STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
OCEAN STATE JOB LOT	)	
	)	
VS.	)	W.C.C. 2007-02092
	)	
SANDRA WHITE	)	
OCEAN STATE JOB LOT	)	
	)	
VS.	)	W.C.C. 2006-06529
	)	
SANDRA WHITE	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's appeal from the consolidated decision and decree of the trial judge, which found that the employee's work-related injury had reached maximum medical improvement and that her workers' compensation benefits should be reduced pursuant to R.I.G.L. § 28-33-18(b). After a thorough review of the record and careful consideration of the parties' respective arguments, we affirm the decision and decree of the trial judge and deny and dismiss the employee's appeal.

This matter came before the court on the employer's petition asking the court to find that the employee's injury had reached maximum medical improvement (hereinafter "MMI"). This petition was granted at pretrial and the employee claimed a trial. Prior to the trial, the employer successfully petitioned the court for a pretrial reduction in the employee's benefits pursuant to R.I.G.L. § 28-33-18(b). The matters were consolidated at trial and both pretrial orders were affirmed.

The employee's injury was memorialized in a memorandum of agreement indicating she suffered a work-related lumbar sprain on June 1, 2005. The employee was deemed partially incapacitated and received benefits from June 2, 2005 and continuing. Her treating doctor's notes indicate she initially experienced pain in her back in December of 2004 after lifting cases of food at work. Thereafter she returned to work in May of 2005, but on June 1, 2005, she re-injured her back after slipping in water on the floor at work.

The employee testified by video deposition from Maine, where she has since moved. The employee testified that she continued to experience pain attributed to her work injury. She described pain in her left lower back, side, and hip. She felt that her physical condition severely limited the activities she was able to partake in. She stated that she could only remain on her feet for about four (4) hours and was unable to do any significant lifting. She testified that while she could walk "pretty good," it hurt to stand up, get in and out of chairs, and bend forward. (Pet. Exh. 3, p. 8.) She stated she was able to do some stretching in the morning and minimal walking exercises, but no aerobic exercises. On a typical day she would "get up in the morning and have [her] coffee and let the dogs out, and just basically hang around." (Pet. Exh. 3, p. 13.) She was able to

drive to the bank or the store for groceries, but her friends assisted her with most household tasks beyond minimal cleaning.

After her benefits were reduced pursuant to the pretrial order, the employee undertook a limited search for work. This included looking through the local weekly newspaper and visiting a number of local businesses; including Wal-Mart, a gas station, a pet store, and a hardware store. At most, the employee would take an application before either realizing herself or being told that the job was beyond her limitations. At Wal-Mart, Ms. White's job inquiries were limited to speaking with several cashiers about potential job openings. She acknowledged that a local restaurant had been hiring, but stated she knew she "wouldn't be able to do that because carrying the dishes and stuff and the trays," so she did not apply. (Pet. Exh. 3, p. 6.)

The employee believed that continued treatments would help ease her pain. She indicated a desire to continue treatment, but could not afford to do so and was concerned that workers' compensation would not pay for any treatment she received. She was under the impression that surgery was not necessary and that pain management would be the focus of any subsequent treatment.

The employee presented the testimony of Dr. Daniel Lalonde, Jr., a neurologist specializing in interventional pain management, who treated the employee from May 30, 2006 through May 23, 2007. Dr. Lalonde diagnosed the employee's injury as chronic localized left-sided lower back and hip pain, which he causally related to the injury she sustained at work. He testified that Ms. White had not reached MMI and that further treatment could reasonably be expected to materially improve her condition. Dr. Lalonde opined that the employee was motivated to get better. She appeared to him to be in

"tiptop shape," with a great range of motion and strong core. (Pet. Exh. 4, p. 16.) This led him to believe that she stretched every day as he had instructed her. Dr. Lalonde also suspected that the employee did aerobic exercises as well.

Dr. Lalonde testified that the joints in the employee's lower lumbar spine predominantly caused her pain. His course of treatment consisted of relieving the pain by injecting medicine into the joints of her spine. He also undertook a course of radio frequency treatment where the nerves on pain inducing joints were burnt off, thus alleviating the pain. The doctor acknowledged that both of these treatments were temporary fixes because the human body will break down the injected medication and the burnt nerves eventually grow back. The employee responded favorably to both treatments, but as expected, their positive effects eventually wore off. Dr. Lalonde then began a treatment of prolotherapy on the employee, a practice he acknowledged was unfamiliar to most doctors. Prolotherapy involves injecting medicine which inflames the patient's ligaments or tendons in the hopes of accelerating the body's natural healing process. Dr. Lalonde opined that this treatment would be reasonably expected to materially improve Ms. White's condition, but he also acknowledged that there was no cure for the employee's condition and she was likely to have long-term chronic pain. His goal was to improve the employee's condition by "a bit better than 50 percent." Id. at 18. He felt that prolotherapy injections would take her pain level from a "six or seven down to a three or four." Id. at 29.

Dr. Lalonde admitted that the employee had "been through a lot with [him] … [s]he was getting more and more frustrated … it got a bit bumpy." (Pet. Exh. 3, p. 13.)

They both agreed to seek a second opinion and Dr. Lalonde referred Ms. White to a psychiatrist who practices in his group.

The employer presented the deposition testimony and the reports of Dr. William Boucher, who is board certified in occupational medicine by the American Board of Preventive Medicine. Dr. Boucher examined Ms. White on September 22, 2006, at the request of the employer. His diagnosis was left L4/5 facet strain with chronic low back syndrome and symptom magnification. He opined that the employee's "perception of her disability was significantly greater than her examination would indicate." (Res. Exh. D, p. 7.) This opinion arose out of the results of two pain-related tests designed to elicit a patient's opinion as to their disability in certain functions. Based on her score on at least one of the examinations, Dr. Boucher testified that the employee perceived herself as crippled.

Dr. Boucher testified that the employee was partially disabled and had reached MMI. He opined that the employee's physical condition had become stable and that continued treatment would maintain, but not materially improve, her condition. Dr. Boucher recommended she undergo physical therapy for aggressive strengthening and conditioning, treatment with anti-inflammatory medication, and continued radio frequency lesioning. He did not believe that prolotherapy would be beneficial for Ms. White. Dr. Boucher testified that in the past he had approximately fifteen (15) patients who underwent this treatment, and found that none of them experienced any substantial improvement. Dr. Boucher testified that this treatment could actually worsen the employee's condition.

On cross-examination, Dr. Boucher acknowledged that workers' compensation defense accounts for approximately ninety (90) percent of his practice. He is also a founding member of the American Board of Independent Medical Examiners, an organization which boasts its membership provides higher referral rates and a competitive advantage over non-members. The doctor also acknowledged similarities between the report he completed in this case and a sample report he provides to prospective clients, the majority of whom are employers and/or insurance companies.

The trial judge ordered an impartial medical examination to be completed by Dr. Stanley J. Stutz, a board certified orthopedic surgeon. The doctor examined Ms. White on January 8, 2007. He diagnosed the employee's injury as a lumbar sprain which also caused some back spasms. He opined that the employee was totally disabled from her regular employment, but partially disabled otherwise. Dr. Stutz "expect[ed] that the problems that she has are going to stay, and other than being sure that she's in the best physical condition as to strength and flexibility, I don't see the need for any other treatment." (Pet. Exh. 2, p. 10.)

Dr. Stutz testified that the employee had undergone a sufficient amount of physical therapy and that any continued physical therapy was unlikely to have a positive or negative effect on her condition. Dr. Stutz was not familiar with prolotherapy injections, and thus could not comment on their utility. When pressed on whether a treatment that encourages ligament strengthening and formation would be beneficial, Dr. Stutz explained that

> [l]igaments don't have strength like muscle. They don't contract. They are able to accept a certain tension when things cause them to be placed on a stretch. But I have no opinion as to prolotherapy, and I know of nothing in my

> experience two years after an incident that accomplishes this, but, again, I don't know anything about prolotherapy.

Id. at 13.

In his testimony, Dr. Stutz did not repeat verbatim the legal definition of MMI. However, he did indicate in his written report to the judge that the employee had reached MMI.

After evaluating the medical evidence presented in this case, the trial judge relied on the opinion of Dr. Stutz in finding the employee had reached MMI. The trial judge was satisfied with Dr. Stutz's evaluation of the employee and consideration of her medical history. Thus, the trial judge rejected the opinions of Drs. Lalonde and Boucher. In particular, the trial judge noted that Dr. Lalonde "did not have an accurate picture of the employee's daily activities and her physical abilities, and … had a rocky relationship with the employee in that he had treated her for quite some time with injections that were not working." (Decision at 19.)

The employee now appeals the trial judge's determination, raising six (6) reasons of appeal. The employee's first reason of appeal states only that the trial judge's decree was against both the law and the evidence presented. The employee fails to specify, as is required, "in what manner or where in the record the trial [judge] allegedly erred." *See* Falvey v. Women and Infants Hosp., 584 A.2d 417, 419 (R.I. 1991); *see also* Bissonnette v. Fed. Dairy Co., Inc., 472 A.2d 1223, 1226 (R.I. 1984). Accordingly, the employee's first reason of appeal lacks the required specificity and is denied and dismissed.

The employee's second and fifth reasons of appeal argue that the trial judge impermissibly reduced the employee's benefits prior to the entry of a final decree finding the employee had reached MMI. In light of the Rhode Island Supreme Court's holding in

City of Pawtucket v. Pimental, 960 A.2d 981 (2008), issued after the employee filed her reasons of appeal but before oral arguments, the employee now concedes these reasons of appeal are moot. In Pimental, on facts nearly identical to those before the panel, the Supreme Court found the Workers' Compensation Court's pretrial procedure does not deprive an employee of their constitutional right to due process.[1] 960 A.2d 981. Accordingly, the employee's second and fifth reasons of appeal are denied and dismissed.

The third and fourth reasons of appeal contend that the trial judge impermissibly found the employee's work-related injury had reached MMI. The employee asserts that the trial judge's reliance on Dr. Stutz's testimony was in error because the doctor never articulated the standard required for a finding of MMI, and also because he is an orthopedic, and not neurological, specialist. Lastly, the sixth reason of appeal contends that the trial judge should not have reduced the employee's benefits in light of her physical restrictions. After thoroughly reviewing the record and carefully considering the respective parties' arguments, we find the trial judge did not err in finding the employee's condition had reached MMI and thus permissibly reduced her benefits.

Before proceeding, we reiterate our adherence to R.I.G.L. § 28-35-28(b), which requires that "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." We are precluded from undertaking a *de novo* review of the evidence and substituting our judgment for that of the trial judge without first determining that the trial judge was clearly wrong. Diocese of Providence v.

[1] In Pimental, the employee's weekly benefits were reduced pursuant to R.I.G.L. § 28-33-18(b), five (5) months after a pretrial order was entered finding the employee had reached MMI. The Court found the reduction of benefits pursuant to a pretrial order comported with due process under the test articulated by the United States Supreme Court in Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Vaz, 679 A.2d 879, 881 (R.I. 1996). With this in mind and after careful consideration, we find no error on the part of the trial judge in reaching her ultimate determination.

The Workers' Compensation Act defines MMI as

> a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to materially improve the condition. Neither the need for future medical maintenance nor the possibility of improvement or deterioration resulting from the passage of time and not from the ordinary course of the disabling condition, nor the continuation of a pre-existing condition precludes a finding of maximum medical improvement.

R.I.G.L. § 28-29-2(8). Finding an employee is at MMI does not mean that the employee's condition will never improve or worsen; the designation "merely identifies the point at which an employee's physical or mental impairment has stabilized and further treatment is not reasonably expected to materially improve his condition." City of Pawtucket v. Pimental, 960 A.2d 981, 987 (R.I. 2008). The need for future medical maintenance does not necessarily preclude a finding of MMI. R.I.G.L. § 28-29-2(8); Fleet/Norstar Fin. v. Lombardo, W.C.C. No. 94-10561 (App. Div. 07/17/97) (holding medical maintenance consisting of anti-inflammatory medication, splinting and injections did not preclude finding of MMI). Once an employee's condition reaches MMI, the trial judge must reduce the employee's weekly compensation to seventy (70) percent of the established rate. R.I.G.L. § 28-33-18(b). However, the trial judge may delay the implementation of this reduction after considering the employee's job seeking efforts. Id.

The employee first argues that Dr. Stutz's testimony did not establish that the employee had reached MMI. This contention ignores the substance of the doctor's testimony and instead focuses on the lack of a verbatim recitation of the MMI legal

standard. When asked about the employee's ultimate prognosis, Dr. Stutz testified that "[w]e're talking about three years later … I would expect that the problems that she has are going to stay, and other than being sure that she's in the best physical condition as to strength and flexibility, I don't see the need for any other treatment." (Pet. Exh. 2, p. 10.) He further testified that there would be no probable benefit, nor downside, to continued physical therapy. He acknowledged that a treatment which accelerated ligament healing and formation could benefit the employee, but he "[knew] of nothing in [his] experience two years after an incident that accomplishes this." Id. at 13. Dr. Stutz's substantive statements established that the employee's physical injury was stable and any subsequent treatment would not materially improve her condition. *See* R.I.G.L. § 28-29-2(8). These statements are supported by the doctor's written report, in which he explicitly states that at the time of his examination the employee had reached maximum medical improvement. Id. at attach. p. 3, Impartial Med. Examination Report.

Second, the employee argues that Dr. Stutz's opinion lacks probative value because he specializes in orthopedics, and not neurology, and also because he was unfamiliar with prolotherapy. This contention is without merit. The Memorandum of Agreement in this case identifies the employee's injury as a lumbar sprain. Dr. Stutz concurred with this evaluation, finding the employee was experiencing pain due to a lumbar sprain. As a board certified orthopedic surgeon, Dr. Stutz is qualified to testify in regards to this type of injury. Further, the doctor's unfamiliarity with prolotherapy injections does not diminish the probative value of his opinion. If anything, it tends to further discredit the opinion of Dr. Lalonde, who championed a treatment which Dr. Stutz

was unfamiliar with and which Dr. Boucher had found to be ineffective in the course of his practice.

As noted above, the trial judge cited a number of reasons for accepting Dr. Stutz's opinion and rejecting Dr. Lalonde's. When confronted with conflicting medical opinions of a competent and probative value, the trial judge has discretion to accept the opinions of one medical expert over the other. Parenteau v. Zimmerman Eng'g, Inc., 111 R.I. 68, 78, 299 A.2d 168, 174 (1973). The trial judge's reliance on Dr. Stutz's opinion that the employee had reached MMI was not in error. Thus, reasons of appeal three (3) and four (4) are denied and dismissed.

Once the employee was found to have reached MMI, the employer was entitled to a thirty (30) percent reduction in the weekly benefit payments and the trial judge only had discretion to delay the implementation of the reduction in light of the employee's job seeking efforts. R.I.G.L. § 28-33-18(b). Here, the employee's benefits were reduced more than five (5) months after she was found to be at MMI. Given the employee's minimal search for employment, a five (5) month delay in the reduction of benefits was not an abuse of the trial judge's discretion. *See* Pimental, 960 A.2d at 990. Thus, the employee's sixth reason of appeal is denied and dismissed.

After our thorough review of the record and careful consideration of the parties' arguments, the employee's appeal is denied and the decision and decree of the trial judge are affirmed. 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

Salem and Hardman, JJ., concur.

ENTER:

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Olsson, J.

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Salem, J.

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Hardman, J.