JENNIFER WOLFINGER
v.
ELECTRIC BOAT CORPORATION
W.C.C. No. 2017-00742
Rhode Island Worker Compensation, Providence
State of Rhode Island and Providence Plantations
January 12, 2022

FINAL DECREE OF THE APPELLATE DIVISION

Nicholas DiFilippo, Administrator

This matter came to be heard by the Appellate Division upon the claim of appeal of the respondent/employer and upon consideration thereof, the employer's claim of appeal is denied and dismissed, and it is

ORDERED, ADJUDGED, AND DECREED:

1. That the findings of fact and the orders contained in a decree of this Court entered on July 5,2018 be, and they hereby are, affirmed.

2. That the counsel fee awarded to Robert D. Goldberg, Esq., attorney for the employee, in W.C.C. No. 2015-02739 is also for services rendered in the defense of the employer's appeal in this matter.

FINAL DECREE OF THE APPELLATE DIVISION

This matter came to be heard by the Appellate Division upon the claim of appeal of the petitioner/employer and upon consideration thereof, the employer's claim of appeal is denied and dismissed, and it is

ORDERED, ADJUDGED, AND DECREED:

1. That the findings of fact and the orders contained in a decree of this Court entered on July 5,2018 be, and they hereby are, affirmed.

2. That the employer shall pay a counsel fee in the amount of Four Thousand ($4,000) Dollars to Robert D. Goldberg, Esq., attorney for the employee, for the successful defense of the employer's appeals in this matter and the consolidated case, W.C.C. No. 2017-00742.

DECISION OF THE APPELLATE DIVISION

OLSSON, J.

These two (2) matters were consolidated at trial and remain consolidated before the Appellate Division for the purpose of addressing the

employer's claims of appeal. W.C.C. No. 2015-02739 is the employer's petition to review seeking a reduction in the employee's benefits from total to partial disability. At the pretrial conference, the trial judge granted the petition, and the employee filed a claim for trial. W.C.C. No. 2017-00742 is the employee's petition to review in which she alleges that she is totally disabled and entitled to continuing weekly benefits pursuant to Rhode Island General Laws § 28-33-17(b) and the common law Odd Lot Doctrine. At the pretrial conference, the trial judge denied the petition, and the employee filed a claim for trial. Following a full evidentiary hearing, the trial judge denied the employer's petition in W.C.C. No. 2015-02739 and granted the employee's petition in W.C.C. No. 2017-00742. After a comprehensive review of the record and consideration of the arguments of both parties, we deny the employer's appeals and affirm the decision and decrees of the trial judge in both matters.

Prior to trial, the parties stipulated that the employee had sustained a work-related injury on March 8,2014 and the only issue for trial was the employee's disability status.

On March 8,2014, Jennifer Wolfinger (the employee) injured her low back and right leg climbing out of a manhole in an auxiliary tank while working for Electric Boat Corporation (the employer). The employee testified that she had been working for the employer for about ten (10) years and at the time of her injury, she was a structural supervisor. The employee explained that her job involved climbing up and down ladders many times a day and climbing in and out of tanks through a manhole about fifteen (15) to twenty-five (25) times a day. She testified that she would carry materials such as hoses, lines, leads, and welding machines weighing ten (10) to fifty (50) pounds in and out of the tanks. The employee worked ten (10) to eleven (11) hours a day, Monday through Friday, and six (6) to seven (7) hours a day on Saturdays and sometimes Sundays.

At the time of her testimony, the employee was treating with Dr. Todd Handel, an interventional physiatrist, who recently administered two (2) epidural injections to treat the pain in her low back and radiating down her right leg. She also had an EMG performed by Dr. William Golini, a neurologist. She asserted that, since her injury, she has not and cannot return to work because she is in pain on a regular basis. The employee uses Duexis 800 milligrams, the Flector Patch, a topical gel, and medical marijuana in the form of liquid drops and edibles for managing her pain. She stated that she has elected not to take opioids.

The medical evidence presented at trial consisted of four (4) reports of Dr. John Czerwein, Jr., the records and two (2) depositions of Dr. Jay Burstein, and the reports and deposition of Dr. Todd Handel.

Dr. Handel is a doctor of physical medicine and rehabilitation, specializing in interventional pain management and sports medicine. He began treating and assisting the employee with the nonsurgical management of her pain on March 7,2016. She presented at the initial visit with a chief complaint of low back pain radiating down her right leg. The employee was using 200 milligrams of Ibuprofen every four (4) hours, an over-the-counter sleep medication, and a CBD formulation to manage her pain. She also had a prescription for Oxycodone but was not taking it on a regular basis. After reviewing the examination done by his nurse practitioner and the results of an MRI and EMG, the doctor's impression was that the employee suffered from a disc herniation at L5-S1 (the employee had undergone a discectomy at L5-S1 in 2009, prior to the 2014 work injury at the employer); spondylosis in the lumbosacral region without myelopathy (the doctor testified that his reports erroneously state with myelopathy); and radiculopathy. He recommended an epidural steroid injection at L5-S1 which was done on April 7,2016. Dr. Handel testified that following the epidural steroid injection, the employee had about thirty-five percent (35%) improvement in her pain but continued to experience numbness and tingling in the leg. The doctor recommended a course of physical therapy which apparently was never approved.

On June 8,2016, Dr. Handel gave the employee a second epidural steroid injection. At a follow-up office visit on June 23, 2016, Dr. Handel indicated that the employee was experiencing chronic muscle spasms and he found her disabled from her job at the employer. He recommended a trial of muscle trigger point injections to break up the spasms in the muscle and assist with her ongoing pain. The first injection was administered that day. On August 5,2016, he noted that the employee was using Oxycodone as needed, Duexis samples, Flector patches, and medical marijuana for her pain. Dr. Handel recommended a sacroiliac joint injection, which was performed on September 14, 2016, and a TENS unit for her chronic myofascial pain and spasms.

On October 27,2016, the employee presented with complaints of trouble sleeping. Dr. Handel recommended a spinal cord stimulator and a trial of Duloxetine (also known as Cymbalta) to assist with her pain, mood, and sleep. On January 3,2017, the doctor noted that the employee stopped taking Cymbalta because she was experiencing side effects from the medication. Dr. Handel again recommended a spinal cord stimulator, but the employee "was not interested in the procedure, and then [Dr. Handel] went on and recommended a TENS unit for chronic myofascial pain and spasm" as well as physical therapy and a functional capacity evaluation (FCE) at the Donley Center. Ee's Ex. 5, Dr. Todd Handel Dep. 30:22-25, 31:14-17. On April 3,2017, he recommended an aggressive spine program

through physical therapy and a home exercise program for lumbar, core, and right lower extremity strengthening, continued use of the TENS unit, and medical marijuana.

On April 19,2017, Dr. Handel noted that the employee started physical therapy at Healy Physical Therapy & Sports Medicine, Inc., was performing a home exercise program daily, and using the TENS unit regularly. During his examination that day, Dr. Handel noted a positive straight leg raise on the right, decreased strength in her right leg, an absent ankle tendon reflex on the right consistent with an L5-S1 nerve abnormality, and limited lumbar flexion and extension. Dr. Handel opined that the employee has chronic SI radiculopathy consistent with the disc herniation after her previous surgery. Based on the employee's pain symptoms and limitations on her activity and mobility, Dr. Handel again found her disabled and opined that she had not reached maximum medical improvement (TVDVII).

At the most recent office visit on February 27,2018, the employee complained of increased pain in her right leg over the last two (2) months with continued numbness that radiates down the outside of her right leg and toward the bottom of her right foot. *See* Ee's Ex. 6, Dr. Todd Handel Updated Report. Dr. Handel noted that the employee remained significantly limited by her overall pain; however, the employee declined a trial with a spinal cord stimulator and administration of another epidural steroid injection. At the employee's request, Dr. Handel referred the employee to Dr. Tadeusz Sytykowski for six (6) visits of acupuncture to see if there was any improvement in her radicular pain.

Dr. Czerwein, an orthopedic surgeon, was appointed by the trial judge at various points in the proceedings to conduct four (4) impartial medical examinations of the employee. The reports of those examinations were admitted into evidence; however, Dr. Czerwein did not testify live or by deposition. Dr. Czerwein initially examined the employee on November 24, 2014 at the request of the court during pretrial proceedings in a consolidated case, W.C.C. No. 2014-04573. On October 19,2016, the employer withdrew its claim for trial in that matter. Dr. Czerwein noted that the employee had previous back surgery in 2009, specifically a hemilaminotomy with discectomy, by Dr. Mark Palumbo. She was out of work for five (5) to six (6) months and then returned to work without restrictions. After conducting a physical examination, Dr. Czerwein concluded that the employee was totally disabled and unable to return to her regular job.

At the examination on August 6,2015, the employee complained of continual low back pain and pain radiating down her right leg. After examining the employee and reviewing a January 2015 MRI of the lumbar spine and the medical reports forwarded to him by the court, Dr. Czerwein

diagnosed the employee with right lower extremity radiculopathy and recurrent L5-S1 disc protrusion/extrusion. He causally related her symptoms to the work injury she sustained on March 8,2014 and recommended an EMG. He opined that the employee was temporarily partially disabled and could work no more than two (2) to four (4) hours per day with very restricted lifting.

At the examination on September 12, 2016, the employee's complaints were essentially the same. The doctor reviewed the results of an EMG which demonstrated a chronic right S1 radiculopathy. Dr. Czerwein opined that the employee had reached MMI. He noted that the employee had chronic right leg pain but did not recommend further surgery. He recommended a FCE but noted that he was not optimistic that she would be able to return to her previous employment.

Dr. Czerwein examined the employee again on July 20,2017. After noting his physical findings and reviewing the FCE report, Dr. Czerwein opined that the employee was permanently partially disabled. He explained that the employee needs a job where she can alternate sitting and standing every thirty (30) minutes, and she can also get up and walk at times. Dr. Czerwein restricted her to lifting ten (10) to fifteen (15) pounds or less, and he recommended no repetitive bending, stooping, or kneeling.

Dr. Burstein, an occupational medicine specialist, examined the employee three (3) times at the request of the employer. After conducting a physical examination on April 10,2015 and reviewing medical records of the employee's past treatment, Dr. Burstein diagnosed the employee with preexisting lumbar discectomy, degenerative lumbar spondylosis, right-sided lower back pain, and right lower extremity pain and paresthesias. He opined that the employee was at MMI, could return to work with restrictions, and that transitioning back to work would be in her best interest. Er's Ex. C, Dr. Jay Burstein Dep. 9:19-20.

Dr. Burstein examined the employee for a second time on January 28, 2016. His diagnosis remained the same. He testified that the employee reported she had pain radiating from her low back to her right knee, whereas at the initial examination, she indicated that the pain radiated down to her right foot. Dr. Burstein testified that the employee told him that her pain level ranged between four (4) to eight (8) out often (10) on the pain scale. He reiterated that as to the work injury on March 8,2014, the employee had reached MMI and that no further treatment was necessary. Dr. Burstein stated that the employee was capable of modified duty work with restrictions of no lifting or carrying more than twenty (20) to twenty-five (25) pounds, no pushing or pulling greater than thirty (30) to thirty-five (35) pounds, and only occasional bending or twisting. He also advised that

the employee gradually transition back to work by only working four (4) hours a day for two (2) weeks, increasing to six (6) hours a day for two (2) weeks, and then resuming full-time work.

Dr. Burstein examined the employee for a third time on March 10, 2017. He noted that the employee reported pain radiating to her upper calf, and her pain level ranged from three (3) to eight (8) out often (10). Dr. Burstein characterized these changes or differences from his prior examination as minor. He did note that the right Achilles reflex was absent but testified that reflexes can vary from examination to examination. Er's Ex. C 19:2-6. Dr. Burstein concluded that the employee had "subjective pain, symptom magnification, and no significant objective physical findings." Er's Ex. C, report dated 3/10/2017, page 3 (attached). After reviewing a functional job description provided by the employer as well as additional medical records, he opined that the employee could return to her regular job with the employer.

After the March 10,2017 examination, Dr. Burstein reviewed the reports of Drs. Czerwein and Handel, Mr. Albert Sabella, and Ms. Danielle Hetu. Dr. Burstein testified that he was not in a position to agree or disagree with the statements in Dr. Czerwein's July 2017 report because Dr. Czerwein saw the employee at a later date, and Dr. Burstein's own opinions were based on the information that he had as of his March 2017 examination of the employee.

When Dr. Burstein was deposed for the second time on March 5, 2018, he was questioned as to whether there had been any improvement in the employee's condition when comparing an examination by Dr. Frank D'Alessandro, the employee's primary care physician, on March 10, 2014 to Dr. Burstein's examination of the employee on April 10, 2015. In response to a request from the employer's attorney, Dr. Burstein wrote a letter dated May 15, 2015 in which he pointed to the fact that, at the March 10,2014 examination, the employee reported her pain level as an eight (8) out often (10) while at his examination on April 10,2015, she described her pain level as ranging from two (2) to six (6) out often (10). As such, Dr. Burstein opined that the employee's pain had improved from March 10,2014 to April 10,2015. He acknowledged that "[p]ain is subjective, and you use it in its totality. In terms of making a diagnosis and improvement, you use that together with objective data, and then you formulate your opinion." Er's Ex. D, Dr. Jay Burstein Dep. 17:2-6. Dr. Burstein testified that, as of the date of his second deposition, March 5,2018, he was unaware of the employee's current pain level and that the last medical record he reviewed was from July of 2017.

The vocational evidence included the testimony and reports of Mr. Albert Sabella and Ms. Danielle Hetu as well as the functional capacity evaluation (FCE) from the Donley Center.

Mr. Sabella, a certified vocational rehabilitation counselor, testified on behalf of the employee regarding his vocational assessment of the employee which resulted in a report dated November 14,2016. He interviewed the employee on October 26,2016 and reviewed medical reports from Drs. Frank D'Alessandro (the employee's primary care physician), Philip Lucas (the employee's initial treating physician), Todd Handel, and John Czerwein. He did not review any medical reports from Dr. Jay Burstein. Mr. Sabella testified that the records indicated that the employee has a very limited sedentary capacity and chronic pain. He opined that the employee could do a sit-down job, but that her pain would make it difficult for her to have regular attendance and would also require her to take frequent breaks. In other words, the employee would not be employable on "an ongoing or sustainable basis." Trial Tr. 47:22-23.

Mr. Sabella stated that the employee faces significant barriers to employment which render her unemployable in the competitive labor market. He testified that these barriers include the employee's physical limitations, negligible transferrable skills, absence from the workforce for over three (3) years, chronic pain, and use of medication. He acknowledged that the employee has an associate degree in applied science from the Community College of Rhode Island (CCRI) and has basic computer skills, but she does not have "competitive keyboarding ability in that she uses the two-finger approach and doesn't know the keyboard and has no real typing speed, per se." Trial Tr. 36:15-17. In addition, she lacks knowledge of the use of Microsoft Word, Excel, and PowerPoint. He stated that the lack of computer skills would be a detriment to obtaining sedentary level work.

In assessing employability, Mr. Sabella noted that it is not based solely on one's physical abilities,

> but also other types of issues or concerns that may hinder one's access to the labor market or be a positive, such as age, education, background, past work, transferrable skills, and the employability also involves the ability to compete with other job applicants to have some type of reasonable expectation that you are going to be hired.

Trial Tr. 25:12-18. Considering all the information he had gathered and reviewed, Mr. Sabella concluded that the employee was "unemployable for any practical vocational purpose." Trial Tr. 46:25-47:1.

Mr. Sabella was questioned regarding Ms. Hetu's report and the Donley Center's functional capacity evaluation (FCE). He testified that Ms. Hetu only focused on the employee's physical barriers and did not take into consideration other vocational factors such as length of absence from the workforce and the employee's chronic pain with regards to the job categories that she listed in her report as being available to the employee. He pointed out that Ms. Hetu's report simply listed broad categories of occupations that she claimed the employee would be capable of performing rather than actual specific jobs, and she classified the employee as having intermediate computer skills in contrast to Mr. Sabella's assessment that the employee possessed only basic computing skills.

Mr. Sabella included the results of his labor market survey in his report and updated his survey prior to his testimony. He reiterated his conclusion that the employee was not employable for any practical purpose.

Ms. Hetu is a vocational consultant and certified rehabilitation counselor at Occupational Resource Network. She has a bachelor's degree in psychology and philosophy and a master's degree in rehabilitation counseling. At the request of the employer, Ms. Hetu prepared a vocational assessment of the employee whom she interviewed on March 13, 2017. In her report dated March 29, 2017, she noted that the employee is a 36-year-old female with supervisory experience and intermediate computer skills. She also reviewed certain medical reports from Drs. Handel, Burstein, and Czerwein and the Donley Center's functional capacity evaluation (FCE). She opined that the employee could do sedentary to light work. Ms. Hetu conducted a transferrable skills analysis which revealed that the employee would be qualified for jobs in assembly, customer service, and inspection. She testified that, in her opinion, there were jobs available in the open market that were within the employee's physical restrictions. She recommended the employee for vocational rehabilitation services, which would include some skills enhancement courses that would enable the employee to qualify for jobs with wages closer to her pre-injury income.

After issuing her report, Ms. Hetu did some additional research on skill enhancement programs, contacted potential employers directly, and reviewed the employee's testimony and medical records, Mr. Sabella's testimony, and additional reports of Drs. Czerwein, Handel, and Burstein. She opined that her review of these items did not affect the opinions she expressed in her report. On cross-examination, Ms. Hetu acknowledged that she did not conduct a complete labor market survey because she was only hired to perform a vocational assessment in accordance with the rehabilitation hierarchy.

Ms. Hetu stated that she reviewed Mr. Sabella's vocational rehabilitation report and that she disagreed with his opinion that the employee has no transferable skills. She testified that she believes the employee has transferable skills and that the transferable skills that she does have are sought after. She testified that she also disagreed with Mr. Sabella's opinion that the employee has many barriers to employment and stated, "it would be best to ask [the employee] what she perceives her barriers to be." Trial Tr. 113:21-22. Ms. Hetu stated that she does not believe that the employee's use of opioids and medical marijuana presents a barrier to the employee's employment because they are legal in the State of Rhode Island, the employee has a prescription, and they are a medical necessity. Nonetheless, she admitted in her testimony that the employee's residual functional capacity is not as high as it once was and that the employee's physical limitations could create a barrier to obtaining employment.

In a lengthy bench decision, the trial judge thoroughly reviewed the testimony and exhibits before initially addressing the employer's petition to review alleging that the employee's weekly benefits should be reduced from total to partial disability. The trial judge found that the employer relied on the testimony of Dr. Burstein who compared the employee's subjective complaints about her pain level at the time she saw Dr. D'Alessandro on March 10,2014 to her complaints on April 10,2015 when she saw him. The trial judge concluded that the employer failed to meet its burden of proof because Dr. Burstein's opinion, that the employee's condition had improved when comparing Dr. D'Alessandro's examination on March 10,2014 to his examination on April 10, 2015, was based on the employee's subjective complaints and self-reported pain levels, which can be affected by medication and "can vary hour to hour, day to day," rather than the physical findings. Trial Tr. 213:17-18. Thus, the trial judge denied the employer's petition.

The trial judge noted that the result of the denial of the employer's petition is that the employee would continue to receive weekly benefits for total incapacity; however, the trial judge felt it was necessary to address the employee's petition alleging total disability pursuant to Rhode Island General Laws § 28-33-17(b)(2).[1] The trial judge relied on the opinions of Dr. Czerwein over those of Dr. Burstein relative to the employee's work restrictions and ability to work. The trial judge indicated that Dr. Czerwein's opinions are somewhat similar to those of the treating physician, Dr. Handel, as both doctors suggest that the employee is partially disabled with numerous restrictions. Regarding the employability of the employee, the trial judge relied on the opinions of Mr. Sabella, rather than Ms. Hetu. The trial judge rejected Ms. Hetu's opinion that the employee did not have any barriers to employment and found that the employee faces several barriers,

including her physical limitations, use of opioids and medical marijuana, and long absence from the workforce. Relying upon the opinions of Dr. Czerwein and Mr. Sabella, the trial judge concluded that the employee is totally disabled pursuant to Rhode Island General Laws § 28-33-17(b)(2) and granted the employee's petition, thereby continuing the employee's benefits at the rate for total disability.

In reviewing the decision of a trial judge, we are guided by the standard set forth in Rhode Island General Laws § 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." In applying this deferential standard of review, the appellate panel may not engage in its own de novo review of the evidence without first finding that the trial judge "was clearly wrong or misconceived or overlooked material evidence". *Blecha* v. *Wells Fargo Guard-Company Serv.,* 610 A.2d 98,102 (R.I. 1992) (citing *Davol, Inc. v. Aguiar,* 463 A.2d 170,174 (R.I. 1983)). After reviewing the record in these matters, we find that the trial judge was not clearly wrong in his assessment of the evidence and the conclusions he drew therefrom.

In W.C.C. No. 2017-00742, the employer asserts two (2) arguments: (1) that the trial judge erred in relying upon the opinions of Mr. Sabella because Mr. Sabella did not consider all of the statutory factors in concluding that the employee was not employable, and (2) that the trial judge overlooked and/or misconceived material evidence when he found that the employee's use of opioids and medical marijuana was a barrier to obtaining employment when the employee testified that she elected not to take opioids.

The employer contends that Mr. Sabella failed to consider the employee's age, educational background, computer skills, and supervisory experience in arriving at his opinion. Our review of the evidence reveals otherwise.

The statutory "Odd Lot" doctrine was enacted in 1992 as part of the reform of the Workers' Compensation Act. *See* P.L. 1992, ch. 31, § 5. The statute, Rhode Island General Laws § 28-33-17(b)(2), states, in pertinent part, as follows:

> [I]n 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.

Id; see also Lombardo v. Atkinson-Kiewit, 746 A.2d 679, 682 (R.I. 2000).

Mr. Sabella testified that employability is

> not just based on one's physical abilities, but also other types of issues or concerns that may hinder one's access to the labor market or be a positive, such as age, education, background, past work, transferable skills, and employability also involves the ability to compete with other job applicants to have some type of reasonable expectation that you are going to be hired.

Trial Tr. 25:11-18. The analysis of these factors focuses particularly on the issues or concerns that are a detriment or hindrance to employment. In his report and testimony, Mr. Sabella stated that the employee, at age 36, would be considered a younger worker and her age would not be a significant factor, i.e., not a detriment. He noted that"[educationally, Ms. Wolfinger would have no significant vocational deficit." Ee's Ex. 1, Initial Vocational Assessment from Albert Sabella, dated November 14, 2016, at 6. However, Mr. Sabella also found that the employee's computer skills, including keyboarding and knowledge of Microsoft Word, Excel, and PowerPoint, were not at a competitive level and would have a negative impact on her ability to secure employment.

Contrary to the employer's assertion, Mr. Sabella did consider the employee's prior work experience, including her supervisory duties at the employer, in conducting his transferable skills analysis. While acknowledging the employee's training and experience as a supervisor at the employer, Mr. Sabella stated that the skills acquired were specific to that employer's business and to shipbuilding and were not transferable to other occupations. He testified that "[a] lot of times when you're supervising, the employer is looking for a specific skill set related to that industry or that particular product, such as plastic products, for instance, or automotive products." Trial Tr. 40:20-24. Mr. Sabella concluded that the employee lacked the necessary level of education and/or the work experience in a specific industry to qualify for most positions in the quality control, production inspection, and customer service categories. He therefore characterized the employee as having negligible transferable skills, which would be a significant barrier to obtaining employment within her physical limitations.

Our review of Mr. Sabella's testimony and report revealed that he evaluated all of the factors listed in § 28-33-17(b)(2) in rendering his opinion that "the combined and compounded effect of her employment barriers as a result of injuries sustained on 3/8/14 are to an extent that renders her unemployable for any practical vocational purpose." Ee's Ex. 1 at 7. Mr.

Sabella may have considered some factors to be more of a detriment than Ms. Hetu did; however, the trial judge chose to accept the opinions expressed by Mr. Sabella over those of Ms. Hetu, and the trial judge explained the basis of that choice in his decision. It is the trial judge's prerogative to choose to rely upon the opinions and testimony of one (1) expert over another and we will not disturb that exercise of discretion absent a finding that the trial judge was clearly wrong in doing so. *See Parenteau* v. *Zimmerman Eng'g, Inc.,* 111. R.I. 68, 78, 299 A.2d 168, 174 (1973). In the present matter, the opinions of Mr. Sabella were competent and probative, and we find no error on the part of the trial judge in relying upon them in rendering his decision.

In W.C.C. No. 2017-00742, the employer also argues that the trial judge overlooked or misconstrued material evidence when he found that the employee's use of opioid medication was a barrier to obtaining employment, despite the employee's testimony on June 28,2016 that she had elected not to take opioids. *See* Trial Tr. 13:11-12. Our review of the record reveals that the employee's statement was not such an absolute declaration that she *never* used opioids. The employee advised Dr. Czerwein on November 24,2014 that she was using Oxycontin to control her pain and, on August 6, 2015, she informed Dr. Czerwein that she was taking Percocet. On January 28,2016, the employee completed a form at Dr. Burstein's office that listed Oxycontin or Oxycodone as one of her medications. On September 12, 2016, the employee told Dr. Czerwein that she was using medical marijuana for pain control, and the employee advised Dr. Czerwein on July 20, 2017 that she was no longer using opioids. During her interview with Mr. Sabella on October 26,2016, the employee told him that she had a prescription for Oxycodone, but she was only using it occasionally for bouts of severe pain as she had qualified for a medical marijuana card earlier in the year and was using that for her chronic pain.

It appears from various records and reports in evidence that the employee, even at the time of her testimony, was still using opioid medication on occasion, but had transitioned to using medical marijuana on a regular basis to control her pain. In his bench decision, the trial judge stated "[t]he fact that she's taking opioid medication and medical marijuana constitutes a barrier to employment." Trial Tr. 222:3-4. Considering the records we have cited above, we cannot say that the trial judge was clearly wrong in making this statement, as it appears that the employee may still be using Oxycodone on occasion. We also note that the trial judge mentions the employee's use of opioid medication and medical marijuana together as a barrier in finding employment, and there is no doubt that the employee is using medical marijuana on a regular basis. Accordingly, we do not find that

the trial judge overlooked and/or misconstrued the evidence in making that statement.

In W.C.C. No. 2015-02739, the employer argues that Dr. Burstein's comparison of the employee's reported pain level as less than previously reported was enough to prove a comparative change from total to partial disability. The employer contends that the trial judge improperly rejected Dr. Burstein's opinion because it was based upon a comparison of subjective complaints rather than physical findings.

In Bumham v. *Hasbro, Inc.,* W.C.C. No. 2004-01070 (App. Div. Oct. 30, 2009), we summarized the standard established by the Rhode Island Supreme Court for the type of medical evidence required to establish a change from total to partial incapacity.

> It is a well-established principle in workers' compensation law that in order to establish a change from total to partial incapacity, the employer must present comparative medical evidence establishing the improvement in the employee's condition since the date she was found totally disabled. *See CD. Burnes Co. v. Guilbault,* 559 A.2d 637, 640 (R.I. 1989). The expert medical witness must be familiar with the employee's condition at the time she was deemed totally disabled and also familiar with the employee's condition at the time she was deemed partially disabled. Testimony which simply states the employee's current condition without any comparison or reference to her prior condition is not competent to prove a change in the degree of incapacity. *See id.* We cannot look at the reports and make our own comparison; rather it has to be done by the expert medical witness.

Burnham, W.C.C. No. 2004-01070 at *4.

In the present matter, the employer relies upon the testimony of Dr. Burstein regarding a letter he authored dated May 15,2015. In that letter, the doctor states:

> Based on the forward [sic] medical record, Ms. Wolfinger's pain level diminished from her 3/10/2014 office visit as compared to her pain level when I evaluated her (rated 2-6/10).
>
> There are no additional forwarded records to provide any additional basis for improvement of her condition.

Er's Ex. D, Dr. Burstein Dep., letter dated 5/15/2015 (attached). Dr. Burstein testified that although pain is subjective, he uses it in its totality, together with objective data. However, the doctor did not cite any such objective data in rendering his opinion that the employee's condition had improved. The sole basis for Dr. Burstein's opinion that the employee's condition has improved is her own statements as to her pain level on a particular day.

As noted by the trial judge, a person's self-reported pain level can vary from day to day and can be affected by the use of medication and other treatment modalities and an individual's activity level on a particular day. In fact, at two (2) subsequent examinations conducted by Dr. Burstein, the employee reported a pain level of four (4) to eight (8) out often (10) and three (3) to eight (8) out of (10). *See* Er's Ex. C, Dr. Burstein Dep., reports dated 1/28/2016 and 3/10/2017 (attached). At the initial consultation with Dr. Handel, the employee reported a current pain score of six (6); her best pain score over the past seven (7) days as a four (4); and her worst pain level over the past seven (7) days as an eight (8). In comparing his examinations on January 28,2016 and March 10,2017, Dr. Burstein characterized changes in the employee's reported pain level and location of her radiating pain in her right leg as "minor changes, minor differences." Er's Ex. C, Dr. Burstein Dep. 18:12. Dr. Burstein also discounted the finding in the March 2017 examination of an absent right ankle reflex, stating "[rjeflexes can be variable from exam to exam. There can be some variability." Er's Ex. C, 19:4-6.

The trial judge concluded that Dr. Burstein's opinion based solely upon the employee's self-reported pain level was simply not sufficiently persuasive or probative to satisfy the employer's burden of proof on the issue of whether the employee's condition had improved. The variability of the reported pain level, the influence of other factors on the pain level, and Dr. Burstein's own characterization of changes in pain level as minor, support the trial judge's determination to reject Dr. Burstein's opinion that the employee's condition had improved. We therefore find no merit in the employer's argument on this issue.

We emphasize that this case does not set a new evidentiary standard that a change in objective physical findings is required to prove a change from total to partial disability. In each case, the trial judge must review the relevant medical evidence as a whole in determining whether the burden of proof is satisfied. Such evidence may include information that has a subjective basis. It is the role of the trial judge to weigh the evidence and determine whether it is sufficient to prove the change in condition. In the present matter, the trial judge was simply not persuaded by Dr. Burstein's opinion due to its questionable foundation.

We also note that the employer chose to only use the initial report from Dr. D'Alessandro for comparison. Pursuant to the pretrial order entered in W.C.C. No. 2014-04573 on December 18,2014, the employee was found to be totally disabled from March 10,2014 and continuing. That pretrial order was entered after the receipt of Dr. Czerwein's report of his first impartial medical examination in which he found the employee to be totally disabled. Because the employee was found to be totally disabled on December 18,2014, medical reports regarding examinations leading up to that date would be available as a basis for comparison, including the Dr. Czerwein's report of his impartial medical examination which was quite detailed. Therefore, the employer cannot claim that it was hampered in proving its case by a dearth of physical findings in Dr. D'Alessandro's report.

Consistent with the foregoing analysis of the issues raised on appeal, we deny the employer's claims of appeal and affirm the decision and decrees of the trial judge. In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, final decrees, proposed copies of which are enclosed shall be entered on *(A&avjO^M ' <* ,» vfp >*

Hardman, J. and Pepin Fay, J., concur.

Notes:

[1] Throughout our decision, any reference to "Odd Lot" status refers to total disability under this statutory provision, as distinguished from the common law "Odd Lot Doctrine."
