STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

SHERI CONTE	)	
	)	
VS.	)	W.C.C. 99-05648
	)	
FLEET FINANCIAL GROUP	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the respondent/employer's appeal from the decision and decree of the trial judge granting the employee's request for the continuation of weekly benefits for partial incapacity beyond the limitation of 312 weeks set forth in R.I.G.L. §§ 28-33-18(d) and 28-33-18.3(a)(1). After careful review of the record and consideration of the arguments of the parties, we deny the appeal and affirm the decision of the trial judge.

The employee has been receiving weekly benefits pursuant to a Memorandum of Agreement dated September 29, 1993. The memorandum states that she became partially disabled due to an occupational disease, tendonitis of the right wrist, on June 5, 1993. At the time of her disability, the employee was an assistant administrator in the accounting department for Fleet. In that position, she worked on a computer at least eight (8) hours a day. After

developing severe pain in her right hand and arm, she began treating with Dr. Lee E. Edstrom, an orthopedic surgeon. In February 1994, the doctor performed surgery on her right elbow. Ms. Conte returned to work briefly for four (4) hours a day doing her regular job duties. However, she continued to have problems with the right hand and developed some minor symptoms on the left side as well. In August 1994, she underwent surgery on her right wrist by Dr. Edstrom.

In October 1994, the doctor released the employee to return to work again for four (4) hours a day. Ms. Conte testified that when she returned to Fleet, she was immediately terminated. Dr. Edstrom referred the employee to the Donley Center where she underwent a program of physical therapy and work hardening. She completed those programs in January 1995 and began utilizing the vocational services at the Donley Center. The employee stated that she interviewed for a number of office work positions, but she was unable to find a job that allowed her to take a break every five (5) minutes to stretch her hands.

The insurer referred the employee to Judith Drew, a vocational rehabilitation expert, for assistance in finding employment. The employee worked with Ms. Drew for several months and then became pregnant. In December 1995, Ms. Conte began working one (1) day a week for five (5) hours in a chiropractor's office. The baby was born in July 1996 and the employee stayed out of work for about three (3) months. She returned briefly to the chiropractor's office and then the office personnel were all terminated.

Ms. Conte again began looking for work. She tried a receptionist position in a dentist's office at some point and had to leave after one (1) hour because it involved constant computer work. On June 7, 2000, the employee began working for Statewide Real Estate Appraisals one (1) day a week for five (5) hours. She obtained this position through a friend's referral. Her job duties involve answering the telephone, scheduling and canceling appointments, some filing, and occasionally some copying of maps or reports. She asserted that she cannot work more than her current schedule because she has constant throbbing pain in both of her hands with numbness and her hands swell with activity.

Dr. Edstrom stated that the employee must avoid repetitive or strenuous activity for over fifteen (15) minutes at a time. He indicated that she could work as a receptionist so long as it did not require a lot of typing or writing.

Albert Sabella, a vocational rehabilitation expert, met with the employee on May 6, 1999 in order to do a vocational assessment. He reviewed the reports of Dr. Edstrom from 1994 to 1999 and the records of the Donley Center from July 1995. It was his impression that the employee was unable to perform any repetitive or strenuous activity with either arm and she required a break from activity every fifteen (15) minutes. He described the job at Statewide as a very isolated and trivial type of work and not a competitive employment situation. Mr. Sabella pointed out that "employability" meant the ability to perform required job tasks and meet physical requirements on a regular, ongoing, and consistent basis. In addition, an "employable" person has the necessary qualifications to

provide access to a reasonable number of jobs in the local labor market, the ability to compete for a job, and a reasonable expectation of being hired. Considering these factors and the employee's background and physical limitations, Mr. Sabella concluded that Ms. Conte was unemployable.

Judith Drew also reviewed the reports and the deposition of Dr. Edstrom, as well as a transcript of Mr. Sabella's testimony. It was her contention that Ms. Conte was employable, although she needed to be in a work setting that would allow her to set her own work pace. She asserted that Dr. Edstrom stated that the employee can do the work she is doing for Statewide five (5) days a week, eight (8) hours a day. Ms. Drew testified that Ms. Conte could work as a dental office manager, a receptionist, and a general office worker, because these positions would allow her to work at her own pace and have discretion as to what tasks she did at what time. She also noted that the employee could use voice-activated computer software to do correspondence if necessary.

The trial judge concluded that the employee's ongoing partial incapacity constituted a material hindrance to obtaining employment suitable to her limitations and, therefore, she was entitled to ongoing weekly benefits beyond the 312 week period. He noted that the fact that the employee was doing some minimal clerical work five (5) hours a week did not demonstrate that she could compete for a reasonable number of jobs in the local labor market.

The scope of review of the Appellate Division is strictly circumscribed by statute. Section 28-35-28(b) of the Rhode Island General Laws states:

> "The findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous."

After review of the record and the decision in this matter, we find no error on the part of the trial judge.

The employer has filed three (3) reasons of appeal. In summary, the employer argues that the trial judge was clearly wrong to find that the employee's partial incapacity posed a material hindrance to finding suitable employment when the employee had been working for almost two (2) years. We recognize that the fact that an employee is actually working would seem to lead to a presumption that the partial disability resulting from the work injury does not pose a material hindrance to finding employment suitable to their limitations. However, we find that the specific facts and circumstances of this case are sufficient to rebut that presumption.

Rhode Island General Laws § 28-33-18.3(a)(1) provides that when an injured worker has received weekly benefits for partial incapacity for a period of 312 weeks, he or she must file a petition with the court seeking the continuation of those benefits. The employee is entitled to the continuation of benefits if

> ". . . the employee demonstrates by a fair preponderance of the evidence that his or her partial incapacity poses a material hindrance to obtaining employment suitable to his or her limitation . . ." R.I.G.L. § 28-33-18.3(a)(1).

The definition of "material hindrance" contained in the current version of the statute applies only to injuries occurring on or after September 1, 1990. With regard to injuries occurring prior to that date, the statute is silent.

In Lombardo v. Atkinson-Kiewit, 746 A.2d 679 (R.I. 2000), the Rhode Island Supreme Court noted that the requirements to qualify for total disability under R.I.G.L. § 28-33-17(b)(2), the so-called "odd-lot" doctrine, were more stringent than the burden of establishing that one's partial disability posed a material hindrance to obtaining employment. Id. at 689. Under the "odd-lot" doctrine as codified in the statute, an injured worker must prove that, taking into account the employee's age, education, abilities, and training, he or she is unable to perform the duties of the employee's regular employment as well as any alternative employment. Under the statute in question in the case before us, the employee need only establish that her partial disability constitutes a substantial impediment to her ability to secure suitable employment within her physical limitations.

It is very clear from the record that Ms. Conte actively pursued alternative employment for several years. Even Ms. Drew acknowledged that the employee was very active in her job search. However, despite her job-seeking efforts, the only positions for which she was hired were very light office work for five (5) hours a day on one (1) day a week. Her current job in the real estate appraisal office was secured through a friend and is a situation where she is simply keeping an eye on the office while the appraisers are out on the road. Such jobs cannot be

considered a viable alternative to her former full-time employment as assistant administrator in the accounting department of a bank. The fact that these are the only positions for which the employee was hired despite her significant job-seeking efforts clearly demonstrates that the physical limitations resulting from her work injury constitute a substantial impediment to obtaining alternative employment.

Both of the vocational counselors utilized the opinion of Dr. Edstrom as to the employee's physical restrictions. The doctor stated that the employee should not perform any repetitive or strenuous activity with either arm in excess of fifteen (15) minutes without taking a break. He further indicated that she could work as a receptionist if the job did not require a lot of typing or writing or other repetitive activity.

Mr. Sabella opined that the employee was unemployable. Ms. Drew felt that Ms. Conte was employable in a position that would allow her to work at her own pace. She gave as examples of such a position a job as a dental office manager, a receptionist or a general office worker. However, she did not explain the basis for her conclusion that these jobs would allow the employee to work at her own pace and have discretion as to the tasks she performed at any given time. Frankly, the work flow of these positions would typically be dictated by the flow of patients, clients, or customers or the work demands of those persons at the next level of management. In addition, Ms. Conte attempted to work as a receptionist in a dentist's office and had to leave because it was too much

repetitive computer work. She testified that she interviewed for other receptionist jobs but they all involved a lot of computer work.

The fact that there may be some isolated job out in the community that the employee may be capable of performing is not sufficient to preclude the continuation of weekly benefits beyond the 312 week period. The employee must have access to a reasonable number of jobs in the local labor market, as well as the ability to compete for such jobs and a legitimate opportunity to be hired. Ms. Drew's opinions and statements do not satisfy these criteria. In addition, the employee's unsuccessful efforts at finding a suitable full-time job support the conclusion that her partial disability resulting from the work injury is a material hindrance to her ability to find employment.

The employer contends that the trial judge's decision is in direct contravention of two (2) previous decisions of the Appellate Division, McQuaide v. Westerly Health Center, W.C.C. 99-03252 (App. Div. 12/26/00) and Larence v. Almacs, Inc., W.C.C. 98-06362 (App. Div. 1/31/00). However, these cases are clearly distinguishable from the present matter.

The employee in Larence injured her left knee while working in the meat department of Almacs and was unable to return to her former employment. After taking some courses in computer skills through the Donley Center, she was hired as a clerical worker at CVS through Today's Temporary. At the time of the trial regarding her request to continue her partial disability benefits beyond 312 weeks, the employee had been working full-time for about twenty (20) months at

CVS. Based upon the fact that the employee had secured suitable full-time employment for a reasonable period of time, the trial judge denied her petition and the Appellate Division affirmed his decision.

In McQuaide, the employee had been working for a period of six (6) years in lighter jobs for several different employers. The trial judge, in denying the employee's request for continuation of her benefits beyond 312 weeks, relied on the facts that the employee had been able to find regular suitable employment consistent with her partial disability and had been able to maintain that employment for six (6) years. The Appellate Division denied the employee's appeal.

In both of these cases, the employees were able to find readily available positions in the local labor market which were suitable to their partial disabilities and they were able to maintain such employment for a lengthy period of time. Consequently, they did not establish by a fair preponderance of the credible evidence that their disabilities posed a material hindrance to finding employment. In contrast, Ms. Conte attempted to find employment over the course of at least a year and was unsuccessful in obtaining full-time work that she could physically perform on a regular basis through the normal job-seeking methods. The fact that she found a position through a friend keeping an eye on a real estate appraisal office for five (5) hours on one (1) day a week is hardly sufficient evidence to conclude that her partial disability is not a material hindrance to obtaining suitable employment.

The employer's reliance upon the Larence and McQuaide decisions is misplaced in this instance. There is no hard and fast rule that if an employee is working, even though the employment may be occasional, intermittent and/or very limited in availability, he or she cannot qualify for continuation of benefits beyond the 312 week period. Based upon the evidence presented in the matter presently before us, we cannot say that the trial judge was clearly erroneous in his decision to grant the employee's request for continuation of her benefits.

Based upon the foregoing, the employer's appeal is hereby denied and dismissed and the decision and decree of the trial judge are affirmed. The employer shall pay a counsel fee in the sum of One Thousand and 00/100 ($1,000.00) Dollars to Eileen G. Cooney, Esq., attorney for the employee, for the successful defense of the employer's appeal.

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

Healy, Acting C.J., and Connor, J. concur.

ENTER:

_____

Healy, Acting C.J.

_____

Olsson, J.

_____

Connor, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

SHERI CONTE	)	
	)	
VS.	)	W.C.C. 99-05648
	)	
FLEET FINANCIAL GROUP	)	

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the respondent/employer 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 May 25, 2001 be, and they hereby are, affirmed.

The employer shall pay a counsel fee in the sum of One Thousand and 00/100 ($1,000.00) Dollars to Eileen G. Cooney, Esq., attorney for the employee, for the successful defense of the employer's appeal.

Entered as the final decree of this Court this day of July, 2004.

BY ORDER:

_____

ENTER:

_____
Healy, Acting C.J.

_____
Olsson, J.

_____
Connor, J.

I hereby certify that copies were mailed to Gregory L. Boyer, Esq., and Eileen G. Cooney, Esq., on _____