amended Decision and Final Decree of the Appellate Division were mailed to Gregory L. Boyer, Esq., and Michael D. Lynch, Esq., on

_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
PATRICIA JASPERS	)	
	)	
VS.	)	W.C.C. 2004-01728
	)	
UNIVERSITY ORAL & MAXILLOFACIAL SURGERY ASSOCIATES, INC.	)	

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the claim of appeal of the petitioner/employee from a decree entered on February 28, 2007. Upon consideration thereof, the appeal of the employee is denied and dismissed; however, in accordance with the Amended Decision of the Appellate Division regarding a companion matter, W.C.C. No. 2004-00390, the following findings of fact are made in conformance with our Amended Decision:

1. That the employee filed a petition requesting approval of a rehabilitation plan proposing enrollment in a four (4) year program at the University of Rhode Island for the purpose of obtaining a college degree in elementary education and seeking employment thereafter as an elementary school teacher.

2. That the employee has transferable skills based upon her educational background and twenty-five (25) years of experience as a dental anesthesia assistant.

3. That the employee has failed to establish by a fair preponderance of the probative and credible evidence that the proposed program is appropriate at this time in conformance with R.I.G.L. § 28-33-41.

It is, therefore, ORDERED:

1. That the employee's petition requesting approval of a rehabilitation plan is denied and dismissed.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Salem, J.

_____
Hardman, J.

I hereby certify that copies of the Amended Decision and Final Decree of the Appellate Division were mailed to Gregory L. Boyer, Esq., and Michael D. Lynch, Esq., on

_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

UNIVERSITY ORAL & MAXILLOFACIAL SURGERY ASSOCIATES	)	
	)	
VS.	)	W.C.C. 2004-08174
	)	
PATRICIA JASPERS	)	

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division on the claim of appeal of the respondent/employee from a decree entered on February 28, 2007. Upon consideration thereof, the appeal of the employee is denied and dismissed; however, in accordance with the Amended Decision of the Appellate Division regarding a companion matter, W.C.C. No. 2004-00390, the following findings of fact are made in conformance with our Amended Decision:

1. That the employee's condition resulting from a work-related injury sustained on August 15, 2002 was found to have reached maximum medical improvement pursuant to a consent decree entered on August 18, 2004 in W.C.C. No. 2003-06485.

2. That a pretrial order was entered in this matter on January 11, 2005, ordering that pursuant to R.I.G.L. § 28-33-18(b), the employee's weekly benefits be reduced to seventy percent (70%) of her weekly compensation rate effective September 1, 2005.

3. That the employee filed a timely claim for trial in this matter.

4. That on September 26, 2005, a pretrial order was entered in W.C.C. No. 2005-05940 which delayed implementation of the reduction until November 2, 2005.

It is, therefore, ORDERED:

1. That the employer's petition requesting reduction of the employee's weekly benefits to seventy percent (70%) of her weekly compensation rate pursuant to R.I.G.L. § 28-33-18(b) is granted.

2. That in conformance with the decree entered in the companion matter, W.C.C. No. 2005-05940, the reduction shall be implemented on November 2, 2005.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Salem, J.

_____
Hardman, J.

I hereby certify that copies of the Amended Decision and Final Decree of the Appellate Division were mailed to Gregory L. Boyer, Esq., and Michael D. Lynch, Esq., on

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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

PATRICIA JASPERS	)	
	)	
VS.	)	W.C.C. 2005-05940
	)	
UNIVERSITY ORAL & MAXILLOFACIAL SURGERY ASSOCIATES, LTD.	)	

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division on the claim of appeal of the respondent/employee from a decree entered on February 28, 2007. Upon consideration thereof, the appeal of the employee is denied and dismissed; however, in accordance with the Amended Decision of the Appellate Division regarding a companion matter, W.C.C. No. 2004-00390, the following findings of fact are made in conformance with our Amended Decision:

1. That the employee's condition resulting from a work-related injury sustained on August 15, 2002 was found to have reached maximum medical improvement pursuant to a consent decree entered on August 18, 2004 in W.C.C. No. 2003-06485.

2. That a pretrial order was entered on January 11, 2005 in W.C.C. No. 2004-08174, ordering that, pursuant to R.I.G.L. § 28-33-18(b), the employee's weekly benefits be reduced to seventy percent (70%) of her weekly compensation rate effective September 1, 2005.

3. That the employee filed a timely claim for trial in that matter.

4. That on September 26, 2005, pursuant to the employee's petition to review requesting

a delay in the implementation of the reduction in her weekly benefits, a pretrial order was entered in this matter which delayed implementation of the reduction until November 2, 2005.

5. That the employee, by her own admission, is not actively engaged in seeking employment because she is attending college on a full-time basis.

6. That further delay in implementing the reduction of benefits pursuant to R.I.G.L. § 28-33-18(b) beyond November 2, 2005 is not warranted.

It is, therefore, ORDERED:

1. That the employee's petition requesting a delay in the implementation of the reduction of her weekly benefits pursuant to R.I.G.L. § 28-33-18(b) is granted.

2. That the reduction shall be implemented as of November 2, 2005.

3. That no counsel fees or costs are awarded as the employee did not achieve any greater relief or benefits after trial than was obtained at the pretrial level.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Salem, J.

_____
Hardman, J.

I hereby certify that copies of the Amended Decision and Final Decree of the Appellate Division were mailed to Gregory L. Boyer, Esq., and Michael D. Lynch, Esq., on

_____