STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

CITY OF PAWTUCKET	)	
	)	
VS.	)	W.C.C. 04-06055
	)	
MICHAEL PIMENTAL	)	
CITY OF PAWTUCKET	)	
	)	
VS.	)	W.C.C. 04-00460
	)	
MICHAEL PIMENTAL	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter came to be heard before the Appellate Division upon the appeals of the employee from a decision and decrees of the trial judge which found that the employee's condition had reached maximum medical improvement and implemented a reduction in weekly benefits pursuant to R.I.G.L. § 28-33-18(b) despite the fact that surgery had been recommended, but declined by the employee to date. After thorough review of the record and careful consideration of the arguments of the parties, we deny the employee's appeals in both cases.

The employee, who was twenty-eight (28) years old when these matters were initiated, sustained a work-related injury on March 22, 2001 while working as a sanitation engineer and

laborer for the employer. Beginning March 23, 2001, he was paid weekly benefits for partial incapacity pursuant to a Memorandum of Agreement dated June 20, 2001. He underwent surgery on his back by Dr. Samuel Greenblatt in December 2001. Pursuant to a decree entered in W.C.C. No. 02-03426, Mr. Pimental received weekly benefits for total incapacity from December 6, 2001 to October 8, 2002 and weekly benefits for partial incapacity from October 9, 2002 and continuing.

W.C.C. No. 04-00460, filed on January 20, 2004, is an employer's petition to review alleging that the employee's condition has reached maximum medical improvement as defined in R.I.G.L § 28-29-2(8). On August 3, 2004, the trial judge entered a pretrial order finding that the employee's condition had reached maximum medical improvement and the employee timely filed a claim for trial. While that matter was pending, the employer filed a second petition to review on September 13, 2004, W.C.C. No. 04-06055, seeking to reduce the employee's weekly benefits to seventy (70%) percent of his weekly compensation rate in accordance with R.I.G.L. § 28-33-18(b). On October 7, 2004, the trial judge entered a pretrial order modifying the employee's benefits to seventy (70%) percent pursuant to the statute, but postponing the effective date of the reduction until March 1, 2005. The employee filed a claim for trial from this order as well.

On March 2, 2005, the employee filed a motion to dismiss the petition in W.C.C. No. 04-06055, alleging that it was prematurely filed by the employer because the finding of maximum medical improvement on which it was predicated had not yet been finally adjudicated at the trial level. The trial judge denied the motion and the matters were consolidated for trial.

The employee testified that he felt worse after the surgery by Dr. Greenblatt. An MRI done in March 2002 indicated that he had residual or recurrent disc material at the level of the

operation which may be causing his ongoing symptoms. Er's Exh. 5, report 10/9/02. Further surgery has been discussed with the employee since that time, but he has declined to undergo another operation. He testified that he was reluctant to have another operation considering how extensive the surgery would be and the lack of any assurance that it would significantly improve his condition. His medical treatment currently consists of visits to his primary care physician and taking Vicodin about three (3) times a day for pain. Mr. Pimental stated that he did not feel that he was capable of any type of employment and had not attempted to find any other employment. He is currently receiving Social Security Disability Insurance benefits.

Dr. James E. McLennan, a neurosurgeon, examined the employee on October 9, 2002 and December 10, 2003, at the request of the insurer. He testified in his deposition that the employee's condition was basically unchanged at the 2003 examination and he considered the employee to be only "mildly disabled." Er's Exh. 5, report 12/10/03. The doctor stated that if the employee did not undergo the proposed second surgery, then his condition had reached maximum medical improvement. Dr. McLennan indicated that if the disc material was still there and was responsible for the employee's complaints of low back and left leg pain, then removal of that material should improve his condition. However, he obviously could not guarantee the outcome of the surgery.

The employee submitted the report of Dr. Mark A. Palumbo whom he saw for a consultation on April 7, 2004. After examining the employee and reviewing a recent MRI of the lumbar spine done in March 2004, the doctor discussed the possibility of further surgery. He indicated the recommended operation would likely be an "anterior lumbar interbody fusion at the L5/S1 segment followed by a staged limited posterior lumbar decompression on the left side of the mid-line." Ee's Exh. 5, p. 4. In addition, an aggressive foraminotomy would be necessary.

Id. Dr. Palumbo advised the employee that the surgery would likely provide only partial relief of his chronic complaints. The doctor did not address the issue of maximum medical improvement.

In W.C.C. No. 04-00460, the trial judge, relying upon the testimony of Dr. McLennan, found that the employee's condition had reached maximum medical improvement and affirmed his pretrial order of August 3, 2004. With regard to the employer's request to reduce benefits in W.C.C. No. 04-06055, the trial judge noted that the employee has not made any effort to seek employment. Consequently, he concluded that delaying the implementation of the reduction until March 1, 2005 was more than fair and he affirmed his pretrial order in that matter as well. The employee claimed an appeal from both of these determinations.

Our review of the conclusions arrived at by the trial judge is very narrow. Section 28-35-28(b) of the Rhode Island General Laws provides that the findings of fact made by a trial judge shall be final unless the appellate panel determines that they are clearly erroneous. On appeal, we are precluded from conducting a *de novo* review of the record and rendering our own view of the evidence absent an initial finding that the trial judge was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). With this standard of review as our guide, we will consider the five (5) reasons of appeal filed by the employee.

In the employee's first three (3) reasons of appeal he argues that the trial judge committed clear error in finding that the employee's condition had reached maximum medical improvement (hereinafter "MMI") when the medical evidence established that a second surgery had been proposed which could improve his condition, despite the fact that the employee declined to undergo the surgery. Counsel urges this panel to reconsider the decision rendered in Robin Rug v. Manteiga, W.C.C. No. 93-04363 (App. Div. 8/16/94), in which the Appellate Division concluded that a finding of MMI can be made when an employee, after a reasonable

period of time to consider his decision, declines to undergo surgery which may improve his condition. After reviewing the decision in Robin Rug and carefully considering the circumstances of the present matter, we stand firm in our support of the conclusions reached in our previous decision and by the trial judge in the present matter.

The definition of maximum medical improvement is set out in R.I.G.L. § 28-29-2(8):

> "'Maximum medical improvement' means a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to materially improve the condition. Neither the need for future medical maintenance nor the possibility of improvement or deterioration resulting from the passage of time and not from the ordinary course of the disabling condition, nor the continuation of a pre-existing condition precludes a finding of maximum medical improvement."

In the first reason of appeal, the employee contends that his condition has not reached MMI because additional diagnostic testing and surgery has been recommended by Dr. McLennan and Dr. Palumbo. Dr. McLennan saw the employee on October 9, 2002 and then over a year later on December 10, 2003. The doctor noted that nothing had really changed between the two (2) examinations. Discussion regarding a second surgery had begun by at least the middle of 2002 after an MRI revealed a recurrent or residual herniated disc. However, the employee had postponed any decision on having the surgery and was simply following up periodically with his primary care physician and receiving pain medication.

In light of this apparent impasse, Dr. McLennan suggested that another MRI study be done to determine if there were any changes since the last study in March 2002 which might impact the recommendation for surgery. Er's Exh. 5, p. 13. The doctor mentioned also that an EMG could possibly be done as well to determine the extent of any nerve damage. However, he did state that the employee first needs to commit to having a second surgery if it is offered to

him, and then the additional MRI should be done to confirm what is causing his left leg pain. Id. at 14-15. In fact, the employee apparently underwent a subsequent MRI after seeing Dr. McLennan. In his report dated April 7, 2004, Dr. Palumbo refers to the results of an MRI dated March 2004. Dr. Palumbo explained the nature of the operation he could perform, as well as non-operative alternatives for management of the employee's chronic pain complaints. Ee's Exh. 2, p. 3-4. Ultimately, the employee testified that he did not want to undergo the surgery proposed by Dr. Palumbo.

It is true that Dr. McLennan testified that if the recurrent disc was the cause of the employee's left leg pain and the employee underwent surgery to remove the disc, his condition would likely improve. However, the employee clearly declined to undergo any additional operation and has not indicated any inclination to participate in any other form of treatment. Neither Dr. McLennan nor Dr. Palumbo indicated that there was any other form of treatment that would materially improve Mr. Pimental's situation. As noted by Dr. McLennan, there has been no active treatment and no significant change in the employee's condition for almost two (2) years. Consequently, there is no further treatment that "is reasonably expected to materially improve" his condition and his condition has reached MMI. R.I.G.L. § 28-29-2(8).

We would point out that, contrary to the employee's assertion in his memorandum, the trial judge did take note of Dr. Palumbo's explanation of the surgery he proposed as well as his statement that there were other non-surgical treatment options to attempt to address Mr. Pimental's ongoing pain complaints. *See* Trial Dec. pp. 4-5. The doctor did not state in his report that these other non-surgical courses of treatment would "materially improve" the employee's condition. Furthermore, Dr. Palumbo was not particularly optimistic about the outcome of the proposed surgery, stating that Mr. Pimental needed "to have very realistic

expectations" and that the surgery "would likely provide him with only partial relief of his long term symptomatology." Ee's Exh. 2, p. 4.

The Appellate Division has previously held that the fact that a surgical procedure, which the employee has declined to undergo, may improve the employee's condition does not preclude a finding of MMI. Providence College v. Gemma, W.C.C. No. 95-01493 (App. Div. 8/19/96); Robin Rug v. Manteiga, W.C.C. No. 93-04363 (App. Div. 8/16/94). Dr. McLennan testified that in the absence of surgery, Mr. Pimental's condition is not expected to change significantly and has reached maximum medical improvement. Dr. Palumbo never commented on the question of maximum medical improvement. Mr. Pimental, after weighing the decision for more than a year, decided that he does not want to undergo a second operation on his back. Therefore, his physical impairment resulting from the work injury has reached a plateau and is stable. In reliance on the medical opinion expressed by Dr. McLennan and the clearly stated decision of the employee not to have further surgery, the trial judge found that his medical condition was at MMI. This determination is well-supported by the record in this matter and the relevant case law.

In his second and third reasons of appeal, the employee urges the Appellate Division to revisit and reverse its holding in Robin Rug v. Manteiga, W.C.C. No. 93-04363 (App. Div. 8/16/94) because the employee is placed in the position of choosing between subjecting himself to a surgical procedure or suffering a thirty percent (30%) reduction in his weekly benefits and the statutory definition of MMI does not apply to a surgical candidate, regardless of whether he has refused the surgery. We find neither of these arguments to be persuasive and decline to reverse the position adopted in Robin Rug.

The employee erroneously argues that the employee is put in the untenable position of

unwillingly undergoing a risky surgical procedure or accepting a reduction in his benefits. This is simply not the case. A finding of MMI pursuant to R.I.G.L. § 28-29-2(8), in and of itself, has no impact whatsoever upon the amount of benefits received by the employee. If the employee is partially disabled, it does trigger the employee's obligation to seek alternative employment suitable to his limitations. *See* K-Mart v. Whitney, 710 A.2d 667 (R.I. 1998). However, if the injured worker is totally disabled and at MMI, the obligation to look for work would not be triggered.

In the present matter, Mr. Pimental has decided that he does not wish to undergo a second surgery and has therefore chosen to live with the present status of his condition. He has previously been found to be partially disabled. (In fact, Dr. McLennan noted in his last report that he is only "mildly disabled.") As in the case of any other injured worker whose condition has stabilized and is not expected to materially improve, he is deemed to be at MMI and is obligated to seek work consistent with what are essentially his permanent physical restrictions. If an employee simply sits back and chooses not to attempt to find alternative work, then he will be subject to the provisions of R.I.G.L. § 28-33-18(b) which permit the reduction in weekly benefits to seventy percent (70%) of his weekly compensation rate. The employee's suggestion that the finding of MMI automatically leads to the reduction in weekly benefits is obviously not accurate.

To adopt the employee's position that a surgical candidate can never be found to have reached MMI, would create a special protected class of injured workers who, by their own decisions not to have the surgery, can remove themselves from certain provisions of the Workers' Compensation Act. We do not believe that this was the intention of the Legislature. In attempting to apply the MMI definition in a reasoned and rational manner, we conclude that the

fact that Mr. Pimental has decided against undergoing the proposed surgical procedure, effectively means that there is no further treatment that is reasonable expected to materially improve his condition. As such, the finding of MMI is appropriate.

The fourth and fifth reasons of appeal involve the second matter, W.C.C. No. 04-06055. The employee alleges that the trial judge was clearly wrong when he failed to dismiss the employer's petition seeking to reduce the employee's weekly benefits pursuant to R.I.G.L. § 28-33-18(b) when the issue whether the employee's condition had reached maximum medical improvement had not yet been fully and finally adjudicated by the court. We find no merit in this argument.

The finding of maximum medical improvement is a condition precedent to seeking the reduction in weekly benefits pursuant to R.I.G.L. § 28-33-18(b). The employee attempts to argue that because he claimed a trial *de novo* from the pretrial order containing the MMI finding, it has no force and effect and cannot be utilized as the basis for the second petition seeking the reduction. However, his contention is contrary to the provisions of the statute.

The pretrial conference procedure is set forth in R.I.G.L. § 28-35-20. Subsection (c) states that the pretrial order is effective upon entry, regardless of whether one of the parties files a claim for a trial. Therefore, the finding of MMI was binding upon the employee and the employer even though a full trial on the merits was pending. Furthermore, the statute anticipated that subsequent petitions may be filed while a trial is ongoing. Unlike a personal injury civil suit arising from a motor vehicle accident, a workers' compensation matter is a continuous process. Numerous issues and disputes may arise from the date of the work-related injury until the point when the employee recovers or at least regains his earning capacity. Section 28-35-20(e) of the pretrial conference statute provides that any subsequent case or dispute involving the same

parties that arises during the pendency of the trial on a previous matter shall be referred immediately to the same judge hearing that trial.

The clear language of the statute reflects the intention of the legislature that any matter that arises involving the same parties shall be promptly addressed by the trial judge who is already involved in the litigation between the parties. To preclude the filing of a subsequent petition on a new issue while a trial on a previously filed petition is pending would thwart the purpose of the pretrial procedure in providing prompt relief whenever possible to both parties. Consequently, we find no merit in the argument presented by the employee in support of his contention that the second petition should have been dismissed.

Based upon the foregoing discussion, we deny and dismiss the employee's appeals in both matters and affirm the decision and decrees of the trial judge. 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

Sowa and Hardman, JJ. concur.

ENTER:

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Olsson, J.

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Sowa, J.

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Hardman, J.

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APPELLATE DIVISION

CITY OF PAWTUCKET)
)
VS.) W.C.C. 04-00460
)
MICHAEL PIMENTAL)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the respondent/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 May 4, 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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Sowa, J.

_____
Hardman, J.

I hereby certify that copies of the within Decision and Final Decree of the Appellate Division were mailed to Albert J. Lepore, Jr., Esq., and Francis T. Connor, Esq., on

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