STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

BRIAN F. CATTERALL	)	
	)	
VS.	)	W.C.C. 03-03692
	)	
CARDI CORPORATION	)	

AMENDED DECISION OF THE APPELLATE DIVISION

OLSSON, J. In accordance with Rule 1.5 of the Rules of Practice of the Workers' Compensation Court, an amended decision is hereby rendered to include the award of interest pursuant to R.I.G.L. § 28-35-12(c) and to include a finding as to the average weekly wage.

This matter is before the Appellate Division on the employee's appeal from a decision and decree of the trial judge which granted his original petition for weekly benefits, but discontinued the payment of those benefits as of November 17, 2004 based upon the testimony and report of Dr. Andrew Green. After thorough review of the record in this matter, in particular the testimony of the employee and the deposition of Dr. Green, we reverse the trial judge and reinstate the payment of weekly benefits to the employee.

In his petition, the employee alleged that he sustained injuries to his right shoulder, back, and left forearm on October 20, 2001 when the truck he was driving rolled over. At the pretrial conference, it was found that Mr. Catterall sustained an injury to his right shoulder on October 20, 2001 which resulted in partial incapacity from October 21, 2001 to December 16, 2001. Both parties claimed a trial from the pretrial order.

It was agreed at the outset of the trial that the primary issues in the case were the nature and description of the injury and the length of incapacity. The employee was the only witness to testify before the court. The trial judge also reviewed depositions of several doctors, as well as medical records from various facilities involved in the treatment of Mr. Catterall. After considering all of this evidence, the trial judge determined that the work accident aggravated a pre-existing right shoulder condition and also caused an injury to the left forearm. Based upon the statements of the treating physician, Dr. Robert Marchand, he found that the employee was initially partially disabled from October 21, 2001 to January 31, 2002 due to the right shoulder problem. A fairly lengthy hiatus from treatment ensued thereafter until March 22, 2004, at which time Dr. Marchand found the employee partially disabled due to the condition of his right shoulder. The trial judge awarded an additional period of incapacity beginning on that date and, based upon the testimony of Dr. Andrew Green, ending on November 17, 2004. Specific compensation for disfigurement was awarded due to a laceration of the left forearm. The allegation of a back injury was denied. The employee filed a timely claim of appeal from these findings.

The statutory standard to which we must adhere in reviewing the decision of a trial judge is very deferential. Rhode Island General Laws § 28-35-28(b) states that "[t]he findings of the trial judge on factual matters are final unless an appellate panel finds them to be clearly erroneous." The appellate panel may not conduct a *de novo* review of the evidence without making an initial finding that the trial judge was clearly wrong, or misconceived or overlooked material evidence. *See* Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996); Blecha v. Wells Fargo Guard-Company Serv., 610 A.2d 98 (R.I. 1992).

The employee has filed three (3) reasons of appeal. In the first two (2) reasons, he alleges that the trial judge was clearly wrong and/or misconceived or overlooked material evidence in his evaluation of the testimony of Dr. Green and that the statements of the doctor substantiate ongoing partial incapacity due to the right shoulder injury. After a close examination of the deposition of Dr. Green and the trial judge's analysis of that testimony, we are constrained to agree with the employee's contention.

The employee's testimony regarding his job duties was uncontradicted. His regular job required him to drive a tractor trailer dump truck, generally within the state of Rhode Island. The trucks had a standard transmission with a gear shift which he operated with his right arm. He would deliver material to paving jobs. Mr. Catterall described releasing a brake which released a piece of canvas to cover the load. In order to uncover the load, he had to operate a crank at about head level with two (2) hands for a minute or two (2). He estimated that he covered and uncovered the truck about seven (7) or eight (8) times a day on average. Tr. p. 13-14. The number of loads he transported was dependent upon the location of the job site. He estimated that he delivered about fourteen (14) loads a day to a nearby job site, but delivered only about five (5) a day to a more distant location. The employee was also responsible for wiping down and waxing the cab, as well as cleaning the windows at the end of the day. He explained that about twice a month he had to change the trailer which involved cranking down the landing gear with both hands.

Dr. Andrew Green, an orthopedic surgeon specializing in shoulder and elbow surgery, evaluated the employee on November 17, 2004 at the request of the insurer. The doctor recorded a history from the employee and reviewed extensive medical records. In particular, it should be noted that Mr. Catterall underwent right shoulder surgery on May 21, 2004 by Dr. Robert

Marchand, which included open rotator cuff repair, acromioplasty and distal clavicle resection. Dr. Green opined that despite some history of right shoulder problems prior to October 2001, the truck accident aggravated a pre-existing condition in the shoulder and that the surgery in May 2004 was necessitated by that injury. Dr. Green further stated in his report that the employee was capable of working in a modified duty capacity and "would likely be able to perform his regular work activity as a truck driver in his current state." Er's Exh. 2, attach. report 11/17/04. It was his belief that the employee may be limited by other psychological problems.

Dr. Green testified that the shoulder problem was still causing a partial disability and that he would restrict use of the right arm above shoulder level for repetitive activity or unsupported sustained activities. He also noted that the employee should not do any climbing or work at high heights. After counsel for the insurer provided additional details regarding Mr. Catterall's job duties, the doctor noted some additional restrictions.

> "Q. All right. Doctor, I want you to assume for the record that Mr. Catterall has testified in this matter and he has testified that in addition to his truck driving duties, there would be other duties associated with that function, namely, at times he'd have to climb up on top of the back of the dump truck or a cement truck or other type of apparatus he was driving and have to, working at or above shoulder level, crank out a cover to the dump truck that he was driving so as to prevent debris from flying out of the back of the truck. He would also at times have to crank down the back of the dump truck off of the hitch that he was driving the truck around on, and he's driving a cab type vehicle with a trailer type dump on the back and oftentimes he'd have to do a lot of cranking activities in order to remove the trailer or to change the trailer out. He also described doing other activities where he would be lifting and handling some weights probably in excess of 30 pounds at the very least on a fairly frequent basis. Assuming those are some of the activities that he would have to do, and I'm not saying that's an exhaustive description, but from my memory and from the deposition transcript, I believe that's a fairly accurate description of some of his activities anyway, would you restrict him in any way from doing those activities that I described to you?

"A. Yes.

"Q. And how would you restrict him from those activities that I described to you?

"A. I think it would depend on how much he has to do those, how long it takes, is it something that he can do once and tolerate and then not have to do it for several hours later, or is this something that he does on a more frequent basis. My perception or understanding was that most of what he did was driving and going to the site, delivery or pick up, and had to do some of those activities that you described, but not on an excessive basis, but if it was something he had to do more excessively or the cranking was difficult to do, then I think he would have restrictions."

Er's Exh. 2, pp. 11-12.

On cross-examination, the doctor explained that if the job involved simply driving a truck, the employee was capable of performing the job without restriction. However, if additional activities such as those described by counsel for the insurer were required, then he would place some restrictions on those activities. The following exchange then ensued between counsel for the employee and Dr. Green.

"Q. Would it be fair, Doctor, that Mr. Catterall over the course of the workday might have to make 11 or 12 different trips to and from the facility where he would pick up the product that's dumped into the back of the truck and would have to crank on and off the tarp that would go over the back of those loads 11 or 12 times a day, that's something you wouldn't want him doing based upon your evaluation of the shoulder?

"A. I think he would have some difficulty doing it. Whether or not I wanted him to, I'm not sure that I could give a statement to it.

"Q. Well, let me ask the question this way. In your opinion to a reasonable degree of medical certainty as a Board Certified Orthopedic specialist, would you restrict him from those type of activities?

"A. Probably, yes."

Er's Exh. 2, pp. 20-21.

In his bench decision, the trial judge notes that Dr. Green would restrict the employee from repetitive activities above shoulder level, climbing, and unsupported prolonged lifting and carrying, but the doctor still indicated that Mr. Catterall was capable of his regular job duties as a truck driver. The judge then refers to the question posed by counsel for the employee quoted above regarding cranking the tarp on and off the material in the trailer and that portion of the doctor's answer where he states he is not sure he could give a statement as to whether he would want the employee to do that. However, he does not mention the following question and answer in which the doctor states that he probably would restrict the employee from those activities. In rendering his decision on the issue of ongoing incapacity, the trial judge stated that after examining Dr. Green's testimony as a whole, rather than focusing on any particular question, he was persuaded that the employee was capable of his regular job duties as of the date of that examination.

After a thorough review of the deposition of Dr. Green and the bench decision of the trial judge, we are constrained to conclude that the finding that the employee is no longer disabled is clearly erroneous. We are well aware of the prerogative of the trial judge to exercise his discretion in choosing between conflicting expert medical opinions, as well as our deferential standard for reviewing such determinations made by a trial judge. However, in this matter, we find that the trial judge misconceived the testimony of Dr. Green in concluding that his statements as a whole substantiate that the employee is capable of all of the duties of his regular job.

In order to find that the employee's incapacity has ended in this situation, the evidence must show that Mr. Catterall is capable of performing all of his former job duties without

reservation or restriction. Leviton Mfg. Co. v. Lillibridge, 120 R.I. 283, 288, 387 A.2d 1034, 1037 (1978). If there is any task required of his former employment which he cannot perform, then his weekly benefits must continue. Id. Under questioning by counsel for the insurer, Dr. Green initially testified that he believed that Mr. Catterall was capable of working in his regular job, although he acknowledged that he had some residual impairment of the shoulder. Er's Exh. 2, pp. 7-8. However, at that point, the doctor had not indicated specifically what he understood the employee's regular job to be, and his written report did not document any type of job description. The doctor did state that he had gleaned information regarding the job duties from the employee and other information in the records he reviewed, but he was never asked what he thought the employee did in his job. Id. at 11. Subsequently, when he was informed of activities the employee had to perform in addition to simply driving the truck, he stated that Mr. Catterall may be restricted from those activities based upon their frequency and the amount of force or weight involved. Id. at 11-12. According to the employee, on average, he had to crank the tarp on and off seven (7) or eight (8) times a day, or almost once every hour. Mr. Catterall further testified that he had to use two (2) hands to turn the crank because he was not strong enough to do it with one (1) hand. One can certainly infer from this statement that a fair amount of force was required to operate the crank.

Thereafter, on cross-examination, counsel further clarified the doctor's opinion on disability. Dr. Green testified that the employee was capable of driving the truck, but he would place some restrictions or limitations on activities such as using a crank to move the tarp or lower the landing gear, and pulling the tarp over the load. Id. at 20. The doctor then had some concern as to the phrasing of the next question as to whether he would want the employee doing such activities and responded that he was not certain that he could give an opinion on that.

However, in the very next response after counsel re-phrased the question, Dr. Green stated that he would probably restrict Mr. Catterall from those activities. Id. at 21.

The trial judge did not mention the response of the doctor to the lengthy hypothetical regarding the employee's job duties on pages 11-12 of the deposition, nor did he make note of Dr. Green's response to the specific question of restricting the employee from those activities on page 21. The job duties as described by both of the attorneys to Dr. Green are reasonably consistent with the employee's testimony. A further consideration is that the employee had to climb up and down from the cab of the tractor each time he loaded and unloaded and was also responsible for cleaning the truck. Both of these activities would require reaching above shoulder level with his right arm.

Dr. Green initially opined that Mr. Catterall could return to his job as a truck driver, but after he was confronted with some details as to the duties required in addition to simply driving the truck, he modified his opinion and placed some restrictions on the performance of those additional duties. His final opinion, therefore, was that the employee was partially disabled. In addition, Dr. Marchand, the treating physician, had also opined that the employee remained partially disabled.

The employee also contends that the trial judge erred in not awarding reimbursement of the expert witness fee paid to Dr. David J. DiSanto as well as other costs associated with the taking of his deposition. In addition to alleging that he injured his right shoulder in the accident, Mr. Catterall also claimed injuries to his back and left forearm. He sought specific compensation for disfigurement resulting from a laceration to his left forearm. The trial judge denied the employee's contention that he injured his back in the accident and the employee has not appealed that determination. The trial judge did find that Mr. Catterall sustained a laceration to his left

forearm which had reached an end result. He awarded specific compensation for the disfigurement.

Dr. DiSanto primarily treated the employee for his back complaints. In a letter to the employee's attorney dated August 26, 2003, the doctor describes a two (2) inch scar on the employee's left forearm which has reached an end result. The deposition of Dr. DiSanto is twenty-six (26) pages long. One (1) page is devoted to questions and answers regarding the left forearm injury and resulting scar. Expert medical testimony that the scar has reached an end result and that it is the consequence of the work-related injury is required to establish those elements of proof for a claim for specific compensation for disfigurement. Consequently, Dr. DiSanto's testimony did contribute to the success of the employee's claim for specific compensation and the trial judge erred in not awarding payment of an expert witness fee. However, we agree with the employer that reimbursement of the full expert witness fee of Three Hundred Fifty and 00/100 ($350.00) Dollars is not appropriate and we, therefore, order reimbursement of the sum of Twenty-five and 00/100 ($25.00) Dollars to counsel for the employee.

Based upon the foregoing discussion, we grant the employee's appeal. In accordance with our decision, a new decree shall enter containing the following findings and orders:

1. That the employee has proved by a fair preponderance of the credible evidence that he sustained compensable injuries arising out of and during the course of his employment on October 20, 2001.

2. That the injuries should be described as an aggravation of an underlying condition in his right shoulder and a laceration to the left forearm which left a scar that has reached an end result.

3. That the employee's average weekly wage is One Thousand Sixty-eight and 54/100 ($1,068.54) Dollars.

4. That the injury to the left forearm was not disabling.

5. That the aggravation of the underlying right shoulder condition caused the employee to be partially incapacitated for the open and closed period between October 21, 2001 and January 31, 2002; that the employee became partially incapacitated from the aggravation of the underlying right shoulder condition from March 22, 2004 until May 20, 2004 and that he was totally incapacitated as the result of surgery from May 21, 2004 to November 17, 2004, and remains partially incapacitated from that date and continuing.

6. That the surgery performed by Dr. Robert C. Marchand was reasonably necessary to cure, rehabilitate or relieve the employee of the aggravation of his underlying right shoulder condition.

7. That the employee is entitled to the award of interest pursuant to R.I.G.L. § 28-35-12(c) for the period from November 18, 2004 (the date the trial judge discontinued benefits) to the date the retroactive payment of benefits is made.

It is, therefore, ordered:

1. That the respondent shall pay to the employee weekly benefits for partial incapacity from October 21, 2001 to January 31, 2002, weekly benefits for partial incapacity from March 22, 2004 to May 20, 2004, weekly benefits for total incapacity from May 21, 2004 to November 17, 2004, and weekly benefits for partial incapacity from November 18, 2004 and continuing until further order of the court or agreement of the parties, with credit for payments made pursuant to the non-prejudicial agreement, pretrial order and trial decree previously entered in

this matter and subject to any Temporary Disability Insurance benefits received by the employee during those periods of incapacity.

2. That the respondent shall pay interest at the rate per annum provided in R.I.G.L. § 9-21-10 on the retroactive payment of benefits from November 18, 2004 to the date the retroactive payment is made.

3. That the respondent shall pay the costs of the surgery performed by Dr. Marchand.

4. That the respondent shall reimburse the employee for the appearance fee paid to Dr. Marchand of Five Hundred and 00/100 ($500.00) Dollars and for the stenographic costs incurred in connection with the depositions of Dr. Marchand and Dr. Green.

5. That the respondent shall reimburse counsel for the employee the sum of Twenty-five and 00/100 ($25.00) Dollars for the expert witness fee paid to Dr. David J. DiSanto, which represents a reduced fee consistent with the portion of his testimony regarding the specific compensation claim.

6. That the respondent shall pay to the employee twenty (20) weeks of disfigurement benefits at the rate of Ninety and 00/100 ($90.00) Dollars a week or One Thousand Eight Hundred and 00/100 ($1,800.00) Dollars for the permanent scar on his left forearm.

7. That the respondent shall pay Gregory L. Boyer, Esq., a counsel fee in the amount of Four Thousand and 00/100 ($4,000.00) Dollars for services rendered to the employee at the trial level which sum is awarded over and above that previously awarded at the pretrial conference.

8. That the respondent shall reimburse Gregory L. Boyer, Esq., the sum of Two Hundred Fifty and 00/100 ($250.00) Dollars for the filing of the appeal and the cost of the transcript of the trial.

9. That the respondent shall pay to Gregory L. Boyer, Esq., a counsel fee in the sum of Two Thousand and 00/100 ($2,000.00) Dollars for services rendered at the appellate 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.

Bertness and Sowa, JJ. concur.

ENTER:

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Olsson, J.

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Bertness, J.

_____
Sowa, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
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	)	
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	)	
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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 from a decree entered on June 9, 2005.

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 has proved by a fair preponderance of the credible evidence that he sustained compensable injuries arising out of and during the course of his employment on October 20, 2001.

2. That the injuries should be described as an aggravation of an underlying condition in his right shoulder and a laceration to the left forearm which left a scar that has reached an end result.

3. That the employee's average weekly wage is One Thousand sixty-eight and 54/100 ($1,068.54) Dollars.

4. That the injury to the left forearm was not disabling.

5. That the aggravation of the underlying right shoulder condition caused the employee

to be partially incapacitated for the open and closed period between October 21, 2001 and January 31, 2002; that the employee became partially incapacitated from the aggravation of the underlying right shoulder condition from March 22, 2004 until May 20, 2004 and that he was totally incapacitated as the result of surgery from May 21, 2004 to November 17, 2004, and remains partially incapacitated from that date and continuing.

6. That the surgery performed by Dr. Robert C. Marchand was reasonably necessary to cure, rehabilitate or relieve the employee of the aggravation of his underlying right shoulder condition.

7. That the employee is entitled to the award of interest pursuant to R.I.G.L. § 28-35-12(c) for the period from November 18, 2004 (the date the trial judge discontinued benefits) to the date the retroactive payment is made.

It is, therefore, ordered:

1. That the respondent shall pay to the employee weekly benefits for partial incapacity from October 21, 2001 to January 31, 2002, weekly benefits for partial incapacity from March 22, 2004 to May 20, 2004, weekly benefits for total incapacity from May 21, 2004 to November 17, 2004, and weekly benefits for partial incapacity from November 18, 2004 and continuing until further order of the court or agreement of the parties, with credit for payments made pursuant to the non-prejudicial agreement, pretrial order and trial decree previously entered in this matter and subject to any Temporary Disability Insurance benefits received by the employee during those periods of incapacity.

2. That the respondent shall pay interest at the rate per annum in R.I.G.L. § 9-21-10 on the retroactive payment of benefits from November 18, 2004 to the date the retroactive payment is made.

3. That the respondent shall pay the costs of the surgery performed by Dr. Marchand.

4. That the respondent shall reimburse the employee for the appearance fee paid to Dr. Marchand of Five Hundred and 00/100 ($500.00) Dollars and for the stenographic costs incurred in connection with the depositions of Dr. Marchand and Dr. Green.

5. That the respondent shall reimburse counsel for the employee the sum of Twenty-five and 00/100 ($25.00) Dollars for the expert witness fee paid to Dr. David J. DiSanto, which represents a reduced fee consistent with the portion of his testimony regarding the specific compensation claim.

6. That the respondent shall pay to the employee twenty (20) weeks of disfigurement benefits at the rate of Ninety and 00/100 ($90.00) Dollars a week or One Thousand Eight Hundred and 00/100 ($1,800.00) Dollars for the permanent scar on his left forearm.

7. That the respondent shall pay Gregory L. Boyer, Esq., a counsel fee in the amount of Four Thousand and 00/100 ($4,000.00) Dollars for services rendered to the employee at the trial level which sum is awarded over and above that previously awarded at the pretrial conference.

8. That the respondent shall reimburse Gregory L. Boyer, Esq., the sum of Two Hundred Fifty and 00/100 ($250.00) Dollars for the filing of the appeal and the cost of the transcript of the trial.

9. That the respondent shall pay to Gregory L. Boyer, Esq., a counsel fee in the sum of Two Thousand and 00/100 ($2,000.00) Dollars for services rendered at the appellate level.

Entered as the final decree of this Court this day of

BY ORDER:

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John A. Sabatini, Administrator

ENTER:

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Olsson, J.

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Bertness, J.

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Sowa, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Gregory L. Boyer, Esq., and Kevin B. Reall, Esq., on

_____