STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERSô COMPENSATION COURT
APPELLATE DIVISION

ROBERT E. NICHOLS	)	
	)	
VS.	)	W.C.C. 03-04052
	)	
R & D CONSTRUCTION CO., INC.	)	
ROBERT E. NICHOLS	)	
	)	
VS.	)	W.C.C. 02-00854
	)	
R & D CONSTRUCTION CO., INC.	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. These two (2) matters were consolidated for trial and remain consolidated at the appellate level. W.C.C. No. 02-00854 is an employeeôs petition to review requesting the continuation of weekly benefits for partial incapacity beyond the limit of 312 weeks pursuant to R.I.G.L. § 28-33-18.3(a)(1). In the alternative, the employee alleges that he is totally disabled pursuant to R.I.G.L. § 28-33-17(b)(2), the so-called ñodd lot doctrine.ò After the filing of the petition, the employee amended his petition to further allege that R.I.G.L. § 28-33-18(d), which mandates the 312 week limit on the payment of partial incapacity benefits, is unconstitutional. The trial judge denied all three (3) allegations and the employee has claimed an appeal.

W.C.C. No. 03-04052 is also an employeeôs petition to review alleging that the employer has failed to pay weekly benefits for partial incapacity in accordance with an agreement that the employee had returned to suitable alternative employment as provided in R.I.G.L. § 28-33-18.2. In the alternative, the employee requests a ruling that his current employment is, in fact, suitable alternative employment. The trial judge denied this petition as well and the employee duly filed his claim of appeal.

The employee was injured on December 26, 1995 when he fell about fifteen (15) feet from a roof onto asphalt, landing on his back. The employer, R & D Construction, does renovations, builds additions and new homes, and installs roofs. Diane Nichols, the employeeôs wife, is the company president, and Robert Nichols, the injured employee, is the vice-president. According to the description contained in the Memorandum of Agreement issued on January 18, 1996, he sustained a fracture to the L1 disc of his spine which resulted in total incapacity from December 27, 1995 and continuing. On October 16, 1996, the employee signed a Mutual Agreement which modified his weekly benefits from total to partial incapacity as of July 28, 1996. On January 7, 1997, a Suspension Agreement was signed by the employee in which he agreed that the payment of weekly benefits shall be discontinued as of October 6, 1996.

On May 23, 1997, a second Memorandum of Agreement was issued indicating that the employee again became partially disabled as of January 13, 1997. Sometime in February of 1997, Mr. Nichols returned to work, but was apparently earning less than his average weekly wage; therefore, he continued to receive varying partial incapacity benefits. On January 23, 2002, Beacon Mutual Insurance Company (hereinafter ñBeaconò) notified the employee that his weekly benefits would cease on July 27, 2002 in accordance with R.I.G.L. § 28-33-18(d), which mandates a limit of 312 weeks on the payment of partial incapacity benefits. On February 5,

2002, the employee filed the petition in W.C.C. No. 02-00854 seeking the continuation of his weekly benefits.

While that petition was pending, a pretrial order was entered on November 8, 2002 in W.C.C. 02-06997, finding that Beacon had miscalculated the 312 week period and the notification of the termination of weekly benefits was premature. Subsequently, Beacon sent a revised notice on January 17, 2003 stating that the payment of weekly benefits would stop on July 17, 2003. On June 5, 2003, Diane Nichols, as the employer, and Robert Nichols, the employee, signed a Mutual Agreement prepared by Mr. Nicholsô attorney stating that the employee had accepted suitable alternative employment from January 13, 1997 to the present and continuing. Below this typewritten statement, Mrs. Nichols wrote in her own hand, ñreturned to work partial June of 1996 lower rate of pay different type of work.ò Pet. Ex. 17. One week later, on June 12, 2003, the employee filed the petition to review in W.C.C. No. 03-04052, alleging that Beacon failed to pay weekly benefits for partial incapacity in accordance with the Mutual Agreement indicating that he had accepted suitable alternative employment.

The employee testified that at the time of his injury he was a working foreman which involved supervising the other workers as well as actually doing roofing, framing, digging, shoveling and raking. He generally worked forty (40) hours a week and occasionally worked some overtime. He asserted that after his injury on December 26, 1995, he could no longer do roofing or heavy lifting and he had difficulty shoveling and raking and doing overhead work. The employee stated that if he has problems with his back, he will notify his wife, Diane, that he is leaving the job site early. Mrs. Nichols runs the business and sets the pay rates and also does some of the carpentry and other work on jobs. Mr. Nichols testified that he did not know how much he earns per week because Diane simply takes his check.

On cross-examination, the employee acknowledged that a much higher pay rate is applied for work on government construction projects as compared to normal residential work. At the time of his injury, he had been working on a government construction project for at least thirteen (13) weeks prior to the injury and, therefore, his average weekly wage was based upon those higher than normal wages. Mr. Nichols testified that he has not looked for any other type of work and has not attempted to be retrained for a different type of employment.

Diane Nichols, the employeeôs wife, testified that she is the president of R & D Construction which has been in business since 1987. She was unable to recall any of the circumstances surrounding the receipt and signing of the Mutual Agreement regarding suitable alternative employment.

Mrs. Nichols also testified by deposition on January 21, 2005, prior to her appearance in court. The deposition and attached exhibits were admitted into evidence during the trial. Mrs. Nichols explained at that time that her husband was injured while working on a prevailing wage rate job. The rate of pay for such jobs is set by federal regulations. At the time of the employeeôs injury, the hourly rate for the prevailing wage rate job was Twenty-seven and 47/100 ($27.47) Dollars per hour. His pay rate immediately preceding the start of that job was Fourteen and 00/100 ($14.00) Dollars per hour. When Mr. Nichols returned to work in June 1996 after his injury, Mrs. Nichols paid him Nine and 00/100 ($9.00) Dollars an hour. Sometime thereafter, the rate was increased to Eleven and 00/100 ($11.00) Dollars per hour.

Mrs. Nichols stated that the company no longer does roofing, but continues to do finish carpentry and framing, as well as more excavation and trucking.

The medical evidence presented in these matters consists of the records of Sturdy Memorial Hospital, the affidavit and reports of Dr. J. Frederick Harrington, the affidavit and

reports of Dr. John R. Parziale, and the affidavit and reports of Dr. H. David Mitcheson. The hospital records are from the date of the injury and reflect that the employee was transferred to Rhode Island Hospital for treatment.

Dr. Harrington, a neurosurgeon, performed a posterior fusion in January 1996 to address the L1 burst fracture the employee sustained when he fell from a roof and landed on his back. He underwent physical therapy for about two (2) months and was released to part-time work by Dr. Harrington in June 1996. In a report dated February 13, 1997, the doctor noted that the employee had been experiencing some pain in his back and had been working full-time doing heavy labor.

Dr. Parziale, a physiatrist, initially evaluated Mr. Nichols on June 12, 1996. On July 12, 1996, after the employee underwent a functional capacity evaluation at the Donley Center, the doctor released him to return to work with restrictions of no lifting above shoulder height, no working over shoulder height, and no lifting in excess of sixty (60) pounds. In early 1997, the doctorôs reports document a flare-up of back pain which was treated with an injection and rest. Thereafter, in May 1997, the doctor notes that Mr. Nichols is working on rooftops without any increase in back pain. Beginning in November 1997, Dr. Parziale saw the employee once a year. In a note dated December 6, 1999, the doctor indicates that Mr. Nichols has given up roofing, but continues to work as a general contractor. In 2001, the employee consulted Dr. Parziale due to shoulder complaints.

Dr. Mitcheson, a urologist, saw the employee about once a year since 1997 for some bladder problems which have not affected his ability to work as a foreman and carpenter.

Dr. Blazar, an orthopedic surgeon, evaluated the employee on May 4, 1999 at the request of the insurer. After a thorough examination and review of past medical records and testing, the

doctor concluded that Mr. Nichols should avoid activities requiring hyperextension of his lumbar spine and also repetitive or heavy lifting, bending, squatting, stooping, pushing, or pulling. Dr. Blazar indicated that the employee could continue to work in the construction field at the same level he has worked over the last several years.

In addition to the medical evidence, the employee presented the testimony and report of Edmond J. Calandra, a vocational rehabilitation consultant. Mr. Calandra met with the employee on June 19, 2002 at the request of his attorney and produced a vocational assessment report dated June 20, 2002. Mr. Nichols had recently undergone right shoulder surgery in April 2002, but had already started working about fifteen (15) to twenty (20) hours a week. The employee informed Mr. Calandra that he cannot do any heavy lifting or repetitive bending, squatting, stooping, pushing or pulling. In assessing the employeeôs physical capabilities, Mr. Calandra relied upon the employeeôs statements and a report of Dr. Blazar dated May 4, 1999 in which he stated that the employee could continue with his restricted activities in the construction business but would not be able to perform unrestricted activities.

Mr. Calandra testified that it was his understanding that the employee had been working in a limited functional capacity and for limited hours since he returned to work in 1996. He indicated that the employeeôs situation was unique in that his employer, who was his wife, accommodated his physical restrictions and any need he might have to take time off due to the effects of his injuries. Because such accommodations would not be available in the general labor market, Mr. Calandra opined that the employeeôs partial incapacity presented a material hindrance to his obtaining employment consistent with his restrictions. Furthermore, the witness stated that the partial disability resulting from the injury would prevent him from regaining his pre-injury earning capacity.

On cross-examination, Mr. Calandra indicated that he considered the employeeôs recent shoulder problems as a ñsecondary factor,ò although what impact it had on his opinions was not fully explained. He did testify that the employee was capable of working forty (40) hours per week. The witness related that he was unaware of a report of Dr. Blazar or any other physician stating that the employee could lift up to sixty (60) pounds on a regular basis. Mr. Calandra was aware that Mr. Nichols continued to do rough carpentry, which he assumed included roofing, after his injury. This type of work would be categorized as heavy.

The trial judge denied the employeeôs allegation that R.I.G.L. § 28-33-18(d) is unconstitutional, citing the decision of the Appellate Division in McQuaide v. Westerly Health Center (App. Div. 2000), which previously addressed the issue. In denying the contention that the employeeôs partial disability posed a material hindrance to obtaining employment suitable to his limitations, the trial judge pointed to Mr. Nicholsô continued employment since 1996, his wage records demonstrating a gradual increase in earnings, and medical reports of various physicians indicating he was performing heavy work and his back condition was relatively stable. She also rejected the opinions of Mr. Calandra because he did not review the medical reports of Drs. Harrington and Parziale. In light of the fact that the standard to establish total disability under R.I.G.L. § 28-33-17(b)(2) is more restrictive than proving material hindrance pursuant to R.I.G.L. § 28-33-18.3(a)(1), the trial judge also denied the employeeôs allegation of total disability.

The employeeôs second petition regarding suitable alternative employment was denied on the grounds that R.I.G.L. § 28-33-18(d) provides that ñin no caseò shall an employee receive benefits for partial disability in excess of 312 weeks. Consequently, a finding of suitable

alternative employment would not provide any protection from the termination of the employeeôs benefits.

The employee has appealed the trial judgeôs rulings in both cases. In reviewing the decision of the trial judge, the appellate panel is bound by the deferential standard of review set forth in R.I.G.L. § 28-35-28(b), which states that ñ[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous.ò If the panel concludes that the trial judge was clearly wrong, or misconceived or overlooked material evidence in arriving at her decision, the panel shall then undertake a *de novo* review of the evidence and render its own findings. In the present matters, we find no reason to disturb the findings and orders of the trial judge.

In W.C.C. No. 2003-04052, the employee has filed three (3) reasons of appeal alleging that the trial judge erred in concluding that the employee was subject to the 312 week limitation on the payment of partial incapacity benefits, even assuming that he was working in a suitable alternative employment position. Since the oral argument in this matter, the Rhode Island Supreme Court issued its decision in Mumma v. Cumberland Farms, Inc., 965 A.2d 437 (R.I. 2009), which is directly on point. The Court held that an employee is subject to the 312 week cap on the payment of partial incapacity benefits despite his/her employment in a job recognized as suitable alternative employment under the statute. Consequently, we see no need to discuss the appeal in this matter in any further detail.

In W.C.C. No. 2002-00854, the employee has filed four (4) reasons of appeal. Initially, he contends that R.I.G.L. § 28-33-18(d), the statute establishing the 312 week limit on the payment of partial incapacity benefits, is unconstitutional and the trial judge erred in not arriving at that conclusion. As noted by the trial judge, the Appellate Division has previously addressed

this constitutional argument in McQuaide v. Westerly Health Center, W.C.C. No. 99-03252 (App. Div. 2000) and found it to be without merit. We find it unnecessary to expand upon the reasoning expressed in that decision at this time.

In the second and third reasons of appeal, the employee makes general allegations that the trial judge erred in failing to find that he established his partial incapacity was a material hindrance to obtaining suitable employment under R.I.G.L. § 28-33-18.3 and that he qualifies for totally disability benefits pursuant to R.I.G.L. § 28-33-17(b)(2). These statements clearly lack the specificity required by R.I.G.L. § 28-35-28(a) and pertinent case law. *See* Falvey v. Women & Infants Hosp., 584 A.2d 417 (R.I. 1991); Bissonnette v. Federal Dairy Co., 472 A.2d 1223 (R.I. 1984). Consequently, they do not warrant consideration by the panel.

The remaining reason of appeal alleges a specific error on the part of the trial judge in that she rejected the opinions of Mr. Calandra in part because she believed that he did not review the reports of Dr. Harrington and Dr. Parziale. The testimony and report of Mr. Calandra reveal that he had available for his review the reports of University Rehabilitation, which were in fact authored by Dr. Parziale. Despite the fact that the trial judge overlooked this material evidence, our *de novo* review of the record leads us to the conclusion that the employee has not established that his partial disability poses a material hindrance to obtaining suitable employment within his physical limitations. As noted by the trial judge, the employeeôs work history, wage records and medical reports do not substantiate his contention.

Mr. Nichols was injured on December 26, 1995. A Suspension Agreement dated January 7, 1997 states that his benefits were discontinued on October 6, 1996, indicating that he had returned to work at his regular wages. Subsequently, a Memorandum of Agreement was issued stating that the employee was partially disabled as of January 13, 1997, when he experienced an

exacerbation of his back symptoms. Despite the assertions of both Mr. and Mrs. Nichols that Mr. Nichols never returned to roofing work, Dr. Harrington noted in his February 13, 1997 report that the employee had been working full-time doing heavy labor. In a report dated January 13, 1997, Dr. Parziale recorded in his history that the employee had been doing roofing and developed increased back pain. On May 12, 1997, the doctor wrote that after undergoing some injections in his back, the employee was back working on rooftops. Apparently, Mr. Nichols continued doing this type of work for several years, as Dr. Parziale finally noted on December 6, 1999 that he had given up work as a roofer. These statements, recorded in more than one (1) instance, clearly contradict the assertions of Mr. Nichols and his wife regarding his work activities.

Payroll records covering the period from 1991 to 2005 were introduced into evidence. Some of the records came in as a separate exhibit and others were admitted through the deposition of Mrs. Nichols. Prior to the employeeôs injury, his hourly rate was Twelve and 00/100 ($12.00) Dollars an hour and then increased to Fourteen and 00/100 ($14.00) Dollars. His hours varied at times but for the most part the records reflect forty (40) hours a week. In the last two (2) quarters of 1996, after returning to work, the employeeôs hours varied somewhat, but some of those hours were paid at the rate of Twenty-four and 97/100 ($24.97) Dollars an hour and some at Fourteen and 00/100 ($14.00) Dollars an hour, even in the same week. This obviously reflected that the business was working on a prevailing wage rate job as he had immediately prior to the injury.

In 1997, the records reveal the employee being paid at the higher rate for about eight (8) weeks and then at Fourteen and 00/100 ($14.00) Dollars an hour, which then dropped to Nine and 00/100 ($9.00) Dollars an hour for the last quarter. In 1998, Mr. Nichols appeared to be

working reduced hours but at a higher rate of pay ($17.03) for the first four (4) months and then returned to the lesser rate thereafter. Since 2000, the records reflect a fairly consistent work week of forty (40) hours, but at a rate of Nine and 00/100 ($9.00) Dollars an hour, which increased in 2002 to Eleven and 00/100 ($11.00) Dollars an hour.

Mr. Nichols acknowledged that he was unaware of what his hourly rate was or how much he earned each week because his wife took care of that end of the business. It is unclear whether the employeeôs pay was strictly based upon the hours worked and the type of work performed, or he was paid based upon the money coming into the family business. If the business was not obtaining jobs and generating income due to economic conditions, obviously the employee and his wife would be taking less money from the business. Mr. Calandra noted in his report dated June 20, 2002, that standard carpenter wages were Twenty and 00/100 ($20.00) Dollars an hour and up and higher for union members. When Mr. Nichols was working on a prevailing wage rate job after his injury he was earning anywhere from Seventeen and 00/100 ($17.00) Dollars to Twenty-five and 00/100 ($25.00) Dollars an hour. In light of these disparities, focusing solely on the employeeôs weekly earnings, as Mr. Nichols urges this panel to do, is an overly simplistic approach to determining whether his partial disability presents a material hindrance.

It is clear that Mr. Nichols is capable of working a forty (40) hour work week and, despite Mr. Calandraôs belief that the employee leaves work early when his back bothers him and takes longer breaks as needed, there is no evidence that this occurred on a regular basis. On the contrary, Dr. Parziale wrote in his two (2) most recent reports (December 6, 1999 and September 24, 2001), that Mr. Nichols reported minimal back symptoms with only mild pain every eight (8) to twelve (12) weeks and that his back symptoms were stable.

Mr. Calandra testified that he relied upon the statement of Dr. Blazar that the employee could continue his restricted activities but would never return to unrestricted duty, in determining the employeeøs physical capabilities. Consequently, he concluded that Mr. Nichols was only capable of functioning at a light duty level which requires lifting up to twenty (20) pounds occasionally. At one point in his testimony, however, he stated that it was his understanding that Mr. Nichols continued to do rough carpentry and even some roofing, which would be heavy work. *See* Tr. 76. He clearly overlooked the parameters of the ñrestricted activitiesò which were stated in the history section of Dr. Blazarøs May 4, 1999 report ï no overhead work and no lifting in excess of sixty (60) pounds. In summary, the foundation of Mr. Calandraøs assessment of the employeeøs physical capabilities is faulty and does not provide a credible or probative basis for his opinions.

In his testimony, Mr. Calandra also stated that he considered the fact that the employee had surgery on his right shoulder two (2) months prior to his evaluation as a ñsecondary factorò in his vocational assessment. However, the problem with the employeeøs right shoulder is not related in any way to the work injury and is therefore not to be considered in assessing whether the partial disability resulting from the work injury is a material hindrance to obtaining employment.

Based upon our review of the record, we find ample grounds for rejecting the opinions expressed by Mr. Calandra regarding the employeeøs vocational opportunities. We also reject the employeeøs argument that because he is not regularly earning wages equal to his established average weekly wage, he has proven that his partial disability is a material hindrance. Section 28-33-18.3 makes no reference to the inability to regain oneøs earning capacity as the standard to qualify for continued benefits beyond 312 weeks. The evidence reveals that Mr. Nichols has

minimal residual effects from his injury, he has been working forty (40) hours a week on a fairly consistent basis for years, and his earnings have fluctuated depending upon whether he works on a prevailing wage rate job and what his wife chooses to pay him. Based upon the record before the panel, we find that the employee has not established that his partial disability poses a material hindrance to obtaining suitable employment.

In W.C.C. No. 2002-00854, the employee also alleged that he should be deemed totally disabled pursuant to R.I.G.L. § 28-33-17(b)(2), the so-called ñodd lot doctrine.ò In order to qualify for total disability under that doctrine, the employee must prove that, taking into account his age, education, background, abilities, and training, he is unable, due to his work-related injury, to perform his regular job and any alternative employment. R.I.G.L. § 28-33-17(b)(2). As noted by the Rhode Island Supreme Court in Lombardo v. Atkinson-Kiewit, 746 A.2d 679 (R.I. 2000), this statute presents ñan even higher statutory hurdleò than the material hindrance criteria in R.I.G.L. § 28-33-18.3(a)(1). Id. at 689. In light of our conclusion that the employee has not satisfied even that lesser standard, we deny his allegation that he qualifies for total disability benefits under the statutory ñodd lotò standard.

Based upon the foregoing discussion, the employeeôs appeals are denied and dismissed and the decision and decrees of the trial judge are affirmed. In accordance with Rule 2.20 of the Rules of Practice of the Workersô Compensation Court, final decrees, copies of which are enclosed, shall be entered on

Connor and Hardman, JJ. concur.

ENTER:

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Olsson, J.

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Connor, J.

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Hardman, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERSôCOMPENSATION COURT
APPELLATE DIVISION

ROBERT E. NICHOLS)
)
VS.) W.C.C. 2002-00854
)
R & D CONSTRUCTION CO., INC.)

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 December 21, 2005 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

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Olsson, J.

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Connor, J.

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Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Gregory L. Boyer, Esq., Michael T. Wallor, Esq., and James T. Hornstein, Esq., on

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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

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