

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

AZADOUHI TOROSSIAN)

)

v.)

W.C.C. 98-01163

)

QUALITY CLEANERS, INC.)

DECISION OF THE APPELLATE DIVISION

Healy, J. This matter came to be heard before the Appellate Division on the respondent's appeal from an adverse decision and decree entered by the trial court on December 11, 1998.

This matter originated as an employee's petition to review seeking a alleging that the employee was totally disabled pursuant to R.I.G.L. §28-38-17(b)(2). At a pretrial conference, the trial judge denied the employee's petition finding that the employee remained partially incapacitated and continued partial benefits. The employee filed a timely claim for trial. After a full hearing, the trial judge concluded that "the employee/petitioner had proven by a fair preponderance of the evidence that she is totally disabled within the meaning of R.I.G.L. §28-38-17(b)(2)." As a result, the respondent/employer was ordered to pay benefits consistent with the

findings. From this decree the employer has duly claimed its right of appeal.

The underlying facts in this matter were not in dispute. The employee was a fifty-five year old native of Beirut, Lebanon, who came to the United States in 1989. She was educated through the eight grade level and has a passable command of spoken English but remains unable to fill out forms, such as employment applications. She is married with four children. Her husband is sixty-two years old and retired without a pension. Therefore, the employee's worker's compensation benefits represent the entire household income.

The employee began working for the employer, Quality Cleaner's Inc., during the summer of 1994. This was the first time in her life that she had worked for wages. The employer is a dry cleaning establishment and the employee was responsible for cleaning and pressing the shirts. Her daily routine typically consisted of sorting and tagging the shirts, placing them in the washing machine and once they were washed, she would iron them with a commercial press. In addition to these duties, the employee would use a hand iron for collars and cuffs and if needed, replace any missing buttons. Once the shirts were cleaned and pressed, she would fold and box them. In terms of weight requirements, the employee's job required her to lift bags that weighed no more than twenty (20) pounds.

Less than a year later, the employee began to have problems with numbness and tingling of the hands. Her right hand was worse than her left hand and she was eventually unable to continue working. She left work on April 20, 1995 and has yet to return. On June 2, 1995, the employee began treating with Dr. Akelman, who diagnosed the employee as suffering from bilateral carpal tunnel syndrome in both hands. Dr. Akelman opined that the employee's condition was causally related her employment and recommended corrective surgery on both hands. (Res.Ex. 5, Attachment; Pet. Ex B, Letter of 6/30/95)

In the interim, the employee made her first appearance before this Court. The employee filed W.C.C. 95-5512, an original petition for benefits. At pretrial, the trial judge found a closed period of total incapacity from April 20, 1995 to September 22, 1995 and an open period of partial incapacity from September 23, 1995 and continuing. The Court awarded benefits accordingly and this decision was not appealed. (Pet. Ex. 1) Subsequently, the employee has had two surgeries, an open carpal tunnel release on each hand, to relieve her symptoms. Both surgeries were considered successful because the employee's symptoms improved. However, Dr. Akelman would only allow the employee to return to modified light duty that did not involve frequent use of her hands. (Pet. Ex. 5) For her part, the employee reported that she continued to have problems. She could not grip things and tended to drop dishes and other objects. She

could only do a very limited number of household chores, such as dusting. Therefore, she was very dependant on her daughters to help her perform household duties. (Tr. at 10-11)

In February 1997, the employee became a client of the vocational counselor Diane Westerman. Ms. Westerman undertook an extensive review of the employee's situation. Part of this review included of a series of personal meetings with the employee. The meetings were used to gauge the employee's condition and help give some direction to her efforts to rejoin the workforce. Ms. Westerman also reviewed the medical reports of Dr. Akelman and the IME of Dr. Kamionek. (Pet. Ex. 4) She used this information to conduct a job search for the employee in the computerized databases at her disposal.

In June of 1997, Ms. Westerman concluded that the employee, for all practical purposes, was unemployable in the Rhode Island job market. She based this conclusion on the employee's physical limitations, age, lack of transferable skills, education and inability to fill out forms in English. (Tr. at 29.) As a result, she closed the employee's file and advised the employee to try to do some volunteer work to widen her contacts and skills. The employee did not heed this advice but did apply for jobs at Citizen's Bank and Walgreens. These attempts were unsuccessful.

Subsequently, this petition to review was filed by the employee. At trial, the court heard the live testimony of the employee and Ms.

Westerman. The court also heard from Jeanne McCluskie, of Crawford and company, who performed an employability assessment for the employer and Edmond Calandra, the manager of the Disability Case Unit for Providence Companies. Also received into evidence were the deposition and reports of Dr. Akelman, the IME report by Dr. Kamionek, the written reports of Ms. Westerman and McCluskie, as well as a job analysis prepared by the employer.

In her decision, the trial judge focused upon what became the main issues at trial: the employee's ability to perform the job of "tagger" purportedly modified to accommodate her physical limitations and the fact that this job was never actually offered to her.

The position of "tagger" came about at the behest of the insurer. Mr. Calandra workers with Quality Cleaners to modify an existing position to suit the employee's limitations. Mr. Calandra visited the employer, watched the job performed, and lifted some bags of laundry that were representative of those the employee would handle. (Tr. at 100-101). Mr. Calandra could not testify to the exact weight of the bags because he never actually weighed any of them. Id. at 104. After his visit, Mr. Calandra prepared a Job Analysis and forwarded it to Dr. Akelman. Dr. Akelman was asked if the employee could perform the position described and by way of a letter dated June 24, 1997, he opined that she could but noted that he had not seen the employee since September 1996. (Res. Ex. 5 Attachment;

See also Res. Ex. 1) Upon receiving this information, the employee failed to follow through with an offer to the employee.

The court noted this non-offer as well as the discrepancies between the purported “tagger” job as described by Mr. Calandra and the description of “tagger” as contained in the authoritative U.S. Department of Labor Publications such as the *Dictionary of Occupational Titles* (DOT). The DOT and other publications, described much heavier jobs which Dr. Akleman agreed that the employee could not perform without risking injury.

The trial judge choosing to rely on Ms. Westerman’s opinion found that the employee was unemployable. The court found that Ms. Westerman’s opinion was supported by the medical opinion of Dr. Akelman despite his opinion as of June 24, 1997. (Res. Ex. 5 – Attachment). Additionally, the trial judge specifically rejected the opinion of Ms. McCluskie, who was of the opinion that there were light duty jobs requiring repetitive hand use that the employee could perform. Dr. Akelman explicitly stated that the employee could not perform the job duties of a hand presser, folder, preparer, silverware assembler, or press operator. (Res. 5 Attachemnt, Pet. A).

The court, thereupon entered a decree, which contained the finding and order previously noted. The employer duly claimed its right of appeal.

Pursuant to R.I.G.L. § 28-33-28(b), a trial judge’s findings on factual matters are final unless found to be clearly erroneous. Diocese of

Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). The Appellate Division is entitled to conduct a *de novo* review only when a finding is made that the trial judge was clearly wrong. Id., citing, R.I.G.L. § 28-33-28(b); Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986). Such a review, however, is limited to the record made before the trial judge. Vaz, *supra*, citing Whittaker v. Health-Tex, Inc., 440 A.2d 122 (R.I. 1982).

Cognizant of this legal duty imposed on us, we have carefully reviewed the entire record of this case, and we find no merit in the employer's appeal. We, therefore, deny and dismiss the employer's reasons of appeal and affirm the decision and decree of the trial judge.

On appeal, the employer submitted four reasons. The employer's first and third reasons of appeal are closely related. Convenience and logic dictates that we discuss and dispose of them together. Reason one asserts:

"The decision is against the weight of the evidence. Specifically, the employee failed to prove that she is unable to earn any wages in any other employment due to her compensable injury pursuant to R.I.G.L. §28-33-17(b)(2). Indeed, although it was not required to do so, the employer identified other employment which the employee was capable of performing within her physical limitation."

Reason three states:

"The trial judge's decision was erroneously prejudiced by irrelevant factors. On page 11 of her decision the trial judge stated that:

'There certainly has been no offer of suitable alternative employment for the employee to perform the job of tagger as depicted in the job description. '

The standard set forth in 28-33-17(b)(2) is the only method by which the employee may prove that she falls within the category of 'odd lot.' That section requires that the employee must prove that (1) he or she is unable to earn any wages in any other employment due to compensable injury, and (2) a 'manifest injustice' would result if his or her benefits were reduced.¹ Lombard v. Atkinson Kiewit, W.C.C. 95-1339 (App. Div.). Whether or not the employer offered suitable alternative employment to the employee is both irrelevant and immaterial. Accordingly, the trial judge's decision was erroneously prejudiced by irrelevant factors.

In both instances, we disagree. R.I.G.L. §28-33-17(b)(2) in relevant part reads as follows:

In all other cases, total disability shall be determined only if, as a result of the injury, the employee is physically unable to earn any wages in any employment; provided, however, that in cases where manifest injustice would otherwise result, total disability shall be determined when an employee proves, taking into account the employee's age, education, background, abilities, and training, that he or she is unable on account of his or her compensable injury to perform his or her regular job and is unable to perform any alternative employment. The court may deny total disability under this section without requiring the employer to identify particular alternative employment.

In the present case, it was uncontested that the employee is a middle aged immigrant, with serious physical limitations regarding the use of her hands, an eight grade education, no transferable skills and a limited command of the English language. It was also undisputed that her weekly workers' compensation check represented the sole income of the

¹ The Appellate Division notes that this is no longer a two part test. In Lombardo v. Atkinson-Kiewit, the Rhode Island Supreme Court held that it should be found that manifest injustice would otherwise result if total disability benefits are not awarded to permanently but partially disabled employees when they show that they are unable on account of their work related injuries to perform their regular jobs and any alternative employment. 746 A.2d 679 (R.I. 2000).

household. The grim picture was buttressed by the testimony of Diane Westerman, a Donely Center Counselor who, while accepting that Ms. Torrossian had a notional ability to perform some light duty work found her unemployable. The Court also had before it the testimony of Drs. Akelman and Kamionek, who both found that the employee could not return to her previous job at Quality Cleaners.

The employer chose to defend this petition by customizing a job for the employee and presenting it to her physician for approval. This approval was given. We will assume, that this job was within her physical limitations, without actually deciding that this was actually the case.

This job was presented as evidence for the court's consideration. The employer, in fact, essentially bases its defense on this evidence. The employer, however, for reasons not disclosed on the record, either neglected or declined to make an actual job offer to Ms. Torrossian.

While we readily agree with the employer's assertion that they were not obligated to make that effort, we cannot agree that the failure to offer the employee a job was irrelevant. Were we to agree with this claim, we would be allowing the employer the benefit of both sides of the argument. In a case like this, where the only real evidence purporting to show that Ms. Torrossian could work was the assertion that she could perform this custom made job, we believe that the employer had a duty to make this position a reality by offering it to the employee. To put it bluntly, without such an

offer this exercise seems little more than the creation of an illusion for the benefit of the court, not an option for the benefit of the employee.

This case presents a fact pattern reminiscent of that in Olneyville Wool Co. v. DiDonato, 65 R.I. 154, 13 A.2d 817 (1940). In that case, the employee, a middle aged female, a wool comber who had a limited command of the English language, and who could do light duty work, was found eligible for the protection of the Odd Lot Doctrine. The DiDonato court found that "the evidence tend to show that the condition of her back would prevent her from doing light duty work, it is obvious she cannot do any kind of light duty work in general. It is clear that such kind of work as she can perform, considering the condition of her back and her situation in life, must be in the nature of odd jobs not generally obtainable." Id. at 158.

Here, sixty-four years later, we find a similarly situated employee and were we to agree with the employer's argument, we would effectively eviscerate R.I.G.L. §28-33-17(b)(2). There would be no real obstacle to an unscrupulous employer purporting to modify a job which they never intended to offer, and then presenting this modification to the court as evidence of earning capacity. Based on the record before us, we cannot say that the trial judge erred when she found the employee had met her burden to prove that she could not earn wages, nor can we say she was wrong under these circumstances to note the lack of a job offer. Therefore, reasons of appeal One and Three are denied and dismissed.

The employer's second reason of appeal asserts that the Trial Judge misconstrued the testimony of Diane Westerman. The employer argues that Ms. Westerman changed her testimony after reviewing Dr. Akelman's report of June 24, 1997 and as a result could no longer maintain, to a reasonable degree of scientific certainty, that the employee was unemployable. We disagree.

The record is clear that the employer's counsel presented the report of Dr. Akelman to Ms. Westerman at trial. He specifically asked her if this report caused her to change her opinion. Ms. Westerman answered unambiguously in the negative. (Tr. p. 42-43). When asked by employer's counsel if she had to base her opinion of the employee's employability only on Dr. Akelman's June 24, 1997 report, Ms. Westerman opined that the employee might not be unemployable. (Tr. at 43-44) This exercise of having the witness answer premised on a hypothetical situation that does not remotely reflect the actual reality of the case can hardly be said to constitute a change of opinion. Ms. Westerman's qualifications were stipulated to by the employer. (Tr. at p. 19). Her evidence was clearly competent. She never wavered in her opinion that the employee was unemployable when it was based upon the actual facts before her. Thus, we cannot say that the court committed an error in relying on her testimony. Therefore, the employer's reason of appeal number two is denied and dismissed.

The employer's fourth and final reason of appeal alleges that "The trial judge erred as a matter of law in failing to address the issues of whether 'manifest injustice' would result if the employee's benefits were reduced." Relying on the Appellate Division's decision in Lombardo v. Atkinson Kiewit, the employer asserts that "in order to take advantage of §28-33-17(b)(2) the employee must prove, in part, that manifest injustice would result if his or her benefits were reduced." This is no longer the case. Subsequent to the respondent's appeal, the Rhode Island Supreme Court defined the concept of "manifest injustice" and overturned the Appellate Division's holding in Lombardo. The Supreme Court construes

"manifest injustice" to exist when, considering the totality of the specific statutory circumstances affecting a particular employee's ability to find and perform work (namely, the employee's age, education, background, abilities and training), the employee's permanent-but-partial disability renders him or her incapable of returning to his or her regular job and of securing and performing alternative employment. Given proof of such circumstances, the employee, as a practical matter, is in no better position workwise than if he or she were permanently and totally disabled from work. 746 A.2d at 687.

Therefore, "the trial judge should find that 'manifest injustice' would otherwise result if total disability benefits are not awarded to such employees" who are permanently partially disabled and "show that they are unable on account of their work related injuries to perform their regular employment or any alternative employment." Id.

Following the above reasoning, in the present case, the employee did not need to prove "manifest injustice" would result as a separate element

of her claim and the trial judge did not need to make a separate finding regarding the same. Thus, we can find no error in the trial judge's holding that the employee had proven by a fair preponderance of the evidence that she is totally disable within the meaning of R.I.G.L. 28-33-17(b)(2). Therefore, employer's fourth and final reason of appeal is denied and dismissed.

For the aforesaid reasons, employer's reasons of appeal are hereby denied and dismissed and we affirm the decision and decree of the trial judge.

In accordance with Sec. 2.20 of the Rules of Practice of the Workers' Compensation Court, a decree, copy of which is enclosed, shall be entered on

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