STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

FIRE & ICE RESTAURANT	)	
	)	
VS.	)	W.C.C. 2006-07739
	)	
JACKIE SCHIAPO	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's appeal from the decision and decree of the trial judge which found that the employee's incapacity had ended. After a thorough review of the record and consideration of the issue raised by the employee on appeal, we find no error on the part of the trial judge and affirm the decision and decree.

The employee had been receiving weekly benefits for partial incapacity since October 17, 2004 pursuant to a pretrial order entered in W.C.C. 2004-08222 on April 28, 2005 for a work-related injury she sustained on October 16, 2004. Ms. Schiapo was employed as a waitress for the employer and fell at work, striking her head. The pretrial order describes the injury as head and neck and seizure disorder.

At the time of her testimony on March 26, 2008, Ms. Schiapo was 34 years old. She testified that since her injury she has occasionally has what she calls seizures during which she suddenly freezes and loses control of the right side of her body including her arm. She explained that these episodes occur without warning and last less than a minute, although she has fatigue and a headache afterwards. The most recent episode occurred about three (3) months prior to her testimony. The employee related that she experiences headaches almost every day and migraine

headaches about three (3) to four (4) times a month. The employee asserted that she is not able to return to work as a waitress because she may experience a seizure while carrying food or beverages and drop them on someone.

The employee has two (2) children, approximately aged fifteen (15) and eleven (11) years. She acknowledged that despite her physical problems, she cooks, cleans the house, and does the laundry. She stated that she occasionally drives and sometimes drives her children to school.

The medical evidence presented by the parties consists of the two (2) affidavits and the records of Dr. Vladislav Zayas and the deposition with attached exhibits of Dr. Edward Feldmann. The employee began treating with Dr. Zayas, a neurologist, on January 19, 2005. The doctor initially diagnosed post-concussion syndrome with post-traumatic headaches and cognitive residua, possible seizure disorder and labyrinthine concussion. An MRI study, a CT scan of the brain, an EEG, and an ambulatory EEG were all normal. In the last report made available to the trial judge, Dr. Zayas eliminated possible seizure disorder as a diagnosis and indicated that the episodes described by the employee were due to complex migraines, not a seizure disorder.

The office notes of Dr. Zayas are silent as to the employee's ability to work. However, in an affidavit submitted to the Medical Advisory Board dated September 10, 2008, the doctor indicates that the employee is not capable of any type of work and her condition has reached maximum medical improvement.

Dr. Edward Feldmann, a neurologist, examined Ms. Schiapo on two (2) occasions at the request of the employer. After examining the employee on February 15, 2005 and reviewing her medical records up to that date, his diagnoses were cervical strain, post-traumatic headache and

labyrinthine concussion. He indicated that the cervical strain and concussion had resolved, and that the continuing headaches she was experiencing were likely due to medication overuse. Dr. Feldmann also stated that her reports of possible seizures and her demonstrated cognitive dysfunction should be evaluated further.

Dr. Feldmann re-examined the employee on August 22, 2006. At that time, he noted that the headaches she was still experiencing were due to medication overuse and not traumatic headaches, that she had no significant cognitive dysfunction, that any dizzy spells she experienced were not significant or particularly limiting, and that she did not have a seizure disorder. He testified that the dizzy spells may be caused by migraines or some other condition. The doctor concluded that he would not restrict her activities in any way and return to her former employment as a waitress would not be unduly injurious to her health.

The trial judge indicated that there was no evidence in the record that the employee was disabled due to the injuries described in the pretrial order initially granting benefits, specifically head, neck and seizure disorder. Consequently, he granted the employer's petition with the finding that the employee's incapacity had ended and ordered that her weekly benefits be discontinued. The employee filed a claim of appeal.

In reviewing a decision of a trial judge, the appellate panel is bound by the provisions of R.I.G.L. § 28-35-28(b) which states 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 initially making a determination that the trial judge was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). In the present matter, we find no error on the part of the trial judge in arriving at his ultimate conclusion.

The employee has filed one (1) reason of appeal in which she argues that the employer did not meet its burden of proof. She contends that Dr. Feldmann's testimony and opinions are incompetent because the doctor was of the opinion that the employee did not suffer from a seizure disorder, and therefore, he could not render a legally competent opinion that she was no longer disabled due to the seizure disorder. The employee's reasoning in arriving at this conclusion is, however, contrary to established case law.

In the present matter, the employer must produce competent evidence that the employee's incapacity for work has ended and that a return to her former employment would not be unduly injurious to her health. The Rhode Island Supreme Court further defined this burden of proof in C. D. Burnes Co. v. Guilbault, 559 A.2d 637 (R.I. 1989), when it stated: "This does not require a comparison of employee's present condition to her past condition or knowledge of prior disability but only knowledge of present ability to work." Id. at 640.

Subsequently, as a corollary to this standard, the Court, in American Hoechst Corp. v. Carr, 621 A.2d 710 (R.I. 1993), addressed the very issue raised by Ms. Schiapo. In that case, the physician who examined the employee at the request of the employer was of the opinion that the employee never had berylliosis, a lung disease; despite the fact that an earlier decree had found that she had developed berylliosis during the course of her employment. The Court concluded that the doctor's disagreement with the original diagnosis "would be of no consequence to his opinion regarding employee's present disability or lack thereof." Id. at 713.

Dr. Feldmann testified that based upon his examination and review of the testing and prior medical records, the employee does not have a seizure disorder. He further stated that she is not disabled at all from any condition. As the Rhode Island Supreme Court noted in C. D. Burnes v. Guilbault, *supra*, this is simply "a comparison between black and white: disability

versus no disability." Id. at 640. Dr. Feldmann's disagreement with the original diagnosis documented in the pretrial order does not render his opinion on this issue incompetent. As an aside, we would note that the employee's treating physician, Dr. Zayas, ruled out seizure disorder as a diagnosis after the ambulatory EEG study was normal. On the affidavit dated September 10, 2008, he no longer lists possible seizure disorder as a diagnosis.

In relying upon the opinion of Dr. Feldmann, the trial judge noted that Dr. Zayas provides no foundation or basis for the notation on the affidavit form that the employee is not capable of any type of employment. Despite her own contention that these "spells" prevent her from working, she apparently has not restricted any of her other activities. After our thorough review of the record, we find no error in the trial judge's assessment of the evidence and his reliance upon the testimony and opinions of Dr. Feldmann. *See* Parenteau v. Zimmerman Eng'g, Inc., 111 R.I. 68, 299 A.2d 168 (1973). Consequently, we deny 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

Connor and Ferrieri, JJ., concur.

ENTER:

_____
Olsson, J.

_____
Connor, J.

_____
Ferrieri, 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 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 October 27, 2008 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

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Olsson, J.

_____
Connor, J.

_____
Ferrieri, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Alfredo T. Conte, Esq., and Mark P. McKenney, Esq., on

_____