STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

LUKE SMITH	)	
	)	
VS.	)	W.C.C. 03-02053
	)	
THE TOWN DOCK	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the petitioner/employee's appeal from the denial of his petition for specific compensation on the grounds that the petition was filed more than two (2) years from the date his condition reached maximum medical improvement. After thoroughly reviewing the record and considering the arguments of the parties, we deny the employee's appeal and affirm the findings and orders of the trial judge.

On March 3, 1999, the employee sustained a laceration to the underside of his left foot while working. Apparently, he was taken to the hospital and the wound was sutured. There is no information in the record as to the subsequent treatment of the injury. The employee did not testify in this matter, but comments in the record indicate that he returned to work some time ago. There are also indications that the employee previously received specific compensation for scarring, but we are unable to determine when that occurred.

The parties presented the depositions and reports of Drs. Jonathan Sisskind and K. Nicholas Tsiongas. Dr. Sisskind, a chiropractor licensed in Massachusetts and New York, conducted an evaluation of the employee on October 25, 2002 for the specific purpose of

determining the degree of loss of use resulting from the employee's work injury. The doctor noted that the employee limped somewhat, favoring his left foot, and his work boots revealed extra wear on the outside edge of the sole indicating an effort to keep weight off of the ball of the foot which was the location of the laceration. Dr. Sisskind noted decreased strength of the left foot in flexion and of the left great toe with flexion and extension. Using these strength deficits, he calculated that the employee had a twenty-three percent (23%) loss of use of his left lower extremity based upon the charts found in the American Medical Association's Guides to the Evaluation of Permanent Impairment, 5th edition.

Dr. Tsiongas, a specialist in occupational medicine, evaluated the employee on April 4, 2003 at the request of the insurer. He noted that the employee complained of hypersensitivity in the area of the scar around the ball of his left foot and a constant ache, however, these complaints did not significantly restrict the employee's daily activities. Dr. Tsiongas reviewed the report of Dr. Sisskind and was under the impression that Dr. Sisskind had used charts regarding loss of motion, rather than weakness or loss of strength, in determining the employee's loss of use. Dr. Tsiongas did not find any ratable loss of motion, but there is no indication that he measured weakness or loss of strength.

Dr. Tsiongas indicated that the employee had developed a hypertrophic area of scarring on the ball of the foot which was painful. Using the chart for skin disorders in the AMA Guides, he concluded that the employee had a four percent (4%) whole person impairment due to the impact of the painful scar. The doctor also noted that the employee "may actually benefit from a podiatric evaluation to minimize his pain when walking." (Res. Exh. A, report of Dr. Tsiongas 4/4/03)

The trial judge found that the employee had failed to prove that the petition for benefits for loss of use was timely filed, i.e., within two (2) years of the date the employee's condition reached maximum medical improvement. He noted that neither of the physicians addressed this element of proof. Therefore, he was left with the date of injury, March 3, 1999, as the only known date. The trial judge stated that even giving the employee the benefit of the doubt and estimating that the condition reached maximum medical improvement one (1) year after the injury, at the latest, the limitation period for filing would have ended on March 3, 2002. The petition was filed on March 21, 2003.

The scope of review at the appellate level is narrow. Pursuant to R.I.G.L. § 28-35-28(b), the findings of fact made by a trial judge are final unless the appellate panel finds them to be clearly erroneous. Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996). The appellate panel may conduct a *de novo* review of the evidence only after a finding is made that the trial judge was clearly wrong. Id. (citing Grimes Box Co., Inc. v. Miguel, 509 A.2d 1002 (R.I. 1986)).

The employee has filed four (4) reasons of appeal. He first contends that the trial judge's statements that the only evidence as to the date of maximum medical improvement is the date of injury were clearly erroneous. We agree that the trial judge misspoke in citing the date of injury as the only evidence of a potential date when the employee may have reached maximum medical improvement. We also agree that the speculative discussion in which it was assumed that the employee may have reached maximum medical improvement a year after the injury was inappropriate. However, we believe that these comments were superfluous and do not affect the validity of the findings contained in his decree. In his decree, the trial judge simply finds that the employee failed to prove that the petition was filed within the two (2) year limitation period, without any reference to when that period may have expired.

The employee argues that the testimony of Dr. Sisskind establishes that the employee should have known that his condition had reached maximum medical improvement as of the date of the doctor's examination on October 25, 2002 and therefore; the petition for loss of use was filed within the two (2) year limitation period. The testimony on this issue consisted of one (1) response to a single question.

> "Q. Is it your opinion that Mr. Smith had reached maximum optimal improvement?
>
> "A. From my assessment, yes."

(Pet. Exh. 3, p. 15.)

At best, this testimony establishes that on October 25, 2002, the employee's condition was at maximum medical improvement. However, there was no evidence as to when that point was actually reached. The condition may have been at that point for one (1) year, two (2) years or three (3) years. The employee points out the statements of Dr. Tsiongas that the painful condition of the scar developed after he received benefits for disfigurement, which would obviously be after the date of injury. Unfortunately, there is nothing in the record as to when the employee received the benefits for disfigurement or how long after that the painful hypertrophic scar reached maximum medical improvement.

In a petition for specific compensation for loss of use, the employee bears the burden of proving by competent and credible evidence that the petition was filed within two (2) years of when the employee knew, or by exercise of reasonable diligence, should have known, that his condition was permanent. Auclair v. American Silk Spinning Co., 109 R.I. 395, 399, 286 A.2d 253, 255 (1972). In the present case, there is no evidence from which we can even infer when the employee's condition had reached maximum medical improvement and when he was aware of that fact.

Mr. Smith urges this panel to remand the matter to enable him to present further evidence as to when he knew or should have known his condition had reached an end result pursuant to the decision of the Rhode Island Supreme Court in Rainville v. King's Trucking Co., Inc., 448 A.2d 733 (R.I. 1982). In that matter, the trial judge had relied solely upon a physician's testimony as to when he believed the employee's condition had reached maximum medical improvement, without consideration as to the employee's state of mind. The Court remanded the matter with instructions for the trial judge to conduct a hearing and render a decision as to when the employee knew or should have known that his injury had reached an end result.

We do not believe that remand is appropriate in the case before this panel. The employee had ample opportunity to present whatever evidence he felt was necessary to prove the elements of his case at the trial. The trial judge concluded that the employee had failed to present evidence to establish a basic element of his case. We agree that the record reveals that this was a basic failure of proof on a key element which was required in order to proceed with this petition. We do not believe that fairness and equity require that we remand the matter in order to allow the employee a second opportunity to satisfy the necessary elements of proof.

Based upon the foregoing, we deny the employee's appeal and affirm the findings and orders 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

Sowa and Connor, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Sowa, 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 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 October 14, 2003 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Interim Administrator

ENTER:

_____
Olsson, J.

_____
Sowa, J.

_____
Connor, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq., Robert S. Thurston, Esq., and James T. Hornstein, Esq., on

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