

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

JAMES GUILMETTE)

)

VS.)

W.C.C. 03-01828

)

TEKNOR APEX COMPANY)

DECISION OF THE APPELLATE DIVISION

CONNOR, J. This matter comes before the Appellate Division upon the appeal of the petitioner/employee from the decision and decree of the trial judge entered on November 7, 2003.

This is an employee's petition seeking specific compensation benefits as a result of a December 31, 2001 injury to the employee's left foot. The Memorandum of Agreement that established liability in this matter sets forth a December 31, 2001 injury described as a left foot fracture. It placed the employee on partial disability benefits from January 4, 2002 and continuing, and it established an average weekly wage of Nine Hundred Seventy-five and 38/100 (\$975.38) Dollars.

The employee is seeking specific compensation for a limp and discoloration of his left lower extremity. At the pretrial conference, an order was entered which awarded the employee disfigurement benefits for left ankle discoloration. The

trial judge awarded the employee twenty (20) weeks of benefits at the rate of Ninety (\$90.00) Dollars per week. From this pretrial order, the employee claimed a timely trial.

At the conclusion of the proceeding, the trial judge rendered a decision and entered a decree which contained the following finding and order, *inter alia*:

“6. That the petitioner has failed to prove that he has suffered a permanent limp as a result of his December 31, 2001 injury.

“Based on those findings, it is ordered:

* * *

“2. That the previous denial of the petitioner’s request for specific for a limp also be affirmed.”

From this decision and decree the employee claimed this appeal.

The parties stipulated to the following facts:

“(1) On December 31, 2001, the petitioner sustained a left foot fracture at work.

“(2) Said injury has reached maximum medical improvement for purposes of specific compensation benefits.

“(3) As a result of said injury, the petitioner occasionally ambulates with a limp, which may become apparent after he has been on his feet for an extended period of time.”

A report from Dr. Henry S. Urbaniak was admitted into evidence.

Dr. Urbaniak saw the employee for an impartial medical examination on May 20, 2002. He took a history from the employee that he was injured at work on December 31, 2001, when he fell from a ladder injuring his left foot and ankle.

The doctor conducted an examination which revealed that the employee walked with a left-sided limp. The doctor noted a full range of motion in the employee's left ankle. The doctor found tenderness at the base of the left fifth metatarsophalangeal joint. He found that the employee suffered from a fracture of the left second and third metatarsal necks and a fracture of the left fifth metatarsal base. The doctor felt that the employee was disabled from his usual form of employment and had not yet reached maximum medical improvement. The doctor recommended a structured physical therapy program for the employee.

The transcript of the deposition of Mark Enander, D.P.M., was introduced into evidence. The doctor testified as a licensed podiatrist. He treated the employee for his left foot fracture as a result of his December 31, 2001 injury. Dr. Enander felt that the employee had progressed to a point where he could return to work at a modified duty position.

The doctor testified that the employee walks with a limp, which the doctor believes is spontaneous and consistent. The doctor stated that the employee's limp is a result of a problem that occurs when he stands and begins to walk. The doctor stated that the employee starts to unload his foot more towards the great toe because it significantly hurts him when he goes to push off. Dr. Enander testified that this is the result of his toes being significantly clawed, and the fact that he does have healed fractures and there is some shortening of the metatarsals through the healing process, which results in a little decreased range

of motion. The doctor stated that because the employee sustained a basal fracture, there is some impact on the cuboid articulation and he throws his weight more towards medially. The doctor explained that as a result, he is not really able to toe off when he begins to walk and that is where most of his problem comes from. The doctor stated he is able to stand erect without a problem and it is only when you ask him to walk propulsively as a normal gait that his problem begins. Dr. Enander felt that the employee was very sincere with regard to his complaints to him. It was his opinion that the employee had reached maximum medical improvement with regard to his left foot injury.

The doctor was asked a question regarding the employee's clawed toes on his left foot and their contribution to his antalgic gait. The doctor stated that the condition may be a portion of his problem but he felt that the main portion of the employee's antalgic gait is a result of his fifth metatarsal fracture and pain around the cuboid area, as well as the shortening that occurred with the fractures when they healed because their alignment is not anatomical as it was before. The doctor agreed that the clawing of his left toes would contribute to his antalgic gait. He also agreed that he never saw the employee prior to his accident of December 31, 2001, to determine how the employee walked with regard to his left lower extremity.

Dr. Enander explained that he observed the employee on a number of occasions with regard to his limp. At those times, he was satisfied that the employee was unaware that he was observing him walk. He stated that on at

least ten (10) or twelve (12) occasions he made observations of the employee of which the employee was unaware. The doctor agreed, to a reasonable degree of medical certainty, that the employee does have a limp that is related to his work accident. With regard to the disfigurement on the employee's left foot and ankle, the doctor stated that the light brownish discoloration on the employee's left foot is permanent given that it has been there for over a year.

A March 26, 2003 letter from the employee's attorney to Dr. Enander was entered into evidence. In this letter, the doctor was asked whether the employee's limp was related to his fall on December 31, 2001. To this question, the doctor responded yes. The doctor was also asked if the limp had reached an end result. Again, the doctor responded yes. When asked if the limp was permanent, the doctor also responded yes.

The parties agreed that the only issue to be addressed by the trial judge was whether the employee was entitled to specific compensation for a limp. The parties agreed that the pretrial order, with respect to the award for the permanent discoloration on the employee's left ankle, should remain intact.

The trial judge, in his decision, noted that the workers' compensation statute clearly provides for an award of disfigurement for a limp when it is shown that the limp is, in fact, permanent. The trial judge referred to Black's Law Dictionary to define the word "permanent." The trial judge applied this definition to the evidence presented and found that the employee's limp was not permanent because it only occurs after he has been on his feet for an extended period of

time. The trial judge stated that because the employee's condition was subject to fluctuation, it was more temporary or transient rather than permanent. It was the position of the trial judge that the legislature intended to make or provide for an award of disfigurement when a condition is always present and always noticeable by someone who is looking at the person and not for a condition that is sometimes present and sometimes not, depending on what the person may or may not be doing. The trial judge found that based on the evidence presented the employee had a condition that waxes and wanes, depending on the nature and extent of his physical activities, and this type of condition did not fall within the parameters of the legislative enactment which contemplated the award of specific compensation for a condition that is in fact permanent and present at all times.

The court then entered the previously referenced decree and the employee filed a timely claim of appeal.

Pursuant to Rhode Island General Laws § 28-35-28(b), a trial judge's findings on factual matters are final unless found 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 only when a finding is made that the trial judge was clearly wrong. Id. (citing R.I.G.L. § 28-33-25(b); Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986)). Such review, however, is limited to the record made before the trial judge. Vaz, *supra* (citing Whittaker v. Health-Tex, Inc., 440 A.2d 122 (R.I. 1982)).

Cognizant of this legal duty imposed upon us, we have carefully reviewed the entire record of this proceeding and we find no merit in the employee's reasons of appeal. We, therefore, affirm the decision and decree of the trial judge.

The employee filed two (2) reasons of appeal. The first reason of appeal alleges that the trial judge was wrong for failing to award disfigurement benefits pursuant to R.I.G.L. § 28-33-19 for a limp. The second reason of appeal alleges that the trial judge was wrong as a matter of law for failing to award disfigurement benefits pursuant to R.I.G.L. § 28-33-19 for a limp which is permanent, but not always present.

With regard to the first reason of appeal, it is well established that a permanent limp is a disfigurement that is compensated with specific benefits under the Workers' Compensation Act.

This court has long held that a limp may constitute a disfigurement, since a person with a limp is unable to ambulate in a normal fashion, thereby impairing both the symmetry and appearance of that person. Therefore, an employee may receive specific compensation for a limp. Pearl K. Lopes v. Engineered Yarns, Inc., W.C.C. No. 90-01363 (App. Div. 1991). The trial judge certainly acknowledged this general concept in his decision. However, this is not the issue before this appellate panel.

The issue before this panel is more precisely stated in the employee's second reason of appeal, specifically, whether an employee who has a limp which

is only occasional and may become apparent only after he has been on his feet for an extended period of time is entitled to specific compensation benefits.

In addressing this issue, the stipulation of facts entered into by the parties cannot be ignored. Stipulation No. 3 states that:

“As a result of said injury, the petitioner occasionally ambulates with a limp, which may become apparent after he has been on his feet for an extended period of time.” (emphasis added)

Rhode Island General Laws § 28-33-19(3)(ii) provides for the payment of specific compensation benefits when the disfigurement is permanent. In construing a statute, this court attempts to ascertain the legislative intent by viewing the statute in light of the circumstances that motivated its passage. In determining the legislative intent, this court must examine the language of the statute itself, giving the words their plain and ordinary meaning. Krikorian v. R.I. Dept. of Human Services, 606 A.2d 671, 675 (R.I. 1992).

Rhode Island General Laws § 28-33-19(3)(ii) clearly provides benefits to an employee for permanent disfigurement. Black’s Law Dictionary, Fifth Edition, defines permanent as:

“Continuing or enduring in the same state, status, place, or the like, without fundamental or marked change, not subject to fluctuation, or alteration, fixed or intended to be fixed; lasting; abiding; stable; not temporary or transient.” (emphasis added)

Clearly, in applying this definition to the agreed upon facts of this case, the employee’s condition is not permanent if his limp may occasionally become apparent only after he has been on his feet for an extended period of time. A

condition, which may or may not appear, cannot be considered to be permanent disfigurement within the meaning of R.I.G.L. § 28-33-19(3)(ii). We are unaware of any authority under which this court can award specific compensation benefits to an employee whose disfigurement may or may not be present at any given time. We find that the evidence presented to the court did not establish that the employee suffered from permanent disfigurement as the result of his occasional limp and we find that the trial judge made no error in his finding on this issue.

We, therefore, deny and dismiss the employee's reasons of appeal and affirm the decision and decree of the trial judge.

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

Olsson and Bertness, JJ. concur.

ENTER:

Olsson, J.

Bertness, J.

Connor, 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 November 7, 2003 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

ENTER:

Olsson, J.

Bertness, J.

Connor, J.

I hereby certify that copies were mailed to Conrad M. Cutcliffe, Esq., and
Tedford Radway, Esq., on
