STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT APPELLATE DIVISION

THOMAS CAPPALLI	)	
	)	
VS.	)	W.C.C. 2009-00576
	)	
CITY OF PROVIDENCE, as successor to PROVIDENCE CIVIC CENTER	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's claim of appeal from the decision and decree of the trial judge which found that the employee failed to establish by a fair preponderance of the evidence that his partial incapacity resulting from a work-related injury he sustained on March 22, 2003 posed a material hindrance to obtaining suitable employment and denied his request for continuation of weekly benefits beyond three hundred twelve (312) weeks. After a thorough review of the record and careful consideration of the parties' respective arguments, we grant the employee's appeal and reverse the decision and decree of the trial judge.

The employee was injured on March 22, 2003 while working at the Dunkin' Donuts Center as the operations supervisor. A Memorandum of Agreement dated July 20, 2003 described the injury as a neck sprain and the employee began receiving weekly benefits for partial incapacity as of March 28, 2003. Pursuant to a pretrial order entered in W.C.C. No. 2003-06812 on November 3, 2003, the description of the injury was amended to read "neck strain,

cervical myelopathy with spasticity, left shoulder girdle strain." Ee's Ex. 2. In accordance with R.I.G.L. § 28-33-18(d), the employee received a notice from the insurer that his weekly benefits would be discontinued as of March 29, 2009, as he would have received 312 weeks of partial incapacity benefits. On January 28, 2009, the employee filed a petition to review, seeking the continuation of his partial incapacity benefits pursuant to R.I.G.L. § 28-33-18.3(a)(1). On February 16, 2009, a pretrial order was entered denying the petition, and the employee filed a timely claim for trial.

The employee testified that he is sixty-seven (67) years old and has not worked since his injury in 2003. He began to work part-time at the Dunkin Donuts Center in 1992 as a security person, becoming full-time as operations supervisor in 1996. As operations supervisor, he was responsible for inspecting areas of the facility after maintenance personnel completed their cleanup assignments. In order to inspect the different areas, he would have to walk the entire Dunkin Donuts Center from top to bottom, frequently going up and down the narrow, steep stairs. He also supervised the crews assigned to changing over the facility from one sporting event to another to ensure everything was done correctly. On March 22, 2003, he was injured when he slipped and fell down the concrete steps in the facility.

After the fall at work, Mr. Cappalli saw his primary care physician and then followed up with Dr. Edward C. Tarlov, a neurosurgeon at the Lahey Clinic, on May 1, 2003. Dr. Tarlov had previously seen Mr. Cappalli in 2000. At an initial evaluation on September 11, 2000, the employee had complained of numbness and tingling in both hands over the last two (2) to three (3) years, worse on the left, and decreased sensation in his hands over the last six (6) months. He was also experiencing some weakness in his legs which caused him to modify his gait. An MRI of the cervical spine revealed significant spinal stenosis superimposed on a congenitally narrow

cervical spinal canal. On October 11, 2000, Dr. Tarlov performed surgery, specifically a full laminectomy and medial facetectomy with cervical spinal cord decompression of C3-7. Two (2) days after the surgery, the employee reported significant improvement in his preoperative symptoms, particularly his fine motor skills. Mr. Cappalli missed three (3) weeks of work due to the surgery and then returned to his regular job at the Dunkin Donuts Center. He stated that he never missed a day until the injury on March 22, 2003.

Mr. Cappalli reported that he suffers from spasms between six (6) and eight (8) times per day. The spasm starts in his shoulder and goes to his neck and down his arm, causing his hand to constrict and go completely numb. He indicated that he has constant pain in his left shoulder, arm and hand. He noted that he is left hand dominant. When he experiences a spasm, he has to lie down and wait for it to subside which may take anywhere from fifteen (15) minutes to three (3) hours. The spasms also make his leg jump, sometimes causing him to fall down. He stated that "[I] hardly sleep more than three hours because of the injury." Tr. 26. A typical day consists of getting the paper and coffee, chatting with friends at the bake shop, babysitting his nine-year-old granddaughter with his wife, and sometimes going fishing at a stream near his house. He testified that he drives short distances on a regular basis, using primarily his right hand, and has a handicapped placard. If he is driving and feels a spasm coming on, he will pull over and wait for it to pass, or call someone to pick him up.

The medical evidence consists of the records of the Lahey Clinic, the affidavit, deposition, and records of Dr. Joel M. Oster, the affidavit, reports, and deposition of Dr. Steven G. McCloy, and the affidavits and report of Julie Roberts and Christine Frati, who prepared a functional capacity assessment of Mr. Cappalli.

The Lahey Clinic records reflect that Mr. Cappalli saw Dr. Tarlov at the Lahey Clinic on May 1, 2003, reporting that his left arm and leg were much worse since his fall at work. The doctor noted that the employee had a very successful result from his surgery in 2000 and an MRI done after the fall did not reveal any new injury. Dr. Tarlov indicated that spasticity was a major symptom and he referred the employee to Dr. Oster, a neurologist at the Lahey Clinic, for evaluation.

Dr. Oster has seen the employee periodically since his initial evaluation on May 22, 2003. Over the years, Mr. Cappalli has also seen orthopedic and pain management specialists at Lahey Clinic to evaluate and treat his condition. The doctor had access to these extensive records. Dr. Oster testified that "[m]y opinion is that within a reasonable degree of medical certainty that the patient's fall at work on March 22, 2003 caused his present disability and his inability to be gainfully employed in any material fashion." Er's Ex. B at 25. Dr. Oster also indicated that there was a safety issue due to his condition, such that he could injure himself or others. He explained that "[t]his patient can't do anything without risking a fall. He has spasms. Prior to his injury, it sounded as if he could function. Now he can't even sit or do anything without pain and spasm and disability." Er's Ex. B at 18. The doctor noted that, even if the employee could drive, it was unlikely that he could be gainfully employed.

Dr. McCloy examined the employee on June 23, 2003 and January 30, 2009 at the request of the employer. His examination in 2009 revealed that Mr. Cappalli had abnormal deep tendon reflexes in both legs and arms, loss of sensation in the fingertips of both hands but more so on the left, diminished grip strength in both hands, and a spastic gait. In addition, pressure on the muscles in the left shoulder area caused his arm to jump and pain to shoot down the arm to his fingers. Dr. McCloy noted six (6) diagnoses in his report:

> "1. Longstanding cervical spondylosis or degenerative disease of his neck bones.
> 2. Cervical myelopathy constriction with direct damage to the spinal cord secondary to diagnosis #1.
>
> 3. Ataxia secondary to diagnosis #2.
>
> 4. Status-post cervical laminectomy.
>
> 5. Chronic psoriasis.
>
> 6. Chronic myofascial pain syndrome of the left shoulder girdle."

The doctor concluded that, with the exception of his chronic psoriasis, all of the diagnoses were causally related to the fall at work which aggravated the pre-existing degenerative disease in the cervical spine. With regard to Mr. Cappalli's potential for employment, Dr. McCloy stated in his report that "[t]he employee's ataxia, difficulty with balance, and spasticity restrict him from all work activities." Er's Ex. A, 1/30/09 report at 5.

Under questioning from the employer's attorney during his deposition, Dr. McCloy stated that the employee "could return to an appropriate sedentary type of job," with restrictions of "not walking excessively, not climbing, avoiding steps and stairs." Id. at 13-14. On cross-examination, the doctor acknowledged that the employee has loss of sensation in the fingers of both hands and has developed curling of the left fingers due to the progression of the degenerative disease in his neck. When asked what type of job Mr. Cappalli would be capable of doing with the level of impairment he experiences in his upper extremities and neck, as well as the spasticity and myelopathy, Dr. McCloy responded that Mr. Cappalli could do sorting, filing, packing, and other activities that do not require significant finger sensation. Finally, Dr. McCloy admitted that his opinion changed between the date of the deposition and when he examined the employee on January 30, 2009. He had not been provided any additional reports or medical

records and had not reviewed Mr. Cappalli's file until just prior to the deposition, but the doctor testified that he had "reflected more" on the issue and felt that Mr. Cappalli did have some capacity to work in a sedentary job with restrictions. Id. at 23-24.

Mr. Cappalli completed a functional assessment by Christine Frati and Julie Roberts at D & H Therapy on December 11, 2008. Their report dated December 15, 2008 indicated that he demonstrated full effort in performing the various tasks. It was noted that the employee often lost his balance during the testing due to his ataxic gait which put him at a high risk for injury. Their conclusion was that "gainful employment is not realistic." Ee's Ex. 7.

The employee also presented the testimony and report of Amy Vercillo, a vocational rehabilitation counselor with a doctorate in rehabilitation services from Boston University, who prepared a vocational assessment of Mr. Cappalli dated February 25, 2009. She noted his age, medical history, educational and vocational history, obtained a description of his job duties, and reviewed his medical records from Dr. McCloy, Dr. Oster, and the Lahey Clinic. Based on her assessment, Ms. Vercillo opined that Mr. Cappalli "would not be able to perform even sedentary work, unskilled work on a sustained basis, based on the functional restrictions outlined by the treating and examining physicians." Tr. 54. She indicated that he could not do even part-time work on a sustained basis.

Ms. Vercillo was questioned extensively as to whether Mr. Cappalli was capable of working as a greeter at Wal-Mart. She testified that the job requires prolonged standing on a hard floor and due to his problems with balance and spasticity, it would not be appropriate. Ms. Vercillo explained that Wal-Mart does provide greeter positions as rehabilitative employment to senior citizens and disabled individuals. These positions are not considered competitive employment, but rather a community service, and involve working one (1) to two (2) hours on a

couple of days a week. She described competitive employment as a situation where a person must meet the production demands of the occupation on a sustained basis day after day without having significant absences and without unscheduled breaks. She opined that based on Mr. Cappalli's functional restrictions, there were no positions that he could perform on a sustained basis where he would arrive at work, stay at work, meet basic production demands and maintain a regular schedule. When asked whether it was her opinion that Mr. Cappalli's functional impairment posed a material hindrance to his obtaining competitive employment, she responded affirmatively. Tr. 56.

In denying the employee's petition, the trial judge cited the decision of the Appellate Division in Cabral v. Crystal Brands, W.C.C. 99-02844 (App. Div. 11/28/05). He interpreted Cabral to provide that "where expert testimony indicates that the employee is capable of being a greeter, usher, cashier, telemarketer, night auditor, access control security guard, and a companion to a disabled person or elderly person, that the employee's partial incapacity does not pose a material hindrance to finding suitable employment." Dec. at 3. The trial judge felt that such expert testimony was proffered in this case, from Dr. McCloy who stated that the employee could perform some type of sedentary work, and from Ms. Vercillo who suggested that he might be able to work as a greeter at Wal-Mart. The trial judge also mentioned in his decision that the employee is capable of driving and in fact does drive on a daily basis. The employee filed a timely claim of appeal of that decision.

Before proceeding to address the employee's reasons of appeal, we reiterate our adherence to the standard of appellate review set forth in 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. Vaz, 679 A.2d 879, 881 (R.I. 1996). After reviewing the record in this matter, we find that the trial judge overlooked and misconceived certain testimony in finding that the employee failed to prove that his partial disability resulting from the March 22, 2003 work injury poses a material hindrance to obtaining suitable employment.

Section 28-33-18(d) of the Rhode Island General Laws provides a limitation on the payment of partial incapacity benefits of 312 weeks. Once an injured worker has received partial incapacity benefits for that period of time, his right to continuing workers' compensation benefits is determined pursuant to R.I.G.L. § 28-33-18.3(a)(1), which allows the employee to petition the court for the continuation of weekly benefits if he "demonstrates by a fair preponderance of the evidence that his or her partial incapacity poses a material hindrance to obtaining employment suitable to his or her limitation."

The employee filed six (6) reasons of appeal. The two (2) primary issues raised by the employee involve the trial judge's evaluation of the testimony of Dr. McCloy and Ms. Vercillo. Mr. Cappalli alleges that the trial judge was clearly wrong to conclude that, based upon Dr. McCloy's testimony, he was capable of performing some type of sedentary work. We find that the foundation for Dr. McCloy's change of opinion is lacking and, therefore, renders the opinion stated in his deposition incompetent.

Dr. McCloy evaluated the employee on two (2) occasions at the request of the employer. In the report of his most recent examination on January 30, 2009, Dr. McCloy, in response to a question as to what restrictions he would place on the employee in a light duty position, wrote

"[t]he employee's ataxia, difficulty with balance, and spasticity restrict him from all work activities." Ee's Ex. 5 at 5. Dr. McCloy signed an affidavit containing the following statement:

> "That the medical records and reports attached hereto and made a part hereof are a fair and accurate description of the treatment, diagnosis, prognosis, findings and opinions with reasonable medical certainty of the proximate cause of the condition so diagnosed and disability from the incident that occurred at work on March 22, 2003."

Ee's Ex. 5.

During his deposition on April 8, 2009, in response to a question posed by the employer's attorney whether Mr. Cappalli could return to the workforce with restrictions of no excessive walking, no climbing and avoidance of steps and stairs, Dr. McCloy, contrary to his statement in his report, stated, "I think he could return to an appropriate sedentary type of job, yes." Er's Ex. A at 14. On cross-examination, the doctor acknowledged that Mr. Cappalli also has some limitations in the use of his upper extremities due to loss of sensation in the fingers of both hands, as well as curling of the fingers of his left hand due to spasticity. It should be noted that the employee is left hand dominant. When confronted with this change in his opinion, the doctor did not provide any objective basis for his revised opinion.

> "A: They've changed. I've reflected more on what his capacity is and what is [sic] capacity isn't, and I think that he does have some capacity.
>
> Q: Have you been provided with any additional medical records or reports or any additional information since examining Mr. Cappalli on January 30, 2009?
>
> A: Only been provided with my own thoughts.
>
> Q: And since the day that you wrote this report on January 30, 2009, have you had occasion to look at Mr. Cappalli's file; prior to today, that is?
>
> A: No.

> Q: So today was the first time that you looked at this file since seeing Mr. Cappalli on January 30, 2009?
>
> A: That's correct.
>
> Q: And prior to Mr. Reall arriving here today and meeting with you in preparation for the deposition, did you have an opportunity to look at the file?
>
> A: I reviewed the entire file before starting the deposition, yes.
>
> Q: And the entire file consists of the two reports for the two examinations of Mr. Cappalli?
>
> A: Yes, the two reports plus my intake papers.
>
> Q: And how much time prior to the deposition did you review that?
>
> A: Between 3:30 and four, about a half hour.

Er's Ex. A at 23-24. Based on this exchange and the lack of any substantive rationale for Dr. McCloy's sudden change of opinion, we find that it was error for the trial judge to rely upon the doctor's opinion in finding that the employee was capable of sedentary work.

In addition to the problem with Dr. McCloy's testimony, the trial judge misconceived or overlooked portions of the testimony of Ms. Vercillo, as reflected in his decision.

> "More troubling for the employee is the fact that his vocational expert, Amy Vercillo, Ph.D. agreed with said contention, and in fact suggested that he might be able to work as a greeter at Wal-Mart. However, it is important to note that Ms. Vercillo felt that such a job could not be considered 'competitive employment.' Unfortunately, the Court is without any guidance as to whether or not said Wal-Mart job can be considered 'competitive employment' by virtue of the fact that no transferable skills analysis or a labor market survey was conducted."

Dec. at 2-3. A review of Ms. Vercillo's testimony reveals that the trial judge misunderstood or overlooked her explanation of rehabilitative employment and competitive employment as a greeter at Wal-Mart.

Ms. Vercillo was questioned extensively regarding the Wal-Mart greeter position. She first explained that a full-time position as a greeter requires a person to work thirty-seven (37) to forty (40) hours a week standing on a hard surface for two (2) hours at a time before having a break. Considering Mr. Cappalli's difficulty with balance and spasticity, Ms. Vercillo was of the opinion that this was not an appropriate job for him. She then noted that Wal-Mart also has what is considered "rehabilitative employment" as a greeter which allows clients to use a wheelchair, if necessary, and only work one (1) to two (2) hours a shift for three (3) to ten (10) hours a week. This type of position is provided as a community service and is not considered "competitive employment." Tr. at 55-56. When the trial judge questioned Ms. Vercillo regarding whether Mr. Cappalli could perform part-time work as a greeter, she responded:

> "No. Again, the question is are there part-time competitive positions. There absolutely are. Are there part-time positions that Mr. Cappalli could perform on a sustained basis that he gets to work, stay [sic] at work, meet [sic] basic production demands on a regular basis, maintain [sic] a schedule. Based on the functional restrictions, no."

Tr. at 66-67.

It is clear from Ms. Vercillo's testimony that she was of the opinion that Mr. Cappalli was not capable of obtaining and sustaining full-time or part-time work in a competitive position as a greeter. The references to the "rehabilitative" greeter position are not relevant to the decision on the employee's petition. As Ms. Vercillo explained, individuals are placed in those positions as a community service rather than actually competing through a hiring process for the

position. As we have previously noted in Conte v. Fleet Financial Group, Inc., W.C.C. 99-05648 (App. Div.7/22/04), *cert. denied* 10/12/04:

> "The fact that there may be some isolated job out in the community that the employee may be capable of performing is not sufficient to preclude the continuation of weekly benefits beyond the 312 week period. The employee must have access to a reasonable number of jobs in the local labor market, as well as the ability to compete for such jobs and a legitimate opportunity to be hired."

Id. at 8.

Based upon the statements in his decision, the trial judge apparently misconceived or overlooked the testimony of Ms. Vercillo regarding the distinction between the rehabilitative and competitive greeter positions and her opinion as to Mr. Cappalli's ability to perform either position. Consequently, the trial judge's reliance on our decision in Cabral v. Crystal Brands, W.C.C. No. 99-02844 (App. Div. 11/28/05), is misplaced. In Cabral, expert testimony was presented demonstrating that the employee was capable of performing and obtaining employment in a variety of light duty positions which led to the determination that the employee's partial incapacity was not a material hindrance to obtaining suitable employment. In the present matter, Ms. Vercillo testified that not only did Mr. Cappalli's partial incapacity pose a material hindrance to obtaining suitable employment, but that based upon the functional limitations outlines by the physicians, Mr. Cappalli was not even capable of performing sedentary, unskilled work on a sustained basis. The evidence in the matter presently before the panel is clearly distinguishable from the record in Cabral.

In light of our determination that the trial judge erred in his assessment of the testimony and opinions of Dr. McCloy and Ms. Vercillo, we have conducted a *de novo* review of the evidence and find that the employee has established by a fair preponderance of the evidence that his partial incapacity poses a material hindrance to obtaining employment suitable to his

limitations. Although the trial judge expressed some concern that Dr. Oster was equivocal as to whether the work injury was solely responsible for the employee's current condition, we find that the evidence as a whole establishes that the employee's current disability was caused by the work injury.

First, we would note that the description of the work injury was amended in November 2003 to include a neck strain, cervical myelopathy with spasticity, and a left shoulder girdle strain. Consequently, the progressive worsening of the cervical myelopathy and spasticity is deemed to be part of the effects of the work-related injury, despite the fact that Mr. Cappalli underwent surgery prior to the injury to relieve cervical myelopathy caused by severe spinal stenosis. In the Lahey Clinic records, there are reports which reflect that indicate that Mr. Cappalli had a good result from the surgery in that pain in his neck and arms subsided and his muscle weakness, balance and ambulation improved. The fact that he returned to work after three (3) weeks and then continued to work until the fall at work in March 2003 supports that contention. In addition, Dr. McCloy stated in his reports and testified that the fall at work aggravated the employee's pre-existing cervical spine disease. The evidence clearly establishes that Mr. Cappalli's current physical condition and functional limitations are related to the effects of his work-related injury.

The next step in the analysis is whether the employee's partial disability poses a substantial impediment to securing some type of employment that is commensurate with his significant functional limitations. In this regard, we accept the testimony and opinions rendered by Ms. Vercillo. She had the opportunity to review the medical reports of Dr. Oster and Dr. McCloy, as well as the functional capacity evaluation performed at D & H Therapy. She also interviewed Mr. Cappalli. Ms. Vercillo's opinion was that Mr. Cappalli's permanent physical

impairments prevented him from obtaining any type of competitive employment in the general labor market. She explained in her testimony that she did not document the transferable skills analysis in her report and she did not conduct a labor market survey because the medical records were consistent in documenting what she termed "total vocational disability." Tr. at 61. After a thorough review of her vocational assessment report and her testimony, we find no reason to question the competency of her opinions.

The trial judge noted in his decision that, "the employee admitted that he is capable of driving, and in fact does so." Mr. Cappalli did testify that he generally drove only short distances almost daily and if he felt a spasm coming on, he would pull over and wait until it subsided. We would note that the employee's petition seeks the continuation of his partial incapacity benefits because his partial disability poses a material hindrance to obtaining alternate employment. It is not necessary that he establish that he is actually totally disabled for all work, or that he qualifies for total disability benefits pursuant to R.I.G.L. § 28-33-17(b)(2) (the so-called statutory "odd lot" doctrine). The fact that the employee does some limited driving does not necessarily translate to an ability to be hired and work on a sustained and productive basis and no evidence was presented to substantiate such a contention.

As a result of the employee's success on appeal, he is entitled to the award of attorney's fees and costs pursuant to R.I.G.L. § 28-35-32 for services rendered at the appellate level, as well as the pretrial conference and trial level. This panel will only make an award for services rendered in the prosecution of the appeal. The matter will be remanded to the trial judge upon entry of our decree so that he may determine the appropriate counsel fee for services rendered at the pretrial and trial levels.

The attorney for the employee filed a motion for attorneys' fees with an accompanying affidavit and detailed listing of services rendered and time expended regarding the claim of appeal. The total fee requested regarding prosecution of the appeal is Twelve Thousand Seven Hundred and 00/100 ($12,700.00) Dollars for 63.5 hours at Two Hundred and 00/100 ($200.00) Dollars per hour plus costs. The appellate panel ordered that the parties appear to argue the motion and both parties submitted memoranda in support of their positions. After thoughtful deliberation and discussion, the panel has determined that a counsel fee in the amount of Eight Thousand One Hundred Fifty and 00/100 ($8,150.00) Dollars is a fair and reasonable fee for services necessary to prosecute this successful appeal.

In Annunziata v. ITT Royal Electric Co., 479 A.2d 743 (R.I. 1984), the Rhode Island Supreme Court delineated the factors to be considered in determining the award of a counsel fee in workers' compensation matters:

> ". . . the amount in issue, the questions of law involved (whether they are unique or novel), the hours worked and the diligence displayed, the result obtained, and the experience, standing, and ability of the attorney who rendered the services."

Id. at 744. Clearly, the stakes were high in this case – the employee would either be awarded continuing partial disability benefits or those benefits would be terminated. Although the issue of whether this employee's partial disability poses a material hindrance to his ability to obtain suitable employment was not unique, these so-called "gate" cases are difficult due to the lack of definitive statutory guidelines and legal precedent. By their nature, these cases are extraordinarily fact-intensive and generally require not only expert medical evidence, but also vocational and functional capacity assessments and testimony. Mr. Cappalli's case was further complicated by the fact that he had a significant pre-existing condition which was aggravated by his work-injury.

Counsel for the employee submitted a twenty-six (26) page memorandum detailing his reasons of appeal and a six (6) page statement of the case summarizing the legal arguments. Counsel expended a significant amount of time preparing these documents as well as preparing for the settlement conference and the oral argument. We commend the employee's attorney for his detailed and thorough presentation of his case both in writing and orally. We would note, however, that, by his own admission, the attorney practices before the Workers' Compensation Court infrequently and, as such, expended more time in research and preparation than an attorney who appears before the court on a regular basis and has a greater familiarity with the procedures and relevant case law. Consequently, the panel has awarded a fee less than the amount set forth in the attorney's affidavit and detailed hourly billing statement. The full amount of costs requested shall be reimbursed by the employer.

Based upon the foregoing discussion, the appeal of the employee is granted and the decision and decree of the trial judge are reversed. In accordance with our decision, a new decree shall enter containing the following findings and orders:

1. That the employee has been paid benefits for partial incapacity for 312 weeks as a result of a work-related injury he sustained on March 22, 2003.

2. That the employee has established by a fair preponderance of the evidence that his partial incapacity resulting from the effects of the work-related injury poses a material hindrance to obtaining employment suitable to his limitations.

It is, therefore, ORDERED:

1. That in accordance with R.I.G.L. § 28-33-18.3(a)(1), the employer shall reinstate the payment to the employee of weekly benefits for partial incapacity from the date the 312 week

period expired and continue those payments until further order of the court or agreement of the parties.

2. That the employer shall pay interest in accordance with R.I.G.L. § 28-35-12(c) on the amount of retroactive benefits due to the employee from July 28, 2009 (six (6) months after the filing of the petition) to the date when the payment of the retroactive benefits is made.

3. That the employer shall reimburse the employee's attorney the sum of Two Hundred Sixty-five and 00/100 ($265.00) Dollars for the cost of providing a transcript of the trial to the Appellate Division and the filing fee for the claim of appeal.

4. That the employer shall reimburse the employee's attorney the sum of Twenty-five and 54/100($25.54) Dollars for costs incurred in prosecuting the appeal including photocopying, postage and delivery services.

5. That the employer shall pay to Michael R. DeLuca, Esq., attorney for the employee, a counsel fee in the amount of Eight Thousand One Hundred Fifty and 00/100 ($8,150.00) Dollars for services rendered in the successful prosecution of the employee's claim of appeal.

6. That upon entry of the final decree, the matter shall be remanded to the trial judge for the sole purpose entering an order awarding a counsel fee and costs in accordance with R.I.G.L. § 28-35-32 for services rendered by the employee's attorney at the pretrial and trial levels.

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

Hardman and Ferrieri, JJ., concur.

ENTER:

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Olsson, J.

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Hardman, J.

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Ferrieri, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

THOMAS CAPPALLI)
)
VS.) W.C.C. 2009-00576
)
CITY OF PROVIDENCE, as successor)
to PROVIDENCE CIVIC CENTER

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, and upon consideration thereof, the appeal of the employee is granted. In accordance with the Decision of the Appellate Division, the following findings of fact are made:

1. That the employee has been paid benefits for partial incapacity for 312 weeks as a result of a work-related injury he sustained on March 22, 2003.

2. That the employee has established by a fair preponderance of the evidence that his partial incapacity resulting from the effects of the work-related injury poses a material hindrance to obtaining employment suitable to his limitations.

It is, therefore, ORDERED:

1. That in accordance with R.I.G.L. § 28-33-18.3(a)(1), the employer shall reinstate the payment to the employee of weekly benefits for partial incapacity from the date the 312 week

period expired and continue those payments until further order of the court or agreement of the parties.

2. That the employer shall pay interest in accordance with R.I.G.L. § 28-35-12(c) on the amount of retroactive benefits due to the employee from July 28, 2009 (six (6) months after the filing of the petition) to the date when the payment of the retroactive benefits is made.

3. That the employer shall reimburse the employee's attorney the sum of Two Hundred Sixty-five and 00/100 ($265.00) Dollars for the cost of providing a transcript of the trial to the Appellate Division and the filing fee for the claim of appeal.

4. That the employer shall reimburse the employee's attorney the sum of Twenty-five and 54/100($25.54) Dollars for costs incurred in prosecuting the appeal including photocopying, postage and delivery services.

5. That the employer shall pay to Michael R. DeLuca, Esq., attorney for the employee, a counsel fee in the amount of Eight Thousand One Hundred Fifty and 00/100 ($8,150.00) Dollars for services rendered in the successful prosecution of the employee's claim of appeal.

6. That upon entry of the final decree, the matter shall be remanded to the trial judge for the sole purpose entering an order awarding a counsel fee and costs in accordance with R.I.G.L. § 28-35-32 for services rendered by the employee's attorney at the pretrial and trial levels.

Entered as the final decree of this Court this day of

PER ORDER:

____
John A. Sabatini, Administrator

ENTER:

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Olsson, J.

____
Hardman, J.

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Ferrieri, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Michael R. DeLuca, Esq., and Francis T. Connor, Esq., on

____