STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

JOSEFINA DONAHUE)
)
VS.) W.C.C. 02-04486
)
ROSS SIMONS, INC.)

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division pursuant to an order issued to the parties to appear and show cause why the employee's appeal should not be summarily decided. After reviewing the record and considering the arguments of the parties, we find that cause has not been shown and we will proceed to render our decision in this matter without further argument.

The employee filed an employee's petition to review requesting that the court order the continuation of her weekly benefits for partial incapacity beyond the limitation of 312 weeks on the ground that her partial incapacity resulting from her work-related injury poses a material hindrance to obtaining employment suitable to her limitations, in accordance with R.I.G.L. § 28-33-18.3(a)(1). The trial judge denied the petition at the pretrial conference and the employee claimed a trial in a timely manner.

After conducting a full hearing on the merits, the trial judge, in a decree entered on November 17, 2003, affirmed his pretrial order and again denied the petition. The employee then filed a claim of appeal. After considering the employee's reasons of appeal and reviewing

the record, the Appellate Division held that the trial judge erroneously applied the "manifest injustice" or "odd lot" standard codified in R.I.G.L. § 28-33-17 (b)(2), rather than the "material hindrance" standard set out in R.I.G.L. § 28-33-18.3(a)(1). Consequently, the matter was remanded to the trial judge for reconsideration and application of the correct standard.

On remand, the trial judge, after reviewing the evidence in relation to the "material hindrance" test, concluded that the employee still did not satisfy the burden of proof. He denied the petition once again and the employee claimed the present appeal from that decision.

Ms. Donahue was injured at work on June 1, 1996. A Memorandum of Agreement dated December 26, 1996 indicates that she was paid weekly benefits for partial incapacity from July 31, 1996 for a low back strain. In a pretrial order issued on February 10, 2000 in W.C.C. No. 00-00249, it was found that the employee's condition had reached maximum medical improvement. In W.C.C. No. 00-02657, the employer attempted to reduce the employee's weekly benefits to seventy percent (70%) of her weekly compensation rate pursuant to § 28-33-18(b); however, the request was denied on the ground that the employee was making good faith efforts to find work. In a subsequent petition making the same request, W.C.C. No. 01-02279, the employer was successful in implementing the reduction as of June 2, 2001.

Ms. Donahue, who was fifty-eight (58) years old at the time of her testimony, relocated to the United States from Spain in 1967. She testified without the assistance of an interpreter and stated that she was also able to read and write English somewhat. She began working as a part-time housekeeper for a church in 1977 or 1978 and did this for about ten (10) years. She then worked for brief periods for Filene's Basement putting together the daily receipts for deposit and for JC Penney's in their warehouse. In 1990, the employee began working for Ross Simons as a jewelry picker in their catalog order distribution center.

Ms. Donahue injured her back in June 1996 and was out of work for a period of time beginning in July 1996. In November 1996, she returned to work at Ross Simons on a part-time basis. Initially she did her job as a jewelry picker, but when it caused problems with her back she was switched to a position in which she simply boxed the jewelry for shipping. However, her back condition continued to worsen and she left work in June 1997. In April 1998, she underwent surgery on her back.

The employee began working with Audrey Bell, a vocational rehabilitation counselor to whom she was referred by the insurer, near the beginning of 1999. Ms. Bell would provide her with lists of employers to contact about once a week or every other week. This relationship abruptly ended after about six (6) months, but Ms. Donahue continued her job search on her own. Near the end of 2000, she sold her home and moved to Seattle, Washington, with her sister. She unsuccessfully sought work in the Seattle and then returned to Rhode Island in March 2002. The employee asserted that she has continued to seek employment through her own efforts as well as with two (2) employment agencies, World Wide and Senior Works, but has not had any success.

Leah Andrikos, the owner of Senior Works Incorporated, explained that her company is an employment agency specializing in the placement of individuals fifty (50) years old and older. She testified that the employee registered with Senior Works on September 10, 2002 and advised her that she could only do sedentary work because she could not lift anything heavy and could not sit or stand for long periods. Ms. Andrikos stated that her agency contacted the employee about a potential child care position. She related that the employee interviewed for the job, but did not get hired. Ms. Andrikos testified that as of the date of her testimony in October 2003, she had not called Ms. Donahue regarding any other opportunities because nothing had come up that

would match her background and capabilities.

Stanley J. Stutz, M.D., an orthopedic specialist, conducted an impartial medical examination of the employee on December 17, 2002 at the request of the court. Dr. Stutz related that he recorded the employee's history, conducted a physical examination, and formed a diagnosis of "status post lumbar disc surgery with residual spasm." He testified that the employee could perform light duty work so long as she refrained from carrying more than ten (10) pounds, repeated bending and twisting, and sitting for longer than thirty (30) minutes at a time.

Paul Murgo, a vocational rehabilitation counselor, interviewed the employee on May 16, 2002 and produced a report dated June 18, 2002. Immediately prior to his deposition, he interviewed the employee again in May 2003. Mr. Murgo opined in his report that "the limitations flowing from the injury of 6/1/96 materially and substantially impair the client's ability to secure alternative employment." (Ee's Ex. 2, att. report 6/18/02) He explained in his deposition testimony that his opinion was based upon the employee's age, education, cognitive ability as evidenced by certain standardized testing he administered, functional capacity as detailed in particular by Dr. Stutz, and the lack of transferable skills.

Karen Davis, a vocational rehabilitation counselor, conducted an independent vocational assessment of the employee on February 19, 2003 at the court's request. After conducting a transferable skills analysis which incorporated the employee's previous jobs, her education level, and the physical restrictions imposed by Dr. Stutz, Ms. Davis concluded that despite some barriers to employment, Ms. Donahue "maybe able to be employed." Jt. Ex. 1, p. 28. Ms. Davis cited the employee's own perception that she was not capable of working, her receipt of Social Security Disability benefits, her previous lack of success in working with a vocational counselor,

and the length of time out of work as potential barriers. Ms. Davis specifically noted that the employee would be capable of working as a customer service representative, leasing agent, school bus monitor, and surveillance system monitor. She indicated that these positions were classified as either sedentary or light and did not require lifting in excess of ten (10) pounds.

Ms. Davis also testified that she did not incorporate the fact that Ms. Donahue was bilingual in her assessment. She stated that this skill would broaden Ms. Donahue's employment opportunities further.

Judy Miles, a vocational rehabilitation counselor, interviewed the employee on June 19, 2003 and prepared an initial vocational assessment dated June 23, 2003. Ms. Miles had previously produced a labor market survey dated August 16, 2002 which identified a number of potential employment opportunities. She also provided an updated labor market survey dated July 21, 2003. In that report, Ms. Miles noted that Ms. Donahue could be employed as a bank teller, a receptionist, a general office clerk, or a customer service representative, among other job categories, and noted that over 100 job openings in these positions were projected to be available statewide annually.

Ms. Miles testified that, taking into consideration her transferable skills and the physical restrictions resulting from the work injury, Ms. Donahue was employable in a number of positions and there were a significant number of those positions available in the local community. She explained that the list of job titles attached to her initial vocational assessment was derived from a computer program which incorporated the employee's work history, education and physical restrictions as documented by Dr. Stutz. Ms. Miles then narrowed this list down further by taking into consideration more specific physical restrictions of the employee and availability of certain occupations in Rhode Island.

The trial judge, in a decision rendered pursuant to our remand order, chose to rely upon the opinions expressed by Ms. Miles and Ms. Davis. He noted that both expert witnesses concluded that, considering Ms. Donahue's transferable skills and her physical restrictions, she was capable of performing a significant number of jobs which were available in the community and she would be able to compete for such jobs as well as have a legitimate opportunity to be hired. Accordingly, the trial judge found that the employee's partial incapacity did not pose a material hindrance to obtaining suitable employment and he denied her petition for the continuation of her weekly benefits beyond the 312 week limitation.

The factual determinations made by a trial judge are viewed with great deference by the Appellate Division. In conformity with R.I.G.L. § 28-35-28(b), "[t]he findings of the trial judge on factual matters are final unless an appellate panel finds them to be clearly erroneous." Only after concluding that the trial judge was clearly wrong may the Appellate Division conduct a *de novo* review of the record and arrive at its own determinations based upon the evidence. Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996); Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986).

The employee has filed two (2) reasons for appeal. Initially, the employee contends that the trial judge committed error by relying upon the testimony of Judy Miles, the employer's vocational expert, because Ms. Miles, in using a computer program to search for job titles, categorized the employee as capable of light duty work which can involve lifting between ten (10) and twenty (20) pounds. We find no merit in this allegation.

Ms. Miles testified that she used the computer program to seek out job title in both the light and sedentary classifications. She also stated that she then culled through those job titles to eliminate those that required sitting all day or involve lifting in excess of ten (10) pounds on a

regular basis. Ms. Miles clearly indicated that she utilized the restrictions imposed by Dr. Stutz in determining which jobs the employee would be capable of performing. *See* Res. Ex. 2, pp. 41, 45-46, 49-50. There was testimony to the effect that jobs in the "light" classification may involve lifting up to twenty (20) pounds, but not every light job would require that capability. *See* Jt. Ex. 1, pp. 32-33. After reading the deposition of Ms. Miles in its entirety and taking her testimony as a whole, it is clear that her methodology and ultimate conclusions are well-supported and based upon correct information as to the employee's physical restrictions.

In the second reason of appeal, the employee argues that the trial judge erred in weighing the competent evidence the employee presented against the correct standard of proof to be applied in this case because Ms. Davis, one of the vocational experts, could only identify four (4) jobs that the employee may be capable of performing and could not say whether those jobs were available in the local labor market. Again, we disagree.

A careful review of the record demonstrates that the trial judge was presented with the deposition testimony of Paul Murgo, Karen Davis, and Judy Miles. After thoroughly reviewing the opinions offered by each expert, the trial judge, as is his prerogative, chose to rely on the opinions tendered by Ms. Miles and Mrs. Davis rather than the opinions offered by Mr. Murgo. Our Supreme Court held in Parenteau v. Zimmerman Eng., Inc., 111 R.I. 68, 299 A.2d 168 (1973), that when confronted with conflicting expert testimony of competent and probative value, it is the prerogative of the trial court to accept the opinions of one (1) expert witness over another.

The employee misstates the testimony of Ms. Davis in arguing that she "was able to identify only four jobs that Ms. Donahue was capable of performing within her skill level and physical capabilities. On the contrary, Ms. Davis testified that her transferable skills analysis

identified "several positions within the sedentary to light duty capacity that she may be capable of performing. . . ." Jt. Ex. 1, p. 16. She had eliminated other positions from the list generated by the computer program because they were not available in the Rhode Island area or the employee did not have the necessary training. In addition, Ms. Davis stated that Ms. Donahue's employment opportunities would broaden after taking into consideration the fact that she is bilingual. Jt. Ex. 1, p. 37. We believe that her testimony more than adequately establishes that sufficient job opportunities are available in the local job market for this employee.

Based on the foregoing, we find no error on the part of the trial judge in finding that the employee failed to prove by a fair preponderance of the evidence that the partial incapacity resulting from her work-related injury posed a material hindrance to obtaining suitable employment. Consequently, the employee's appeal is denied and dismissed and the decision and decree of the trial judge is 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

Bertness and Sowa, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Bertness, J.

_____
Sowa, J.

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by 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 April 7, 2005 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Bertness, J.

_____
Sowa, J.

I hereby certify that copies were mailed to Ronald L. Bonin, Esq., and Francis T. Connor, Esq., on

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