STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

JOSEPH BRAZIL)
)
VS.) W.C.C. 2010-05504
)
WAL-MART)

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 in which he found that the employee suffered a work-related injury to his neck on July 2, 2010 resulting in partial incapacity from July 8, 2010 through July 25, 2010, total incapacity from July 26, 2010 through March 23, 2011, and partial incapacity from March 24, 2011 and continuing. The focus of the employee's appeal is the reduction from total to partial incapacity beginning March 24, 2011. After thorough review of the record and consideration of the arguments of the parties, we find merit in the employee's appeal.

The employee, Joseph Brazil, was employed by Wal-Mart for over two (2) years as a zone supervisor for the back rooms. The employee was responsible for supervising other employees as well as handling inventory. On or about July 2, 2010 the employee was unloading two (2) general merchandise trucks by hand with several other employees. While lifting and moving merchandise around in the second truck the employee felt a pop in his neck as he lifted an air conditioner.

At the time that the employee felt the pop in his neck he did not do anything to address it. The employee testified that they were just getting ready to go on break, so he went on break and mentioned to one of his employees that he thought he pinched a nerve. The employee continued to work after feeling the pop in his neck, and did not report the injury to anyone else. The employee was told he could take off the next day, Saturday, because his employer was requesting that he work on Sunday. He noted that it was a very busy time at the store because it was the Fourth of July weekend.

On July 8, 2010, the employee was called into the office to conduct an interview of a potential new hire. As the employee was sitting in the interview, he started to experience heart palpitations, blurry vision, and numbness in his left arm. Tr. at 13:7-11. He stopped the interview and then went home early after telling Christine in the personnel office and his assistant manager that he was not feeling well.

On the following day, July 9, 2010, the employee went to his primary care physician, Dr. Brian G. Kwetkowski, for an examination. When Mr. Brazil began to experience symptoms similar to the day before, Dr. Kwetkowski called an ambulance which transported him from the doctor's office directly to Miriam Hospital. The records of Miriam Hospital, which were admitted into evidence, reflect that for the past two (2) weeks the employee had complaints of chest tightness and shoulder pain radiating down his arm, particularly when lifting objects. He also informed the emergency room personnel about the episode which occurred during the interview at work the day before. After examination and testing, it was determined that Mr. Brazil had not suffered a heart attack but rather that his symptoms were likely due to a muscle sprain and cervical nerve compression.

After learning that the symptoms emanated from his neck, the employee began treating with Dr. Christopher F. Huntington, an orthopedic surgeon. Mr. Brazil acknowledged that he has more than a ten (10) year history of low back problems which originated with an injury in 1997. Dr. Huntington performed surgery on his low back at least three (3) times prior to 2007. On cross-examination, the employee stated that prior to his neck injury he was still seeing Dr. Huntington approximately once every three (3) months to check on his back. The employee indicated that there were times that he felt fine and other times when he was experiencing pain. The employee also testified that he was taking pain medication to help alleviate his back pain up until the time of his July 2, 2010 injury; he would take five (5) to six (6) tablets of Oxycodone on normal days, and seven (7) to eight (8) tablets on days when he experience more severe pain. The employee asserted that since he began working for Wal-Mart in 2007, he did not lose any time from work due to his low back condition.

The pertinent medical evidence consists of the affidavit and reports of Dr. Huntington and the deposition and records of Dr. Philo F. Willetts, who examined the employee at the request of the employer. Prior to seeing Mr. Brazil regarding the neck injury, Dr. Huntington referred him for an MRI which was performed on July 15, 2010. The results of the MRI revealed central C5-6 and leftward C6-7 disc protrusions with mild central stenosis, a borderline C4-5 central canal, mild foraminal narrowing, and milder spondylitic changes elsewhere in the cervical spine.

The employee saw Dr. Huntington on July 19, 2010 and reported that about two and one-half (2 ½) weeks ago he began experiencing neck pain radiating down his left arm with numbness, as well as headaches and lightheadedness. It was noted in the report that the employee was taking Roxicodone ten (10) times per day. Although there is no documentation of

a physical examination in the report, the doctor's diagnosis was herniated discs at C5-6 and C6-7. Dr. Huntington wrote that, after discussing various options, Mr. Brazil agreed to undergo surgery, specifically an anterior cervical decompression and fusion, as soon as possible. An undated addendum was added to the report stating that, on July 19, 2010, the employee told the doctor that while he was at work on June 30, 2010 unloading a tractor trailer and lifting an air conditioner, he felt a pop in his neck and then numbness in his left arm.

On July 26, 2010, Dr. Huntington performed an extensive surgery on the employee, specifically an anterior cervical decompression and fusion, and a C5-6 and C6-7 corpectomy with an anterior cervical locking plate with a local bone graft. In a letter dated September 27, 2010 addressed to the employee's attorney, the doctor stated that the employee has been totally disabled from June 30, 2010 to the present due to the injury he sustained to his neck at work. There are no other statements by Dr. Huntington as to the extent of the employee's disability.

Dr. Willetts, an orthopedic surgeon, examined the employee on March 24, 2011 at the request of the employer and provided a thirty-six (36) page report with an additional thirty (30) pages of appendices summarizing the medical records he reviewed. The employee provided the doctor with a history of the events surrounding his injury at work which was consistent with his testimony in court. In addition, Mr. Brazil explained to Dr. Willetts that he initially experienced some improvement in his condition after the surgery, but he noted a gradual increase in his pain level to a seven (7) or eight (8) out of ten (10) starting about three (3) months prior.

Dr. Willetts testified that, based upon the history provided by the employee, the incident at work was the cause of his current medical condition. The only comments regarding the employee's ability to work are contained in Dr. Willetts' report in which he stated that the employee "does appear very limited in his ability to do effective work at this time, being fit only

for part-time sedentary activity." Er's Ex. A, Willetts' Report at 34. The doctor specifically mentions the job of a part-time greeter at Wal-Mart as potential employment because the employee would have the ability to sit and stand as needed. The remainder of the doctor's deposition and report focus on the reasonableness and necessity of the surgery performed by Dr. Huntington.

The trial judge concluded that the employee sustained an injury to his neck while at work on July 2, 2010. He also determined that the medical evidence demonstrated that the employee was partially disabled from July 8, 2010 (the last day worked) through July 25, 2010, totally disabled from July 26, 2010 (the date of the surgery) through March 23, 2011, and partially disabled from March 24, 2011 (the date of Dr. Willetts' report) and continuing. In addressing the issue of the surgery performed by Dr. Huntington, the trial judge found that it was not necessary or reasonable at the time. The employee filed a timely claim of appeal.

The appellate standard of review is very limited and is clearly delineated in R.I.Gen.Laws § 28-35-28(b), which dictates that "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." Furthermore, we are precluded from engaging in 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 a thorough review of the record, we find that the trial judge erred in finding that the employee became partially disabled as of March 24, 2011.

The employee presented three (3) reasons of appeal in support of his contention that the trial judge erred in finding the employee to be partially disabled as of the date of Dr. Willetts' examination on March 24, 2011. The employee alleges that Dr. Willetts never testified

regarding the employee's ability to work in his deposition and that the trial judge erred in relying upon one (1) sentence from Dr. Willetts' sixty-six (66) page report to support his conclusion that the employee's condition had improved from total to partial disability. The employee further contends that the trial judge erred in relying upon Dr. Willetts' assessment of the employee's incapacity because it lacked any foundation demonstrating a comparative change in the employee's condition as required by the current state of the law as set forth in Burnham v. Hasbro, Inc., W.C.C. No. 2004-01070 (App. Div. 10/30/09).

In Burnham, we addressed the issue of the type of medical evidence required to establish a change in condition 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* C.D. 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.

It is this standard that we must apply to the present matter.

The employer contends that it did not bear the burden of proving a comparative change in condition because the burden remained with the employee to establish his ongoing total incapacity from the date of injury and continuing. We must disagree. This matter came before the court on the employee's original petition. The trial judge granted the petition and awarded benefits for partial incapacity from July 8, 2010 (the last day worked) through July 25, 2010, benefits for total incapacity from July 26, 2010 (the date of surgery) through March 23, 2011, and benefits for partial incapacity from March 24, 2011 (the date of Dr. Willetts' examination)

and continuing. In his reasons of appeal, the employee stated that he is only contesting the trial judge's finding of partial incapacity beginning March 24, 2011. The employer did not claim an appeal and therefore cannot challenge the trial judge's findings that the employee was partially disabled for a limited period following the injury and then became totally disabled as of the date of the surgery. *See* Thompson v. Coats & Clark, Inc., 105 R.I. 214, 229, 251 A.2d 403, 411 (1969). Consequently, our focus is solely on whether the evidence supports the finding of a change from total to partial incapacity as of March 24, 2011. We conclude that it does not.

In Burnham, the employee filed an employee's petition to review alleging, among other things, an increase to total incapacity as of January 14, 2000 and continuing based upon an examination by Dr. Randall Updegrove, the court-appointed impartial medical examiner. The trial judge accepted the opinion of Dr. Updegrove in finding that the employee became totally disabled as of January 14, 2000; however, he then relied upon the opinion of Dr. John Froehlich, who examined the employee on April 1, 2004 at the request of the employer, to find that she became partially disabled as of the date of his examination. The Appellate Division vacated the finding of partial disability because there was no comparative medical testimony to establish a change in the employee's condition.

> "In the present matter, a thorough review of Dr. Froehlich's reports and deposition reveals that his testimony did not satisfy the requirement of comparative evidence needed to establish a change from total to partial incapacity. The doctor did not have firsthand knowledge of the employee's condition at the time she became totally disabled in January 2000. Neither attorney presented Dr. Froehlich with an appropriate hypothetical to compare the employee's condition on January 14, 2000 to her condition when he examined her four (4) years later. Although the doctor did review most, if not all, of the voluminous medical records regarding Ms. Burnham's treatment, he was never asked to compare physical findings or indicate how the employee's condition had improved. Therefore, the employer failed to present the required comparative medical testimony to establish a change from total to partial incapacity." Burnham, W.C.C. No. 2004-01070 at *5.

In the present matter, there is no dispute that Mr. Brazil was totally disabled as of the date of the surgery performed by Dr. Huntington. Admittedly, the office notes of Dr. Huntington are rather sparse; however, the doctor did state in a letter dated September 27, 2010 that the employee was still totally disabled as of that date. The employee is not required to continually produce medical reports stating he remains totally disabled. Although this is an original petition, upon establishing total incapacity, the burden shifts to the employer to prove that the employee's condition has improved to partial incapacity by comparative evidence. The report and testimony of Dr. Willetts did not satisfy that burden.

The employee is correct in stating that Dr. Willetts was not asked his opinion as to the employee's ability to work during his deposition; rather, the focus of the entire deposition was on the reasonableness and necessity of the surgery performed by Dr. Huntington. After thoroughly perusing Dr. Willetts' extensive and detailed report dated March 24, 2011, we found one (1) section addressing Mr. Brazil's ability to work in which the doctor responded to a request by the employer to indicate any work restrictions and whether the employee was capable of returning to a light duty position. The doctor responded as follows:

> "Mr. Brazil does appear to be in some significant neck pain, and his imaging studies do support a basis for ongoing neck to upper extremity pain, numbness, and tingling. He also displays limited motion, complains of credible pain upon neck motion, displays guarded left upper extremity motion, and does appear to have substantial pain based upon his physical examination appearance. Unless separate information would contradict that, he does appear to be very limited in his ability to do effective work at this time, being fit only for part-time sedentary activity.
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> He could work as a greeter for four hours per day, since that job allows standing and sitting. There is little else that he could do, based upon how he presented himself here today." Er's Ex. A, Willetts' Report at 34.

In his bench decision, the trial judge singles out that portion of Dr. Willetts' response in which he states that the employee is capable of "part-time sedentary activity" in support of his

finding that the employee became partially disabled as of March 24, 2011. We find that this determination is erroneous as the doctor never draws any comparison between the employee's physical condition on July 26, 2010, when he was found totally disabled due to surgery, and his condition at the time of the doctor's examination on March 24, 2011. As we stated in Burnham, such comparative evidence is required in order to find a change in the degree of disability from total to partial.

Furthermore, our review of Dr. Willetts' entire comment on the employee's ability to work leads to the conclusion that it is not sufficient to establish that the employee is capable of light, selected work. The employee cites Suffoletta v. Ricci Drain Laying Co., 113 R.I. 114, 319 A.2d 19 (1974), in support of his contention that the employer was required to show that Mr. Brazil had the ability to re-enter the labor force and recapture his earning capacity in order to prove partial disability. The decision in Suffoletta is instructive as it involved a medical opinion similar to that of Dr. Willetts in the present matter. However, the employee overlooked a key word in restating the holding in the decision.

> "Our conclusion is that in the doctor's judgment the employee was unable as a practical matter to return to gainful employment. Nonetheless, he felt that the employee should 'try to do something within the tolerance of his pain' rather than remain idle, and that were he to make the attempt, he might find he could *possibly* 'do some things part time, sitting down.
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> That description of the employee's employment capabilities clearly does not justify a finding of only partial incapacity for work. Perhaps it might were we to equate total incapacity with complete helplessness. But we have not taken that narrow and technical approach to a very practical problem. Instead, we have adopted the commonsensical view that a worker should remain on the 'totally incapacitated' list until his physical condition '* * * has reached the point where he can once again join the labor force and attempt to recapture his former earning capacity.' Perry's Heating Service v. Cashman, 104 R.I. 75, 79, 241 A.2d 823, 826 (1968)." Suffoletta, 113 R.I. at 116, 319 A.2d at 20-21 (emphasis added).

Similarly, in Soprano Const. Co., Inc. v. Maia, 431 A.2d 1223 (R.I. 1981), the Rhode Island Supreme Court found that a physician's statement that an employee could probably do some light work to be insufficient to establish partial incapacity when the doctor detailed the extensive restrictions he would place upon the type of employment the employee could perform. Those restrictions included the ability to vary his position from sitting to standing periodically, no significant lifting, no repetitive bending, no extensive walking, and no climbing stairs or ladders. Maia at 1225. The Court found that the doctor's "testimony concerning the many restrictions he attached to Maia's return to the job market completely nullified his earlier positive prediction concerning Maia's ability to do light, selected work." Id. at 1226.

Dr. Willetts' response in his report concerning Mr. Brazil's ability to perform any type of work is comparable to the physicians' statements in Suffoletta and Maia. The doctor found the employee's complaints of pain and limited motion to be credible and supported by the diagnostic testing, which revealed problems with the hardware placed in his cervical spine. He did note that the employee could work as a greeter for four (4) hours per day because he could alternate between sitting and standing, however, this is the limit of the employee's capabilities as the doctor stated "[t]here is little else that he could do, based upon how he presented himself here today." Er's Ex. A, Willetts' Report at 34. It should be noted that the position of a greeter at Wal-Mart simply involves standing or sitting at the entryway and greeting customers. The fact that there may be a single, part-time position within the employee's capabilities is not sufficient to establish that he can perform some form of light work in the competitive labor market.

For the aforementioned reasons, we grant the employee's appeal and vacate the trial judge's finding of partial incapacity beginning March 24, 2011. In accordance with our decision, a new decree shall enter containing the following findings and orders:

1. That the employee sustained an injury to his neck on July 2, 2010, arising out of and in the course his employment with the respondent, connected therewith and referable thereto, of which the employer had notice.

2. That the employee's average weekly wage is Five Hundred Twenty-five and 00/100 ($525.00) Dollars, estimated, and subject to a wage statement.

3. That the employee was partially incapacitated from July 8, 2010 through July 25, 2010 and totally incapacitated from July 26, 2010 and continuing.

4. That there is a TDI lien.

It is, therefore, ORDERED:

1. That the employer shall pay to the employee weekly benefits for partial incapacity from July 8, 2010 through July 25, 2010 and weekly benefits for total incapacity from July 26, 2010 and continuing until further order of this court or agreement of the parties.

2. That the employer is entitled to credit for any wages earned by the employee during the period of his partial incapacity.

3. That the employer is entitled to credit for all payments made pursuant to the pretrial order entered on October 27, 2010 and the trial decree entered on August 16, 2011.

4. That the employer shall reimburse John M. Harnett, Esq., for the stenographic cost of the deposition of Dr. Philo Willetts.

5. That since the matter was successfully prosecuted at the trial level, the employer shall pay a counsel fee in the amount of Three Thousand and 00/100 ($3,000.00) Dollars to John M. Harnett, Esq., attorney for the employee, for services rendered during the trial.

6. That the employer shall reimburse John M. Harnett, Esq., the amount of One Hundred Seventy-five and 00/100 ($175.00) Dollars for the cost of filing the claim of appeal and providing the transcript on appeal.

7. That since the matter was successfully prosecuted on appeal, the employer shall pay a counsel fee in the amount of Two Thousand Five Hundred and 00/100 ($2,500.00) Dollars to John M. Harnett, Esq., attorney for the employee, for services rendered at the appellate level.

In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a new decree, a copy of which is enclosed shall be entered on August 29, 2016 at 10:00 a.m.

Connor and Hardman, JJ. concur.

ENTER:

/s/ Olsson, J.

/s/ Connor, J.

/s/ Hardman, J.