STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

LILLIAN LARKIN	)	
	)	
VS.	)	W.C.C. 2003-04853
	)	
RHODE ISLAND BLOOD CENTER	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter was heard before the Appellate Division on the employee's appeal from the denial of her petition for classification as totally disabled pursuant to R.I.G.L. § 28-33-17(b)(2), the "odd lot" statute. After a thorough review of the record and consideration of the arguments of the respective parties, we deny the employee's appeal and affirm the decision and decree of the trial judge.

The employee began receiving weekly benefits for partial incapacity pursuant to a memorandum of agreement dated July 5, 2001, which states that she sustained an injury on January 15, 2001. The employee had an initial disability period of about six (6) days and then was out of work again beginning May 15, 2001. The injury was described as bilateral hand stenosing tenosynovitis, bilateral carpal tunnel syndrome, and right ulnar nerve compression. On June 29, 2003, a pretrial order was entered in W.C.C. No. 2003-03760 finding that the employee's condition had reached maximum medical improvement. On July 16, 2003, the employee filed the present petition, which was denied at the pretrial conference on October 20, 2003. The employee thereafter filed a timely claim for trial. While the trial was pending, a

pretrial order was entered on November 21, 2003 in W.C.C. No. 2003-06972 modifying the description of the injury to include left ulnar nerve compression, cubital tunnel syndrome, and bilateral epicondylitis.

At trial, the employee, a sixty-two (62) year old woman, testified that she graduated from Bay View High School and Newport Hospital School of Nursing and worked full-time for the employer for twenty-one (21) years as a nurse phlebotomist. Her job required her to draw blood from about twenty (20) volunteer donors a day and fill out necessary paperwork. The employee indicated that she was required to take continuing education classes to retain her nursing certification, which she had continued to do until she let her certificate lapse in 2004. It is uncontradicted that the employee is not able to return to her pre-injury occupation due to the effects of her work-related condition. In addition to the work-related injury, the employee stated that she has other medical issues, including cervical and lumbar stenosis and irritable bowel syndrome.

As for the employee's daily activities and capabilities, she related that she cannot write very legibly due to her work related injury, and she is unable to drive very far. She noted that she moves slowly and she has assistance with activities such as cleaning and yard work because they are very difficult for her. She asserted that she cannot stand for very long due to back pain. On cross-examination, Ms. Larkin estimated that she drove five (5) days a week, did grocery shopping and prepared her own meals. When asked whether she used the computer, the employee responded that she wrote e-mails back and forth with her two (2) daughters who live outside the country and would use the internet at times.

The employee felt that she could not do any of the jobs mentioned by the vocational counselors during the trial because they involved repetitive work with her hands. Regarding the

jobs which did not involve repetitive hand work, she stated she could not do the job because of the amount of time she would have to be standing.

The medical evidence introduced at trial consisted of the deposition and records of Dr. Edward Akelman, the records of the Dr. John E. Donley Rehabilitation Center, the deposition of Jason Bomback, and an affidavit and report of Dr. Randall Updegrove. Dr. Akelman, a board certified orthopedic surgeon licensed in the state of Rhode Island, specializing in hand surgeries, treated the employee from February 7, 2001 to August 16, 2004, during which time he performed three (3) surgical procedures on Ms. Larkin, the most recent on February 3, 2004. In a report dated April 12, 2004, Dr. Akelman stated that the employee could return to modified light duty work that was not constantly repetitive and did not require lifting or gripping more than thirty (30) pounds. In June 2004, Dr. Akelman referred Ms. Larkin to the Donley Center for a functional capacity evaluation.

The functional capacity evaluation was performed at the Donley Center on June 30, 2004 by Jason Bomback, a licensed physical therapist. Based upon the information obtained during that evaluation, Mr. Bomback concluded that the employee was capable of work in the sedentary category which would require occasional lifting up to ten (10) pounds and would be performed in a seated position a majority of the time. He also indicated that the employee should avoid repetitive work with her hands. He explained that his recommendation that Ms. Larkin would perform best in a seated position and be able to alternate her position was related to a secondary medical condition, specifically her back problems. Mr. Bomback testified that he believed the employee was capable of some sort of work and gave examples such as a greeter at Wal-Mart, or an instructor in the nursing field. Mr. Bomback's recommendations as to Ms. Larkin's physical capabilities were sent to Dr. Akelman who noted that his agreement with them on July 27, 2004.

Edmond Calandra, a certified vocational rehabilitation counselor in the State of Rhode Island, testified on behalf of the employee in relation to his vocational assessment of her dated March 26, 2003. Mr. Calandra interviewed Ms. Larkin and obtained information as to the nature and history of her injury, her education, past work history, current medical issues, and ongoing physical difficulties affecting her activities. He reviewed Dr. Akelman's reports from February 7, 2001 through January 21, 2003 in preparing his report and, prior to his testimony, updated reports of Dr. Akelman and the functional capacity evaluation were made available to him. Mr. Calandra administered tests to evaluate reading and math skills and found that the employee was performing at a sixth grade math level and high school graduate reading level. He also performed a transferable skills analysis.

It was Mr. Calandra's opinion that Ms. Larkin was not employable. The basis for his opinion was the sedentary work restriction given by Mr. Bomback and Dr. Akelman, her age, and her non-work related medical issues. He also testified that even without considering the secondary medical issues the employee would still be unemployable because most sedentary occupations require repetitive use of the hands and because of her age.

Upon cross examination, Mr. Calandra admitted that an employee's age could be a benefit to employers because of an older employee's ability to be on time and their tendency to be more responsible than younger employees. Upon questioning from the trial judge, Mr. Calandra admitted that without age as a negative factor and disregarding her secondary medical issues, there was not enough to render the employee unemployable.

Karen Davis, also a certified vocational rehabilitation counselor in the State of Rhode Island, testified on behalf of the employer. She met with the employee in December of 2003 and prepared a vocational assessment. Around May 2004, she compiled a labor market survey which

listed eight (8) jobs available at the present time within the local community that the employee could perform. Ms. Davis admitted that at the time she originally compiled the list she relied on Dr. Akelman's initial lifting restriction of thirty (30) pounds. After reviewing the functional capacity evaluation and becoming aware of the new lifting restrictions, Ms. Davis added two (2) more sedentary work positions to the list, alarm monitoring jobs, and admitted that the employee was no longer qualified for some of the original jobs. She also explained that jobs sometimes overlap the sedentary and light categories and one needs to examine the actual job duties of the particular position to see if it falls within the restrictions. Ms. Davis opined that there were positions available in the labor market for Ms. Larkin, even considering her non-work-related back problem.

After reviewing a description of an alarm monitoring job from one of the companies contacted by Ms. Davis, Dr. Akelman opined that the alarm monitoring job would not be suitable for the employee because it was too repetitive.

Upon the conclusion of the trial, the trial judge found that the employee had not met her burden of proving she qualified for "odd lot" status. In arriving at this determination, the trial judge considered the opinions of Dr. Akelman and Mr. Bomback along with the conflicting opinions of Mr. Calandra and Ms. Davis. The trial judge noted that the employee's age was a benefit to securing employment. He found that her background and training, including her educational and employment history, were such that she had many skills transferable to another occupation. He also indicated that her computer literacy shows potential employers that she is willing and able to learn new things which is a skill that is "quite frankly, not embraced by everyone in her age group." (Decision at 6.) The employee appealed this decision.

Pursuant to R.I.G.L. § 28-35-28(b), the findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous. Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996). The Appellate Division is entitled to conduct a *de novo* review of the record only after a finding is made that the trial judge was clearly wrong. Id. (citing R.I.G.L. § 28-35-28(b); Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986)). In the present matter, we find that the trial judge was not clearly wrong in his findings.

The employee has put forth seven (7) reasons of appeal in this case, essentially raising two (2) issues. The employee's first issue is that the trial judge erred when he allegedly considered only the employee's age and favorable presentation during her testimony in determining the issue of her employability. Secondly, the employee argues that the trial judge erred in his analysis regarding the employee's odd lot status when he failed to find that the employee was limited to the sedentary work classification.

In pertinent part, R.I.G.L. § 28-33-17(b)(2) provides 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. The court may deny total disability under this subsection without requiring the employer to identify particular alternative employment.

The statute squarely places the burden of proof on the employee to prove the requisite elements for establishing the employee's odd lot status in any given case. Lombardo v. Atkinson-Kiewit, 746 A.2d 679, 684 (R.I. 2000).

The employee contends that the trial judge failed to properly consider the evidence in the record in that he focused only on her age and favorable presentation during her testimony at trial. She also argues that the trial judge improperly considered her computer literacy as a positive

factor toward employability when the medical evidence demonstrated that the employee could not engage in such repetitive use employment. The employee asserts that the trial judge should have factored in the employee's non-work-related medical issues when considering her limited "abilities" under R.I.G.L. § 28-33-17(b)(2).

A review of the trial judge's decision in the present matter reveals that he did consider more than just the employee's age and her favorable presentation while testifying. The trial judge considered her age to be a positive factor toward finding alternative work, citing the testimony of Ms. Davis that some employers believe older workers are more reliable and responsible. Although Mr. Calandra testified that he viewed Ms. Larkin's age as a negative factor, he admitted on cross-examination that some employers see age as a benefit when looking to hire new employees. Mr. Calandra also acknowledged that without age as a negative factor, together with the exclusion of the employee's non-work-related health issues, he believed the employee was employable.

It is clear from his decision that the trial judge considered more than just the employee's age. He states specifically in his decision: "The Court was also impressed with the employee's background and abilities. She is a nursing school graduate, was steadily employed for 40 years, kept up on the latest nursing techniques through continuing education classes until very recently, and is computer literate." (Decision at 5-6.) The employee misinterpreted the reasoning behind the trial judge's consideration of her computer literacy. The trial judge specifically noted that the importance of her computer literacy is that it "evidenc[es] an ability to learn new things, and one that is, quite frankly, not embraced by everyone in her age group." Id. at 6. His analysis clearly reflects consideration of all of the factors set forth in the statute.

The employee asserts that the trial judge erred in failing to consider the effect of the physical restrictions flowing from her non-work-related medical issues, particularly her back problems, on her employability in some alternative employment. In Tiverton School Department v. Aguiar, W.C.C. No. 97-02237 (App. Div. 10/23/00), we reversed the trial judge's decision that an employee had met the odd lot standard in part because of his consideration of the employee's non work-related health factors. The statute specifically states that the employee must prove "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." R.I.G.L. § 28-33-17(b)(2)(emphasis added). In Aguiar, we concluded that in codifying the odd lot doctrine, "the legislature explicitly required the employee to demonstrate an inability to find or sustain employment when the *work-related injury,* combined with the employee's limited vocational skills, resulted in total incapacity." W.C.C. No. 97-02237 (emphasis added).

The employee attempts to distort the meaning of the word "abilities" in the statute to include physical limitations related to her low back complaints. The factors set forth in the statute (age, education, background, abilities, and training) are in the nature of vocational criteria, to be considered in conjunction with the physical limitations resulting from the work injury. There is nothing in the statute to suggest that the general physical condition of the employee must be factored into the analysis. Furthermore, there is nothing in the record establishing that the employee's back complaints were as severe while she was working as she now claims. On the contrary, a report of Dr. Randall Updegrove dated March 26, 2002, which was introduced into evidence, states that based upon her history, the effects of a low back strain in 1999 resolved some time ago and her current complaints were likely due to degenerative disc disease.

The second basic argument presented by the employee is that the trial judge erred in failing to specifically find that the employee was only capable of work in the sedentary category. As a corollary to this argument, she asserts that she met her burden of proving total disability under § 28-33-17(b)(2) because she established that she was not capable of performing any of the jobs listed by Ms. Davis in her labor market survey. We find no merit in these assertions.

The classifications of jobs as sedentary, light, medium and heavy reflect lifting, sitting, and standing requirements for a particular job title. These classifications assist vocational counselors in narrowing a job search based upon the physical limitations of a particular individual. As noted by Ms. Davis, a specific job may overlap two (2) categories in terms of physical requirements. In the workers' compensation field, the focus is on the physical restrictions resulting from the work injury as determined through the evaluation of expert medical opinions. The trial judge is required by § 28-33-17(b)(2) to consider the employee's evidence relating to her work-related injury, and the restrictions resulting therefrom, in combination with her limited vocational skills, to determine whether it results in the inability to find any realistic employment. *See* Porter v. Steel Specialists, Inc., W.C.C. No. 97-01070 (App. Div. 9/4/98). There is no requirement that the trial judge make a specific finding as to the category of work which the employee is capable of performing in order for him to conduct this analysis.

The only physical condition to be considered in this case is the work-related injury to the employee's wrists and hands and the effect it has on her ability to perform certain types of employment. The restrictions placed on the employee due to this injury were no lifting over ten (10) pounds and no work that requires repetitive use of her hands and wrists. The trial judge cannot then consider, in determining her employability, the restrictions of the sedentary work

category as a whole, which includes other limitations on an employee's ability to work, specifically the ability to stand for long periods of time. Although Mr. Bomback and Dr. Akelman did place a restriction on the amount of time the employee was capable of standing in this case, it was unrelated to the work injury.

As discussed *supra*, a trial judge cannot consider the employee's personal, non-work-related medical conditions in determining whether she is employable. Tiverton School Department v. Aguiar, W.C.C. No. 97-02237. The argument by the employee is an attempt to have her unrelated medical condition become a factor in this determination. "One of the most fundamental aspects of the workers' compensation law is that employers are held liable for the casualties of the work place. In order to accomplish this, it is important that liability not be imposed for situations neither caused by nor affected by the work." Id. Requiring the court to consider the employee's placement in a sedentary work category overall when an employee's work injury restrictions are much narrower could result in imposing liability on the employer for injuries not caused or affected by her work.

Similarly, the employee's assertion that she established that she could not perform any of the alternative positions proposed by the employer, thus proving that she qualifies for odd lot status, is without merit. The clear statutory language of § 28-33-17(b)(2) provides that "[t]he court may deny total disability under this subsection without requiring the employer to identify particular alternative employment." In contrast to the common law odd lot doctrine, it is no longer the employer's burden at trial to provide evidence of available jobs that the employee is capable of performing.

In her vocational assessment dated December 5, 2003, Ms. Davis compiled a list of potential occupations that were within the physical restrictions she was aware of at the time. Ms.

Davis also compiled a list of actual job openings in her labor market survey dated May 17, 2004. The physical restrictions she relied on in those reports were modified after Ms. Larkin underwent the functional capacity evaluation, which resulted in a lifting restriction of ten (10) pounds rather than thirty (30) pounds. Ms. Davis acknowledged that there were some jobs that the employee would no longer be capable of doing based on the new restrictions. However, it was unclear whether the employee was incapable of performing all of the jobs noted in her reports solely because of her work-related injury and any vocational limitations. In addition, Ms. Davis noted that the listings were simply a sampling of potential jobs and therefore, did not represent an exclusive list.

The trial judge found that the employee was not able to discount all of the jobs on the list. He continued to point out that regardless of whether she could perform these specific jobs, the odd lot statute does not require the employer to identify particular employment. (Decision at 5.) He stated that "it is far from clear that the employee is unable to perform all jobs." Id. We find that the trial judge was not clearly wrong in his assessment of the evidence as to Ms. Larkin's potential for some type of alternative employment.

The employee's reliance on Soprano Construction Co., Inc. v. Maia, 431 A.2d 1223 (R.I. 1981) is misplaced. The employee argues that Soprano is instructive to this case, interpreting it to mean that the employer is not absolved from presenting some evidence that the employee does not qualify for odd lot status once the employee presents a prima facie case. However, the issue addressed in Soprano had nothing to do with the odd lot concept. The petition in Soprano was an employer's petition to review claiming that the employee was partially disabled, rather than totally disabled. In such a case, the employer has the burden of introducing "evidence which would indicate that [the employee's] re-entry into the labor force posed no hazard to his health."

Id. at 1226. The petition was denied because the expert medical witness placed so many restrictions on the employee's activities that he "completely nullified his earlier positive prediction concerning Maia's ability to do light, selected work." Id. Under the circumstances, we do not find that this decision provides any assistance to the employee's claim.

Based upon the foregoing, the employee's appeal is denied and dismissed. In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, a copy of which is enclosed shall be entered on

Connor and Hardman, JJ., concur.

ENTER:

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Olsson, J.

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Connor, J.

_____
Hardman, J.

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RHODE ISLAND BLOOD CENTER)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the claim of appeal of the petitioner/employee and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on August 12, 2005 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

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Olsson, J.

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Connor, J.

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Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Gregory L. Boyer, Esq., and Berndt W. Anderson, Esq., on

_____