STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

CAROLYN B. BURNHAM	)	
	)	
VS.	)	W.C.C. 04-01070
	)	
HASBRO, INC.	)	
CAROLYN B. BURNHAM	)	
	)	
VS.	)	W.C.C. 99-06793
	)	
HASBRO, INC.	)	

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 in order to add the award of statutory interest on the payment of retroactive weekly benefits pursuant to R.I.G.L. § 28-35-12(c) in W.C.C. No. 99-06793.

These matters, along with several others, were consolidated before the trial court for hearing and decision. These two (2) cases remain consolidated before the Appellate Division for decision regarding the employee's appeals in both matters. After reviewing the pertinent portions of the record in these cases, we grant the employee's appeal in W.C.C. No. 99-06793

and vacate the trial judge's finding that the employee's condition had improved from total incapacity to partial incapacity as of April 1, 2004. As a result of our decision regarding that appeal, the trial judge's findings and orders in W.C.C. No. 04-01070 must be vacated as premature because the employee has not received partial incapacity benefits for 312 weeks.

The employee began receiving weekly benefits for partial incapacity on June 1, 1998 pursuant to a Memorandum of Agreement dated September 2, 1998. Her injuries were described as bilateral deQuervain's, carpal tunnel and lateral epicondylitis. Subsequently, the parties executed a Mutual Agreement which provided for a period of total incapacity from June 1, 1998 to September 1, 1998 and partial incapacity thereafter, as well as a modification to the description of the injury to include flexor tenosynovitis.

During the trial, the employee introduced five (5) depositions of medical experts, nine (9) affidavits of physicians with their records, three (3) sets of medical records of various providers, spreadsheets outlining the employee's treatment, as well as other documents for a total of twenty-seven (27) exhibits. The employer introduced three (3) additional depositions of medical experts. The only witnesses to testify before the court were Judith Drew, a vocational counselor, and the employee. Most pertinent to these appeals are the depositions of Dr. Randall L. Updegrove and Dr. John A. Froehlich.

The employee began working in the marketing department at Hasbro in March 1997 and shortly thereafter was promoted to marketing manager and then marketing director. Her job required her to work long hours and spend a lot of time at a computer, causing her to develop numbness and tingling in her right arm. She first sought treatment in April 1998 and continued to see many doctors over the next few years for ongoing pain in the right arm. The employee left

Hasbro due to the pain in June 1998. She attempted to return in 1999, but Hasbro was unable to accommodate her restrictions.

In 1999, the employee went back to school in New York, but her physical limitations prevented her from completing her studies. She moved to Massachusetts to be near her parents so that they could assist her with activities of daily living. She worked with a vocational counselor and a pain specialist in an effort to return to some type of employment. On September 18, 2004, the employee gave birth to her first child and faced many challenges in caring for her daughter. Her ability to lift was limited and she performed many child care duties on the floor, relying on the assistance of her husband and her parents.

The employee has not worked since she left Hasbro in 1998.

In his decision in W.C.C. No. 99-06793, the trial judge relied upon the evaluation of Dr. Updegrove, the court-appointed impartial medical examiner, in finding that the employee was totally disabled as of January 14, 2000. Dr. Updegrove opined that the employee was totally disabled each time he saw her between January 14, 2000 and April 18, 2001. The trial judge then relied upon the evaluation of Dr. Froehlich on April 1, 2004 in finding an end of total incapacity and a recovery to partial incapacity. He therefore concluded that the employee was totally disabled from January 14, 2000 to April 1, 2004 and partially disabled from April 1, 2004 and continuing. Regarding the petition requesting continuation of weekly benefits beyond 312 weeks, the trial judge found that the employee had not shown that her disability was a material hindrance to finding suitable employment. The employee appealed both of these decisions.

The Appellate Division's standard of review is narrowly delineated by statute. Section 28-35-28(b) of the Rhode Island General Laws states "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." *See also*

Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996). Although we cannot substitute our evaluation of the evidence for that of the trial judge, we can examine whether the expert opinions upon which he relied were competent.

The employee has put forth seven (7) reasons of appeal in the two (2) cases, raising essentially two (2) issues. She first argues that the trial judge erred in finding that her condition had improved from total to partial incapacity as of April 1, 2004. She contends that the opinion of Dr. Froehlich was not competent with regard to this issue because the doctor did not establish a change in her condition by comparing the results of his examination in April 2004 with the examination findings made by Dr. Updegrove in January 2000 when he found the employee to be totally disabled.

It is a well-established principle in workers' compensation law that in order to establish a change from total to partial incapacity, the employer must present comparative medical evidence establishing the improvement in the employee's condition since the date she was found totally disabled. *See* C.D. Burnes Co. v. Guilbault, 559 A.2d 637, 640 (R.I. 1989). The expert medical witness must be familiar with the employee's condition at the time she was deemed totally disabled and also familiar with the employee's condition at the time she was deemed partially disabled. Testimony which simply states the employee's current condition without any comparison or reference to her prior condition is not competent to prove a change in the degree of incapacity. *See* id. We cannot look at the reports and make our own comparison; rather it has to be done by the expert medical witness.

Both the Rhode Island Supreme Court and the Appellate Division have reiterated this standard on many occasions. *See* Costello v. Narragansett Electric Co., 623 A.2d 441, 444 (R.I. 1993) (citing Guilbault, 559 A.2d 637, 640) ("[C]omparative evidence has been required in

situations in which an employee alleges a recurrence of incapacity or an employer alleges a decrease in incapacity."); Siebe Norton, Inc. v. Merolli, 572 A.2d 288, 289 (R.I. 1990) (affirming that Guilbault provides the requirement of comparative evidence in cases alleging a decrease from total to partial incapacity); Turex, Inc. v. Fallon, W.C.C. No. 94-10404 (App. Div. 8/1/97) (explaining that an expert witness must give a comparative opinion for there to be a proper foundation for the conclusion that a condition has changed). Furthermore, the starting point of the comparison is specifically the date on which the employee was found totally disabled. Hart Corp. v. Lomberto, W.C.C. No. 93-12502 (App. Div. 11/14/94).

In the present matter, a thorough review of Dr. Froehlich's reports and deposition reveals that his testimony did not satisfy the requirement of comparative evidence needed to establish a change from total to partial incapacity. The doctor did not have firsthand knowledge of the employee's condition at the time she became totally disabled in January 2000. Neither attorney presented Dr. Froehlich with an appropriate hypothetical to compare the employee's condition on January 14, 2000 to her condition when he examined her four (4) years later. Although the doctor did review most, if not all, of the voluminous medical records regarding Ms. Burnham's treatment, he was never asked to compare physical findings or indicate how the employee's condition had improved. Therefore, the employer failed to present the required comparative medical testimony to establish a change from total to partial incapacity.

Based upon the foregoing, the employee's appeal in W.C.C. No. 99-06793 is granted because Dr. Froehlich did not provide any comparative evidence to establish a change in the employee's condition from total to partial incapacity. Consequently, the trial judge's finding that the employee became partially disabled as of April 1, 2004 is vacated.

In her appeal regarding W.C.C. No. 04-01070, the employee asserts that the trial judge erred in determining that her incapacity did not pose a material hindrance to obtaining employment because the issue became speculative once it was found that she was totally disabled for four (4) years of the 312 week period. As such, the issue of an extension of benefits beyond the 312 weeks could not be considered because, as a result of the decision in W.C.C. No. 99-06793, the employee should have been paid benefits for total incapacity, which period would not count towards the 312 week limitation on partial disability benefits. The statute is clear that any time for which the employee was receiving benefits for total incapacity is not to be included in the 312 weeks. R.I Gen. Laws § 28-33-18.3(a)(1).

In light of our finding in W.C.C. No. 99-06793 that the employee now remains totally disabled, the decree in the companion case, W.C.C. No. 04-01070, must be vacated because the employee has not received weekly benefits for partial incapacity for a period of 312 weeks and is not yet subject to having those benefits discontinued under R.I. Gen. Laws §§ 28-33-18(d) and 28-33-18.3. Therefore, the employee's appeal in that matter is granted and the decree shall be vacated.

In accordance with our decision, a new decree shall enter in W.C.C. No. 99-06793 containing the following findings and orders:

1. That the employee developed thoracic outlet syndrome arising out of and in the course of her employment with the respondent, Hasbro, Inc.

2. That the employee has established by a fair preponderance of the credible evidence that she became totally incapacitated on January 14, 2000 as a result of the work-related injuries she sustained on June 1, 1998.

It is, therefore, ordered:

1. That the employer shall pay to the employee weekly benefits for total incapacity beginning January 14, 2000 and continuing until further order of this court or agreement of the parties.

2. That the employer shall pay interest on the amount of benefits paid retroactively beginning April 2, 2004 to the date the payment is made in accordance with R.I.G.L. § 28-35-12(c).

3. That the employer shall be entitled to credit for all sums paid to the employee pursuant to the terms of the pretrial order, various interlocutory orders and the trial decree entered in this matter.

4. That the employer shall reimburse Gregory Boyer, Esq., for costs incurred to obtain the depositions of Dr. Randall Updegrove taken on January 26, 2001 and December 5, 2003, in the amount of Two Hundred Fifteen and 30/100 ($215.30) Dollars.

5. That the employer shall pay a counsel fee to Gregory Boyer, Esq., in the sum of Three Thousand Seven Hundred Fifty and 00/100 ($3,750.00) Dollars for services rendered at the trial level.

6. That the employer shall pay an expert witness fee in the amount of One Thousand Five Hundred and 00/100 ($1,500.00) Dollars to Dr. Edgar Ross, for his testimony by deposition in this matter.

7. That the employer shall reimburse Gregory Boyer, Esq., the sum of Two Hundred Sixty-seven and 65/100 ($267.65) Dollars for costs incurred in obtaining the deposition of Dr. Allen J. Togut.

8. That the employer shall reimburse Gregory Boyer, Esq., the sums of Three Hundred Ninety-seven and 50/100 ($397.50) Dollars for the cost of the trial transcript in this matter and Twenty-five and 00/100 ($25.00) Dollars for filing the claim of appeal.

9. That the employer shall pay a counsel fee to Gregory Boyer, Esq., attorney for the employee, in the amount of Three Thousand Five Hundred and 00/100 ($3,500.00) Dollars for services rendered at the appellate level.

In accordance with our decision regarding W.C.C. No. 04-01070, a new decree shall enter containing the following findings and orders:

1. That as a result of the decision and decree of the Appellate Division in W.C.C. No. 99-06793, the employee became totally disabled as of January 14, 2000 due to the effects of the work-related injury she sustained on June 1, 1998 and remains totally disabled.

2. That the employee has not received benefits for partial incapacity for three hundred and twelve (312) weeks.

3. That the employee's petition requesting continuation of weekly benefits beyond three hundred and twelve (312) weeks pursuant to R.I.G.L. §§ 28-33-18(d) and 28-33-18.3 is premature.

It is, therefore, ordered in W.C.C. No. 04-01070:

1. That the employee's petition to review is dismissed as premature.

In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, final decrees, copies of which are enclosed, shall be entered on

Connor and Ricci, JJ., concur.

ENTER:

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Olsson, J.

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Connor, J.

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Ricci, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
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CAROLYN B. BURNHAM	)	
	)	
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	)	
HASBRO, INC.	)	

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the appeal of the petitioner/employee. Upon consideration thereof, the appeal of the petitioner/employee is granted, and in accordance with the Decision of the Appellate Division, the following findings of fact are made:

1. That the employee developed thoracic outlet syndrome arising out of and in the course of her employment with the respondent, Hasbro, Inc.

2. That the employee has established by a fair preponderance of the credible evidence that she became totally incapacitated on January 14, 2000 as a result of the work-related injuries she sustained on June 1, 1998.

It is, therefore, ordered:

1. That the employer shall pay to the employee weekly benefits for total incapacity beginning January 14, 2000 and continuing until further order of this court or agreement of the parties.

2. That the employer shall pay interest on the amount of benefits paid retroactively beginning April 2, 2004 to the date the payment is made in accordance with R.I.G.L. § 28-35-12(c).

3. That the employer shall be entitled to credit for all sums paid to the employee pursuant to the terms of the pretrial order, various interlocutory orders and the trial decree entered in this matter.

4. That the employer shall reimburse Gregory Boyer, Esq., for costs incurred to obtain the depositions of Dr. Randall Updegrove taken on January 26, 2001 and December 5, 2003, in the amount of Two Hundred Fifteen and 30/100 ($215.30) Dollars.

5. That the employer shall pay a counsel fee to Gregory Boyer, Esq., in the sum of Three Thousand Seven Hundred Fifty and 00/100 ($3,750.00) Dollars for services rendered at the trial level.

6. That the employer shall pay an expert witness fee in the amount of One Thousand Five Hundred and 00/100 ($1,500.00) Dollars to Dr. Edgar Ross, for his testimony by deposition in this matter.

7. That the employer shall reimburse Gregory Boyer, Esq., the sum of Two Hundred Sixty-seven and 65/100 ($267.65) Dollars for costs incurred in obtaining the deposition of Dr. Allen J. Togut.

8. That the employer shall reimburse Gregory Boyer, Esq., the sums of Three Hundred Ninety-seven and 50/100 ($397.50) Dollars for the cost of the trial transcript in this matter and Twenty-five and 00/100 ($25.00) Dollars for filing the claim of appeal.

9. That the employer shall pay a counsel fee to Gregory Boyer, Esq., attorney for the employee, in the amount of Three Thousand Five Hundred and 00/100 ($3,500.00) Dollars for services rendered at the appellate level.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Connor, J.

_____
Ricci, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Gregory L. Boyer, Esq., and Hagop S. Jawharjian, Esq., on

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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
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VS.	)	W.C.C. 04-01070
	)	
HASBRO, INC.	)	

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the appeal of the petitioner/employee. Upon consideration thereof, the appeal of the petitioner/employee is granted, and in accordance with the Decision of the Appellate Division, the following findings of fact are made:

1. That as a result of the decision and decree of the Appellate Division in W.C.C. No. 99-06793, the employee became totally disabled as of January 14, 2000 due to the effects of the work-related injury she sustained on June 1, 1998 and remains totally disabled.

2. That the employee has not received benefits for partial incapacity for three hundred and twelve (312) weeks.

3. That the employee's petition requesting continuation of weekly benefits beyond three hundred and twelve (312) weeks pursuant to R.I.G.L. §§ 28-33-18(d) and 28-33-18.3 is premature.

It is, therefore, ordered:

1. That the employee's petition to review is dismissed as premature.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Connor, J.

_____
Ricci, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Gregory L. Boyer, Esq., and Hagop S. Jawharjian, Esq., on

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