STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
HENRI BOUCHER	)	
	)	
VS.	)	W.C.C. 01-03056
	)	
INTERSTATE DESIGN & CONSTRUCTION CO.	)	

DECISION OF THE APPELLATE DIVISION

BERTNESS, J. This matter came on to be heard before the Appellate Division on the petitioner/employee's appeal from a decision and decree rendered by the trial court on February 7, 2002, which denied the employee's petition. The matter was heard as an Employee's Petition to Review alleging a return to total incapacity commencing February 2, 2001, and continuing. The petition also alleges that the employee received a notice of intention to terminate partial incapacity benefits pursuant to R.I.G.L. § 28-33-18.3 and seeks continuation of benefits pursuant to R.I.G.L. § 28-33-18 (d).

The document under review is a Memorandum of Agreement dated September 11, 1995, for a date of injury of May 5, 1995, described as low back and right knee strain. The document provides benefits for partial incapacity commencing May 15, 1995 and continuing.

In denying the employee's petition, the trial judge found as follows:

> "1. The petitioner has failed to demonstrate, by a fair preponderance of the credible evidence, that he experienced a period of total incapacity subsequent to March 12, 1999, caused by or flowing from his work-related injury of May 5, 1995.
>
> 2. The petitioner has failed to demonstrate that his partial incapacity benefit poses a material hindrance to finding employment suitable to his limitations."

The employee has filed sixteen (16) reasons of appeal. The first thirteen (13) reasons of appeal are general in nature and fail to satisfy the specificity requirements of R.I.G.L. § 28-35-28. They are, therefore, denied and dismissed. Bissonnette v. Federal Dairy Co.Inc., 472 A2.d 1223 (R.I. 1984). The petitioner's thirteenth reason of appeal alleges that his incapacity poses a material hindrance to finding employment suitable to his limitations. The next reason alleges that no one would hire the employee with his limitations. The last two (2) reasons of appeal allege that the trial court erred in relying on future or speculative projections concerning the employee's skill and training.

The instant petition was heard in conjunction with a second petition, W.C.C. No. 01-07582, which alleged that the employee failed to report earnings. That petition was similarly denied and dismissed and no appeal was filed. Nevertheless, both petitions were consolidated for trial and a significant amount of evidence was introduced regarding the second

petition. The court has reviewed all of the evidence presented in both petitions. The instant recitation of facts and discussion shall concern only that evidence presented which is material and relevant to appealed petition.

Mr. Boucher sustained low back and right knee strain injuries on May 5, 1995, for which he continues to receive workers' compensation benefits for partial incapacity commencing May 15, 1995. He is divorced, living with his youngest son. He left school before completing the ninth grade. He worked in an auto garage when he was seventeen (17) years old and in a machine shop. He began working in the construction field when he was twenty-one (21) years old and has continued to work in that field. He is capable of reading and writing English. He attended a computer course three (3) years earlier but was unable to complete the course due to chronic back and leg pain.

Presently, Mr. Boucher takes prescription medications including Oxycontin and Oxycodone.

A vocational report prepared by Judy Miles, MS., CRC, CCM was introduced as a court exhibit. Ms. Miles was appointed by the Worker's Compensation Court Medical Advisory Board as part of an Independent Healthcare Review Team. Along with Stanley J. Stutz, M.D., an orthopedic surgeon, and Elia Shammas, M.D., a psychiatrist. Ms. Miles was provided with Dr. Stutz and Dr. Shammas' reports stating Mr. Boucher's physical

and mental conditions. Following evaluation, Ms. Miles, a vocational rehabilitation counselor, opined that Mr. Boucher is physically partially incapacitated. Ms. Miles opined that additional evaluation was necessary to determine a reasonable vocational expectation for Mr. Boucher, including a functional capacity evaluation from a physician's review and comments regarding the functional capacity evaluation with physical restrictions, a transferrable skills analysis, and a review of the current labor market.

Dr. Stutz's report of September 18, 2001, was admitted as a court exhibit.

Following a records review and examination, Dr. Stutz opined that the employee was partially disabled and at a point of maximum medical improvement.

Dr. Shammas examination of September 11, 2001, found the employee partially disabled with pain focused behavior. He also diagnosed the employee with chronic low back pain and status post multiple arthroscopies for medial meniscal tear as well as right hernia repair.

Pursuant to R.I.G.L. § 28-35-28 (b), a trial judge's findings on factual matters are final unless an appellate panel finds it to be clearly erroneous. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). The Appellate Division is entitled to conduct a *de novo* review of the evidence only after a determination is made that the trial judge was clearly wrong.

Id. (citing R.I.G.L. § 28-35-28 (b)); Grimes Box Co.Inc., v. Miguel, 509 A.2d 1002 (R.I. 1996).

The employee's petition alleges a return to total incapacity commencing February 2, 2001, and continuing. Alternatively, the petition alleges receipt of notice of intention to terminate partial incapacity benefits pursuant to R.I.G.L. § 28-33-18.3 and seeks continuation of benefits pursuant to R.I.G.L. § 28-33-18 (d).

The petitioner in a workers' compensation proceeding has the burden of producing credible evidence of a probative force to support his or her petition. DeLage v. Imperial Knife Co.Inc., 121 R.I. 146, 396 A.2d 938 (1979). The standard of proof is by a fair preponderance of the evidence. Blecha v. Wells Fargo Guard-Co. Serv., 610 A.2d 98, 102 (R.I. 1992).

In the instant petition, the burden was on Mr. Boucher to prove that he had either; (1) a return to total incapacity, or (2) that his partial incapacity poses a "material hindrance" to obtaining employment suitable to his limitations; R.I.G.L. § 28-33-18.3. The employee proferred no expert testimony that he was totally incapacitated. The only expert medical opinions offered are from Dr. Stutz, an orthopedic surgeon, and Dr. Shammas, a psychiatrist. Both found the employee partially disabled. For these reasons, the trial judge appropriately denied the employee's prayer for total incapacity due to failure of proof.

The employee also prayed for a continuation of benefits pursuant to R.I.G.L. § 28-33-18.3. In order to obtain such a continuation of benefits, the employee must prove by a fair preponderance of the evidence, that his partial incapacity poses a material hindrance to obtaining employment suitable to his limitation; R.I.G.L. § 28-33-18.3. The term "material hindrance" is not defined for injuries occurring before July 1, 1995. For cases occurring after that date the term requires greater than sixty-five (65%) percent degree of functional impairment and/or disability; R.I.G.L. § 28-33-18.3.

It was Mr. Boucher's burden to prove that his partial incapacity poses a material hindrance to obtaining employment. The trial court found that the evidence presented failed to satisfy this burden. We agree.

Both Drs. Stutz and Shammas found the employee partially incapacitated for work. The vocational counselor, Judy Miles, was unable to reach a determination based on the information available to her. She noted that Mr. Boucher tested in the average range for arithmetic and reading skills and may be able to take the GED test and pass without having to take classes. There was no opinion offered that Mr. Boucher was unemployable due to his injuries.

Mr. Boucher offered no testimony that he had looked for and was unable to find employment due to his injuries. For these reasons, we find that the

trial court committed no error when finding that Mr. Boucher failed to satisfy his burden of proof.

Mr. Boucher argues on appeal that the record demonstrates that his incapacity poses a material hindrance to finding employment suitable to his limitations and that no reasonable employer would hire him. Mr. Boucher provided no evidence that he has looked for any type of employment since his injury. A report of Judy Miles, was the only vocational report entered in evidence, and she was unable to conclude that the employee was unemployable.

The employee also argues that the court erred the rendering decision based on future projections and speculations concerning skills and or training that the employee may obtain in the future. To the contrary, the burden was on the employee to establish that his injury posed a material hindrance to obtaining employment. There was no expert testimony offered supporting his contention. Expert testimony is required where the subject before the court is scientific, mechanical, or technical in nature. Corning Glass Works v. Seaboard Sur. Co., 112 R.I. 241, 308 A.2d 813 (RI 1973). In the instant petition where medical evidence found the employee partially disabled, the court believes that opinion testimony from a vocational expert was necessary to sustain the employee's burden of proof. The vocational testimony offered did not rise to the level necessary to sustain the employee's burden. For these reasons, the employee's reasons

of appeal are denied and dismissed and the decision and decree of the trial court are hereby affirmed.

In accordance with Sec. 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, copy of which is enclosed, shall be entered on

Arrigan, C.J. and Rotondi, J. concur.

ENTER:

_____
Arrigan, C.J.

_____
Rotondi, J.

_____
Bertness, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

HENRI BOUCHER	)	
	)	
VS.	)	W.C.C. 01-03056
	)	
INTERSTATE DESIGN & CONSTRUCTION CO.	)	

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the 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 February 7, 2002 be, and they hereby are affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Arrigan, C.J.

_____
Rotondi, J.

_____
Bertness, J.

I hereby certify that copies were mailed to Richard A. Skolnik, Esq., and Bruce Balon, Esq., on

_____