STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

MARY ELLEN DUFF	)	
	)	
VS.	)	W.C.C. 02-01327
	)	
SMART MANAGEMENT	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the petitioner/employee's appeal from the denial of her Original Petition in which she alleged that she sustained a neck strain at work on January 10, 2002 which resulted in total incapacity as of January 11, 2002 and continuing. After careful review of the record and consideration of the arguments of the parties, we grant the employee's appeal and reverse the decision and decree of the trial judge.

In January 2002, the employee had been working full-time for the respondent for about eight (8) months in the position of administrative assistant for the human resources coordinator. She explained that her job involved filing, typing, processing payroll information, and handling paperwork for employees' benefits. On January 10, 2002, she was pulling a box from under her desk and she "wrenched" her neck. She immediately told a co-worker who was next to her and then informed her supervisor.

The employee left work that day and went to Rhode Island Hospital. The following day she saw Dr. Jacques Bonnet-Eymard. She complained of left-sided neck pain radiating to her shoulder and down her left arm to her hand. She has remained out of work since the day of the incident.

Ms. Duff acknowledged that she had a prior work-related injury to her left shoulder accompanied by complaints of neck pain while employed by the State of Rhode Island. After undergoing two (2) surgeries on her shoulder, she eventually received a lump sum settlement. She asserted that the last treatment for this prior injury was in May 2001, around the time she began working for the respondent. She indicated that she continued to have pain in her left shoulder thereafter, but it was controlled by medication.

Peter Lyons, the accounting director, testified that he was involved in drawing up the job description for Ms. Duff's position and he also worked in the cubicle next to her. He explained that some boxes of payroll journals were stored under the employee's desk and at times she would have to pull them out to retrieve files or documents. The boxes weighed up to about ten (10) pounds each. The majority of the day would be spent sitting at her desk working on paperwork and typing on the computer.

The employee presented the deposition and records of Dr. Jacques Bonnet-Eymard in support of her petition. The employer submitted records of Dr. Michael J. Hulstyn, Dr. Paul D. Fadale, and Dr. Wojciech Bulczynski regarding the left shoulder injury and prior neck complaints. In addition, the employer

introduced the deposition and records of Dr. Mark A. Palumbo, who examined the employee in March 2002 at the request of the insurer.

Dr. Hulstyn began treating the employee in May 1997 for the injury to her left shoulder which she sustained at work in January 1996. Initially, the employee complained of shoulder pain radiating to her neck and trapezius area. She underwent conservative treatment and therapy at the Donley Center. An MRI of the cervical spine revealed some degenerative changes at C7-T1, but an EMG study was normal. Her neck pain improved, but she continued to have shoulder pain. In March 1998, Dr. Hulstyn performed a left shoulder arthroscopy and found no evidence of a rotator cuff tear or any other significant pathology.

On May 1, 1998, the doctor discharged the employee from his care, stating that he did not expect any further improvement in her shoulder symptoms. The employee did return for two (2) office visits in the fall of 1998 and then did not see the doctor for two (2) years. He notes in his report of September 15, 2000 that Ms. Duff tried a few different jobs but had ongoing complaints of back, neck, and shoulder pain. She indicated that she was applying for early retirement. In December 2000, she was complaining of increased shoulder and neck pain and was out of work. Dr. Hulstyn referred her to Dr. Frederick Burgess for management of chronic pain.

Dr. Fadale evaluated the employee on five (5) occasions from 1996 to 2001 at the request of her former employer, the State of Rhode Island. The date of his last examination, May 30, 2001, the employee was starting her new job with the

respondent, Smart Management. Her chief complaint was continued left shoulder pain. She had decided to try a course of acupuncture. Dr. Fadale indicated that he did not anticipate any improvement in her condition.

Ms. Duff initially began seeing Dr. Bulczynski in March 2000 for complaints of low back pain. However, at a visit on May 25, 2000, she informed the doctor that her major concern was neck pain starting at the base of her cervical spine and radiating into her interscapular area. He noted in his report that the employee's neck had been bothering her since 1996 after an incident at work. X-rays revealed degenerative disc disease of the cervical spine.

Dr. Bonnet-Eymard first saw the employee on January 11, 2002, the day after the incident at work. Her description of the incident to the doctor was the same as her testimony in court. Her chief complaints were pain in the neck radiating to the left shoulder with numbness and tingling in the left hand. The doctor's diagnosis was a strain of the neck which was caused by the pulling of the box from under her desk at work. He found that she was disabled from performing her job as a secretary. He recommended a conservative course of treatment.

When conservative treatment did not result in any significant improvement, Dr. Bonnet-Eymard sent the employee for an MRI of the cervical spine. The doctor reviewed the films of the study and he felt that she had disc disease with radiculopathy on the left at C5-6 and a disc herniation at that level. He then referred the employee to a neurosurgeon to determine whether she was a surgical

candidate. Dr. Sumit Das evaluated the employee sometime in late summer 2002 and stated that Ms. Duff was not a candidate for surgery on her neck.

The employee told Dr. Bonnet-Eymard that she had no prior history of injury to her neck, but she did inform him of the two (2) surgeries to her shoulder. Based upon her assertion that she had no relief from these surgeries, the doctor formed the opinion that the employee had actually sustained a neck injury back in 1996 which continued to bother her, and this incident in January 2002 caused a significant flare-up of pain which caused her to leave work.

Dr. Palumbo saw the employee on March 26, 2002 at the request of the insurer. Her description of the incident at work on January 10, 2002 was consistent with her testimony. Her primary complaints on that date were neck pain radiating to the left trapezius and paresthesias affecting the left upper arm. The doctor noted in his report that she "specifically denied having had any similar neck problems prior to the work related injury." Dr. Palumbo's diagnosis was mechanical neck pain/cervical strain and a possible left arm radiculitis. He concluded that the employee's condition was due to the incident at work and she was totally disabled pending further work-up.

Subsequent to the doctor's examination, counsel for the insurer forwarded a package of reports reflecting most of the employee's medical treatment since her 1996 left shoulder injury. After reviewing those reports, Dr. Palumbo pointed out that, contrary to the employee's statement to him, she suffered from pre-existing chronic neck and shoulder girdle discomfort since 1996. He modified his

opinion as to causation, stating that the incident on January 10, 2002 caused a minor cervical strain and a minor exacerbation of her pre-existing chronic cervical pain. He further opined that the minor cervical strain and the exacerbation would have resolved within four (4) to eight (8) weeks.

Dr. Palumbo testified that, considering only the employee's cervical spine problems resulting from the incident on January 10, 2002, she would have returned to the condition she was in prior to that incident no later than eight (8) weeks later and would have been capable of resuming her regular job at that time.

The trial judge concluded that the employee had intentionally withheld information about her prior neck problems from the physicians who treated and evaluated her after the January 10, 2002 incident. As a result, he rejected all of the medical testimony on the grounds that it was based upon an incomplete history. He also rejected the employee's testimony as unworthy of belief. Consequently, the trial judge did not believe that the employee sustained any injury on January 10, 2002 and he concluded that any ongoing neck complaints were the result of her prior neck problems. He therefore denied her original petition. The employee then filed a claim of appeal.

Rhode Island General Laws § 28-35-28(b) provides that the trial judge's factual findings are final unless the appellate panel determines that they are clearly erroneous. Only after making a specific finding that the trial judge was

clearly wrong may the Appellate Division undertake a *de novo* review of the evidence. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996).

The employee has filed three (3) reasons of appeal. Initially, she contends that the trial judge was clearly wrong to find that she failed to prove she sustained a work-related injury on January 10, 2002 when the employer's counsel stated that he agreed that an incident did occur at work that day. At the close of the trial in this matter, counsel for the employer, in response to a question by the trial judge, stated:

> "The extent of the injury is [sic] issue. There is no question some boxes fell and landed on her." (Tr. 62-63)

During further discussion, the trial judge and counsel for the employer had the following exchange:

> "MR. ANDERSON: We are not contesting she didn't suffer an injury at work. She did. The question is this a fairly minor injury or major, significant injury, is there and [sic] end period of incapacity.
>
> "THE COURT: The issue before the Court is length of disability. Are you conceding liability?
>
> "MR. ANDERSON: We are conceding she had some kind of injury; that is true, but exactly how extensive this injury was and whether or not she is still disabled from it as Dr. Palumbo says." (Tr. 64)

Based upon the foregoing, it is clear that the employer admitted the fact that an incident occurred at work on January 10, 2002 as described by Ms. Duff. Such an admission removes that issue from the trial judge's consideration. The only issue before the court was whether the incident resulted in any disability and

if so, for what period of time. Therefore, we conclude that the trial judge's finding that the employee did not sustain an injury on January 10, 2002 is clearly erroneous.

The employee next contends that the trial judge was clearly wrong because he never addressed the reports and opinions of Dr. Palumbo or his apparent rejection thereof. The trial judge merely stated that he reviewed the deposition of Dr. Palumbo. It appears that the trial judge rejected the opinions of both Dr. Bonnet-Eymard and Dr. Palumbo because they were based upon an inaccurate or incomplete history. However, a review of the record reveals that this assessment is incorrect.

The records reflect that the employee told Dr. Bonnet-Eymard that she had undergone shoulder surgery previously as a result of an injury. There is nothing in his records regarding prior complaints of neck pain associated with that shoulder injury. However, the doctor testified that based upon the employee's statements that her shoulder problems never resolved, he concluded that part of her problem at that time derived from her neck. In a letter to the employee's attorney, he stated that the incident in January 2002 caused a flare-up of the preexisting neck problem.

Dr. Palumbo's report from his March 2002 examination states that the employee denied any similar prior injuries, although she did tell him about the shoulder surgeries. This is not really an untrue statement by Ms. Duff. Admittedly, it is documented in prior medical records that she has had

complaints of neck pain previously, but there is nothing stating that she had a neck injury previously. Dr. Palumbo actually examined Ms. Duff in 1997 after the shoulder injury and stated in his report that he did not believe her problems were due to a cervical condition. The confusion between prior neck pain or complaints, and a prior neck injury was evident in the testimony of the employee. During cross-examination, counsel for the employer on a number of occasions referred to the prior problem as an injury versus complaints of pain. The employee was adamant that when she pulled on the box on January 10, 2002, she felt something snap in her neck and it was very different than anything she had previously felt in her neck. It is quite clear that the employee became confused by the questioning and expressed her confusion on several occasions. The impression from reading the transcript is that the employee misunderstood the questioning and was confused, rather than evasive.

Dr. Palumbo was actually provided with the employee's prior medical records dating back to at least 1996. After reviewing these records, he stated that Ms. Duff sustained a mild cervical strain and a mild exacerbation of her pre-existing cervical pain as a result of the January 10, 2002 incident. He further opined that this would have resulted in a disability of between four (4) and eight (8) weeks. These opinions were stated with a reasonable degree of medical certainty. The trial judge never explained why he did not give any consideration to this opinion. Although Dr. Palumbo did not have a complete history initially, he eventually had an accurate picture of the employee's prior problems and

provided an opinion based upon that history. We believe it was error for the trial judge to overlook or disregard the opinions rendered by Dr. Palumbo.

The trial judge noted in his decision that there was no evidence that the employee's neck pain had resolved at the time she began working for Smart Management in May 2001. However, Dr. Fadale's report of his May 30, 2001 examination makes no mention of any neck complaints. There is no evidence of any medical treatment for neck complaints from May 2001 until January 2002. In addition, the employee worked at her regular job for over seven (7) months with no indication of neck complaints or neck problems. Based upon our review of the record, it was clear error to find that the employee's neck complaints on January 10, 2002 were the result of activities outside of work.

Based upon the foregoing, we sustain the employee's appeal and reverse the decision and decree of the trial judge. A new decree shall enter with the following findings:

1. That the employee sustained a personal injury on January 10, 2002, specifically a mild cervical strain and a minor exacerbation of preexisting chronic cervical pain, arising out of and in the course of her employment, connected therewith and referable thereto, of which the respondent had notice.

2. That the employee's average weekly wage is Three Hundred Ninety-eight and 46/100 ($398.46) Dollars.

3. That the employee has no dependents.

4. That the employee has received Temporary Disability Insurance benefits and workers' compensation benefits pursuant to a Non-Prejudicial Agreement.

5. That the employee was partially disabled from January 11, 2002 through March 7, 2002, a period of eight (8) weeks.

It is, therefore, ordered:

1. That the employer shall pay to the employee weekly benefits for partial incapacity from January 11, 2002 through March 7, 2002.

2. That the employer shall reimburse the Temporary Disability Insurance Fund for those benefits paid to the employee during the above noted period of incapacity and shall take credit in that amount against any weekly benefits due to the employee.

3. That the employer shall take credit for payments made pursuant to the Non-Prejudicial Agreement.

4. That the employer shall pay all reasonable charges for medical services rendered to the employee which were necessary to cure, rehabilitate or relieve the employee from the effects of the work-related injury.

5. That the employer shall reimburse the employee the sum of Three Hundred Fifty and 00/100 ($350.00) Dollars for the expert witness fee paid to Dr. Jacques Bonnet-Eymard.

6. That the employer shall reimburse counsel for the employee for the cost of the transcripts of any depositions or copies thereof upon presentation of proof of payment of such cost.

7. That the employer shall reimburse employee's counsel the sum of Three Hundred and 00/100 ($300.00) Dollars for the cost of the transcript of the trial.

8. That the employer shall reimburse employee's counsel the sum of Forty-five and 00/100 ($45.00) Dollars for the cost of filing the original petition and filing the claim of appeal.

9. That the employer shall pay a counsel fee in the sum of One Thousand Two Hundred and 00/100 ($1,200.00) to John Harnett, Esq., attorney for the employee, for the successful prosecution of the employee's appeal.

10. That the employer shall pay a counsel fee in the sum of Four Thousand and 00/100 ($4,000.00) Dollars to John Harnett, Esq., attorney for the employee, for services rendered at the pretrial conference and the trial level.

We have prepared and submit herewith a new decree in accordance with our decision. The parties may appear on at 10:00 a.m. to show cause, if any they have, why said decree shall not be entered.

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

ENTER:

_____
Healy, C.J.

_____
Olsson, J.

_____
Connor, J.

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the appeal of the petitioner/employee from a decree entered on March 11, 2003.

Upon consideration thereof, the appeal of the petitioner/employee is sustained and in accordance with the decision of the Appellate Division, the following findings of fact are made:

1. That the employee sustained a personal injury on January 10, 2002, specifically a mild cervical strain and a minor exacerbation of preexisting chronic cervical pain, arising out of and in the course of her employment, connected therewith and referable thereto, of which the respondent had notice.

2. That the employee's average weekly wage is Three Hundred Ninety-eight and 46/100 ($398.46) Dollars.

3. That the employee has no dependents.

4. That the employee has received Temporary Disability Insurance benefits and workers' compensation benefits pursuant to a Non-Prejudicial Agreement.

5. That the employee was partially disabled from January 11, 2002 through March 7, 2002, a period of eight (8) weeks.

It is, therefore, ordered:

1. That the employer shall pay to the employee weekly benefits for partial incapacity from January 11, 2002 through March 7, 2002.

2. That the employer shall reimburse the Temporary Disability Insurance Fund for those benefits paid to the employee during the above noted period of incapacity and shall take credit in that amount against any weekly benefits due to the employee.

3. That the employer shall take credit for payments made pursuant to the Non-Prejudicial Agreement.

4. That the employer shall pay all reasonable charges for medical services rendered to the employee which were necessary to cure, rehabilitate or relieve the employee from the effects of the work-related injury.

5. That the employer shall reimburse the employee the sum of Three Hundred Fifty and 00/100 ($350.00) Dollars for the expert witness fee paid to Dr. Jacques Bonnet-Eymard.

6. That the employer shall reimburse counsel for the employee for the cost of the transcripts of any depositions or copies thereof upon presentation of proof of payment of such cost.

7. That the employer shall reimburse employee's counsel the sum of Three Hundred and 00/100 ($300.00) Dollars for the cost of the transcript of the trial.

8. That the employer shall reimburse employee's counsel the sum of Forty-five and 00/100 ($45.00) Dollars for the cost of filing the original petition and filing the claim of appeal.

9. That the employer shall pay a counsel fee in the sum of One Thousand Two Hundred and 00/100 ($1,200.00) to John Harnett, Esq., attorney for the employee, for the successful prosecution of the employee's appeal.

10. That the employer shall pay a counsel fee in the sum of Four Thousand and 00/100 ($4,000.00) Dollars to John Harnett, Esq., attorney for the employee, for services rendered at the pretrial conference and the trial level.

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

BY ORDER:

_____

ENTER:

_____
Healy, C.J.

_____
Olsson, J.

_____
Connor, J.

I hereby certify that copies were mailed to John Harnett, Esq., and Berndt W. Anderson, Esq., on

_____