

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT  
APPELLATE DIVISION

CENTREX DISTRIBUTORS

)

)

VS.

)

W.C.C. 2007-07476

)

DAVID WHITE

)

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's appeal from the decision and decree of the trial judge granting the employer's petition to review alleging that the employee's incapacity for work has ended. 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 had been receiving weekly benefits for partial incapacity pursuant to a pretrial order entered on September 24, 2007 in W.C.C. No. 2007-05530. In that order it was found that he sustained a low back strain on May 1, 2007 resulting in partial incapacity beginning May 2, 2007 and continuing. Mr. White testified that he worked for the employer since 1991 as a warehouseman picking orders of cases of liquor, beer and wine to be delivered to stores, nightclubs and restaurants. He estimated that the cases weighed between twenty (20) and forty (40) pounds each. He asserted that his back feels the same as when he was initially injured and he feels that he is unable to return to work.

The medical evidence consists of the depositions and reports of Drs. Michael Olin, A. Louis Mariorenzi, and Adetokunbo A. Oyelese, and the report of Dr. Stanley J. Stutz. Dr. Olin initially treated the employee for neck problems and performed a cervical fusion in 2004. The employee recovered sufficiently to resume his job as a warehouseman. On October 4, 2006, Mr. White returned to Dr. Olin complaining of low back pain of three (3) months duration. He had undergone an MRI on August 17, 2006 which revealed disc desiccation and a broad-based disc bulge at L4-5 causing mild inferior foraminal narrowing bilaterally. It appears from the records that the employee underwent a course of physical therapy and then was released to return to work on November 27, 2006.

Dr. Olin began treating the employee on May 9, 2007 for a low back strain he sustained while lifting a keg at work. He participated in physical therapy for about five (5) months with some improvement, but not enough to return to work in any capacity. On August 10, 2007, an MRI was performed which revealed a disc bulge at L4-5 lateralizing to the right with mild foraminal narrowing. The doctor referred the employee for more physical therapy. When this failed to improve his condition, Dr. Olin referred him for injection therapy. The employee reported no improvement and so the doctor requested that the Donley Center conduct a functional capacity evaluation.

As a result of the evaluation done on March 19, 2008, the Donley Center recommended a work hardening program to address the employee's decreased muscle strength and endurance levels. Mr. White was not able to complete the program at the Donley Center and was then sent to a different facility by Dr. Olin for work conditioning. In August 2008, the employee was discharged from that program without substantial improvement. Dr. Olin discharged the employee from his care on August 6, 2008 because he had begun treatment with Dr. Oyelese.

The doctor noted that the employee had no neurological deficit, normal motor strength and normal reflexes. He continued to have limited range of motion and complaints of low back pain radiating into both legs.

Dr. Olin testified that as of his last examination, the employee remained partially disabled. He agreed that the results of the MRI studies in August 2006 and August 2007 were basically identical.

Dr. Oyelese, a neurosurgeon, evaluated the employee for the first time on March 5, 2008 for complaints of low back pain without radiation to the legs. The only notable physical finding at that time was markedly limited extension of the lumbar spine. The doctor's impression was that the employee may be suffering from lumbar spondylosis and possibly facet disease with facet syndrome. He recommended an additional course of injections from Dr. Hafeez Khan. This course of treatment failed to improve his condition and on July 24, 2008, Dr. Oyelese referred the employee to Dr. Todd Handel for provocative discograms.

The discograms were performed on August 19, 2008 and revealed a far lateral annular tear on the left at L3-4 and an annular tear on the right at L4-5. Unfortunately, the employee developed an infection in his blood and in his spine and was prescribed antibiotics for several months. Dr. Oyelese testified that it was unclear whether the infection came from the discogram procedure or from the employee's bloodstream due to his colostomy which he has had for many years. The doctor stated that as of his last office visit on October 22, 2008, the employee was not capable of performing his regular job duties but did not clarify if his disability was due to the back injury or the infection or some combination of both.

The employer presented the deposition and report of Dr. Mariorenzi, an orthopedic surgeon, who evaluated the employee on November 8, 2007. The physical examination was

normal and the doctor diagnosed a lumbosacral strain with full recovery. The doctor attributed no clinical significance to the MRI findings in light of the lack of any objective findings on examination. Consequently, Dr. Mariorenzi concluded that the employee was capable of returning to his regular employment.

Dr. Stutz, an orthopedic surgeon, evaluated the employee on January 21, 2008 at the request of the trial judge. The doctor noted the history of prior back problems, a prior MRI of the lumbar spine in 2006, and the neck surgery performed in 2004 by Dr. Olin. He also indicated that the employee was not taking any medication for his back complaints. The physical examination was within normal limits and Dr. Stutz stated that the findings of the more recent MRI in 2007 were similar to those in the 2006 study. The doctor's impression was that Mr. White had sustained a lumbar strain which had resulted in no impairment and that he was capable of returning to his former employment, which the doctor understood to be heavy work.

The trial judge, in affirming his pretrial order, relied on the opinions of Dr. Stutz and Dr. Mariorenzi over the opinions expressed by Dr. Olin to find that the employee was no longer disabled due to the effects of his work-related injury as of February 11, 2008. Additionally, the trial judge concluded that the testimony of Dr. Oyelese established only one (1) additional day of disability, August 19, 2008, the day the employee underwent the provocative discogram. He pointed out that the employee did not produce any competent medical opinion proving a causal relationship between the discogram and the infection occurring thereafter, and Dr. Oyelese did not testify that the employee remained disabled solely due to the back injury. The employee filed a timely claim of appeal from the trial judge's decision.

The parameters of the Appellate Division's review of a decision rendered by a trial judge are set forth in R.I.G.L. § 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.ö The panel is precluded from conducting a *de novo* review of the evidence absent an initial finding that the trial judge was clearly wrong or misconceived or overlooked material evidence. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996); Blecha v. Wells Fargo Guard-Company Serv., 610 A.2d 98, 102 (R.I. 1992). Our review of the record in the present matter leads to the conclusion that the trial judge was not clearly wrong in granting the employee's petition to discontinue the employee's benefits.

The employee has submitted six (6) reasons of appeal which can be summarized as a contention that the trial judge overlooked testimony of Dr. Oyelese establishing that the employee's incapacity continued beyond August 19, 2008. The employee has not alleged any error in the trial judge's ruling that the employee's incapacity ended on February 11, 2008. The focus of his argument is whether the return of incapacity on August 19, 2008, the date of the discogram, continued beyond that date.

Dr. Oyelese testified that as of the day of the discogram the employee was not capable of performing any type of physical activities and he attributed that disability to the work injury. (Ee's Ex. 3 at 16.) In his deposition, the doctor was then questioned regarding the last office visit on October 22, 2008. During the physical examination, Dr. Oyelese noted rigidity in the lumbar spine and tenderness to palpation. In response to questioning from the employee's attorney, the doctor stated that his opinion as to disability did not change, nor did his opinion as to diagnosis and the cause of that diagnosis. At that October visit, the employee was still being treated for the infection in his spine which developed immediately following the discogram; however, Dr. Oyelese was not treating him for the infection.

In the report of the October 22, 2008 office visit, Dr. Oyelese's comments indicate that the infection is affecting the condition of the employee's back.

“I feel Mr. White is stable from a neurological standpoint. It is unfortunate that he has developed an infection in his spine. He has to clear this infection before we can determine what his residual state is. . . . I suspect that some of his pain may actually improve once the infection has burned itself out.”

(See Ex. 3, Oyelese report 10/22/08.) The doctor did testify that as of the October 22, 2008 office visit, he did not believe that the employee could perform his regular job based upon the level of pain he was experiencing and the findings of guarding, stiffness and decreased mobility.

The testimony and report of Dr. Oyelese established that the infection had some impact upon the employee's back symptoms. The question is then presented whether the employee's disability is due solely to the effects of the work injury, the infection, or some combination of both. Dr. Oyelese testified that he did not know whether the infection was caused by the discogram or the employee's colostomy. Therefore, if the employee is disabled due to the infection, his incapacity is not work-related and not compensable. Dr. Oyelese was never asked if the cause of the disability he found on October 22, 2008 was due solely to the effects of the work injury. Based upon this reasoning, it is evident that the employee did not prove that any disability after the date of the discogram was work-related.

The employee also alleges that the trial judge was clearly erroneous in stating that the decision in Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996), was controlling in the present matter. Our review of the trial judge's bench decision reveals that the trial judge merely referred to the Vaz decision in similarly finding only one (1) day of disability and a failure to prove ongoing incapacity. We find no error in making this passing reference.

The trial judge in this matter thoroughly reviewed the testimony and records of Dr. Oyelese and commented on them in detail. The development of the infection in the employee's spine complicated the issue of the cause of the employee's condition and ongoing disability. The employee did not present any expert medical opinion clarifying this key element of his burden of proof. Consequently, we find that the trial judge was not clearly erroneous in finding only one (1) additional day of incapacity.

Accordingly, the employee's reasons of appeal are denied and dismissed, and the decision and decree of the trial judge are affirmed. 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

Ricci and Ferrieri, JJ. concur.

ENTER:

---

Olsson, J.

---

Ricci, J.

---

Ferrieri, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT  
APPELLATE DIVISION

CENTREX DISTRIBUTORS

)

)

VS.

)

W.C.C. 2007-07476

)

DAVID WHITE

)

FINAL DECREE OF THE APPELLATE DIVISION

This matter came to be heard before the Appellate Division on the appeal of the respondent/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 March 24, 2009 be, and they hereby are, affirmed.

Entered as the final decree of this Court this                      day of

PER ORDER:

\_\_\_\_\_  
John A. Sabatini, Administrator

ENTER:

---

Olsson, J.

---

Ricci, J.

---

Ferrieri, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Stephen J. Dennis, Esq., Robert S. Thurston, Esq., and Bruce J. Balon, Esq., on