STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
LINDA ANDERSON	)	
	)	
VS.	)	W.C.C. 05-05778
	)	
WAL MART STORES, INC.	)	
LINDA J. ANDERSON	)	
	)	
VS.	)	W.C.C. 04-04042
	)	
WALMART STORES, INC.	)	
WAL-MART STORES, INC.	)	
	)	
VS.	)	W.C.C. 04-04024
	)	
LINDA ANDERSON	)	
WAL-MART SOTRES, INC.	)	
	)	
VS.	)	W.C.C. 03-07047
	)	
LINDA ANDERSON	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter came to be heard at oral argument before the Appellate Division on the petitioner/employee's appeals from the adverse decision and decrees of the trial court entered on February 27, 2006. The four (4) petitions were consolidated for trial and remain consolidated at the appellate level. The employee alleges error in the setting of earning capacities based upon her refusal of two (2) offers of suitable alternative employment. The second earning capacity exceeded her pre-injury average weekly wage exclusive of overtime pay. In addition, the employee contends that the trial judge was clearly wrong to deny her petition to establish that she developed left wrist deQuervain's stenosis, left thumb stenosing tenosynovitis, and bilateral cubital tunnel syndrome as a result of the effects of the original injury to her right wrist on August 20, 2002. We have carefully reviewed the employee's arguments in conjunction with the record in these matters and we find no error on the part of the trial judge.

Initially, we would note that the employee filed a claim of appeal in W.C.C. No. 04-04042, one (1) of the four (4) consolidated petitions. This was an employee's petition to review requesting that the court classify the employee as totally disabled pursuant to R.I.G.L. § 28-33-17(b)(2), the statutory codification of the so-called "odd lot" doctrine. The trial judge denied this petition at the pretrial conference and again after the trial. The reasons of appeal filed by the employee do not raise any issue with regard to the trial judge's denial of this petition and counsel for the employee conceded at oral argument that the employee is not challenging the decree denying this petition. Therefore, we will enter a decree affirming the trial judge's decision and decree regarding W.C.C. No. 04-04042.

Pursuant to a pretrial order entered in W.C.C. No. 02-07576 on November 21, 2002, the employee began receiving weekly benefits for partial incapacity on September 20, 2002 for right

wrist deQuervain's tenosynovitis which she developed at work on August 20, 2002. She began treating with Dr. John Golberg on October 1, 2002. Medication, splinting, and therapy were prescribed. Despite some initial improvement, Ms. Anderson eventually underwent surgery on her right wrist, a release of the first dorsal compartment, on March 24, 2003. She experienced significant pain in the area of the scar after surgery. Despite her complaints, Dr. Golberg apparently believed that she was capable of returning to some form of employment. The employee disagreed with his assessment and switched her care to Dr. Sean M. Griggs as of July 22, 2003.

The employee testified in court as well as by deposition, which was admitted as a joint exhibit at the request of the parties. She began working for Wal Mart in 2001 as a customer service representative in the jewelry department. This position involved showing jewelry to customers, ordering rings, sizing customers' fingers, sending rings out to be sized, selling jewelry, using the cash register, and stocking the jewelry counters. She worked twenty-eight (28) hours a week. Around December 2001, Ms. Anderson began working as the fabrics and crafts department manager. In this position she worked forty (40) hours a week. She was the only person in the department during her shift and was responsible for waiting on customers, stocking the shelves, ordering and pricing products using a small computerized device, cutting fabric for customers, and scheduling one (1) full-time employee who worked at night in the department, and one (1) part-time employee who covered other odd shifts.

Ms. Anderson testified that she obtained her certificate as a Licensed Practical Nurse in 1967 and held various jobs in the nursing field until sometime in 2000, about six (6) months before she began working for Wal Mart. She indicated that she left the nursing field because she was "burnt out" and subsequently allowed her certification to lapse.

In a letter dated July 3, 2003, Wal Mart offered the employee a full-time job as a Garden Center exit greeter, which it classified as an offer of suitable alternative employment. The position involved greeting customers at the entrance to the Garden Center, providing carts to customers, frequently lifting and deactivating items weighing up to ten (10) pounds, frequently deactivating and recording missing items with certain tools, and picking up small items. The pay rate was Seven and 00/100 ($7.00) Dollars an hour and the employee would be provided with a schedule of forty (40) hours a week.

Ms. Anderson accepted the job, but left the position after working four and one-half (4 ½) days. She testified that she was in so much pain she went directly to the emergency room. She did not return to work. She began her treatment with Dr. Griggs on July 22, 2003 for complaints of pain and numbness along the back of her right thumb and similar pain in the left thumb. The employee advised Dr. Griggs that she first noted discomfort in the left thumb while driving home from court in November 2002.

Dr. Griggs treated the right and left thumb problems with injections, splinting, and therapy. The employee noted improvement in her symptoms and the doctor released her to light duty work as of September 19, 2003. After reviewing the description of the Garden Center exit greeter position at Wal Mart, Dr. Griggs wrote a letter to the employee's attorney stating that the employee could return to this job so long as the lifting and deactivating items was intermittent. Sometime in the end of September 2003, Ms. Anderson returned to work at Wal Mart as an exit greeter. Again, she did not last very long. In his office noted dated October 17, 2003, Dr. Griggs recorded her comments:

> "In regards to work, she was given a release to return to a light duty position. She states that she could not tolerate this because of not really doing anything productive while at work. She apparently is not doing this job anymore. It does not sound as if

> this was an issue with her hand problems." Jt. Exh. B, att. report 10/19/03.

The employee also acknowledged in her testimony that she was physically capable of performing the job of a Garden Center exit greeter, but mentally she was unable to tolerate it because she found it extremely boring. Tr. p. 68.

On October 22, 2003, the employer filed a petition to review, W.C.C. No. 03-07047, requesting that the court establish an earnings capacity based upon the refusal of the employee to perform the suitable alternative employment position of an exit greeter. At the pretrial conference, the petition was granted and a pretrial order entered establishing an earnings capacity of Two Hundred Eighty and 00/100 ($280.00) Dollars per week. The employee claimed a trial. We would note that in accordance with a wage statement submitted by the employer, the employee's average weekly wage including overtime is Four Hundred Thirty-one and 95/100 ($431.95) Dollars, and without overtime it is Three Hundred Ninety-two and 22/100 ($392.22) Dollars.

In a letter dated May 3, 2004, Wal Mart again offered the employee suitable alternative employment as a Garden Center exit greeter, the same position previously offered. However, the letter indicated that she would receive Nine and 88/100 ($9.88) Dollars an hour for a forty (40) hour work week, equivalent to a gross weekly pay of Three Hundred Ninety-five and 20/100 ($395.20) Dollars. Ms. Anderson did not accept this offer of employment. On June 14, 2004, the employer filed a petition to review, W.C.C. No. 04-04024, requesting that the court set an earnings capacity of Three Hundred Ninety-five and 20/100 ($395.20) Dollars based upon the employee's refusal of suitable alternative employment in accordance with R.I.G.L. § 28-33-18.2(c). The petition was granted at the pretrial conference and the trial judge affirmed the setting of the earnings capacity after trial as well. The employee then claimed an appeal.

While the two (2) aforementioned matters were pending at the trial level, the employee filed an original petition alleging that she developed left wrist deQuervain's stenosis, left thumb stenosing tenosynovitis, and bilateral carpal tunnel syndrome from overuse of her left extremity as a result of the work-related injury to her right wrist and thumb. The petition alleged that she became disabled due to this condition on July 18, 2003. The petition was denied at the pretrial conference and the matter was consolidated for trial with the pending petitions. The trial judge denied the petition after trial after finding that the testimony of Dr. Griggs regarding the cause of the left wrist and thumb problems was equivocal and lacking in foundation. The employee duly filed a claim of appeal from that decree.

In addition to the employee's testimony and the deposition of Dr. Griggs, the record also includes the testimony and reports of two (2) vocational rehabilitation counselors, Albert J. Sabella and Michael LaRaia. Mr. Sabella testified that, based upon his evaluation of the employee's physical restrictions as set forth in the various medical reports he reviewed, her education and training, her transferable skills, her age, and her three (3) year absence from the workforce, Ms. Anderson was unemployable in the general labor market. He also went to Wal Mart and observed an exit greeter at the main store entrance for about twenty (20) minutes. He concluded that the job was not appropriate for Ms. Anderson because it required prolonged standing which she was unable to do because of a pre-existing low back problem; it required lifting and manipulating items from a carriage which she could not do because of the problem with her hands; and it was an unskilled job which was not commensurate with her previous employment in skilled positions as an LPN and as a department manager. Tr. p. 32.

Mr. LaRaia arrived at a very different opinion as to Ms. Anderson's employability. He conducted a vocational assessment of the employee, produced a labor market survey, and

identified a number of employment options that would be suitable for Ms. Anderson based on her age, education, background and abilities. Tr. pp. 144-145. He testified that the exit greeter was a suitable position for the employee because it incorporates many of her skills, particularly in customer service, and is in the retail industry which the employee had been working in most recently.

In conformity with the standard set forth in R.I.G.L § 28-35-28(b), the Appellate Division must strictly adhere to the trial judge's findings on factual matters absent clear error. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). The Appellate Division is authorized to conduct a *de novo* review only after a specific finding is made that the trial judge was clearly wrong. Id. (citing R.I.G.L. § 28-35-28(b); Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986)). If the record before the Appellate Division exhibits evidence sufficient to support the trial judge's findings, the decision must stand. With this standard as our guide, we have carefully reviewed the entire record from this proceeding and thoughtfully considered the arguments of the parties. For the following reasons, we find no merit in the employee's appeals and, accordingly, we affirm the trial judge's decision and decrees.

The employee has filed three (3) reasons of appeal. In her first reason of appeal, the employee alleges that the trial judge erred in failing to find that she developed deQuervain's tenosynovitis on the left due to overuse of her left hand after the work-related injury and subsequent surgery on her right hand. She contends that the uncontradicted testimony of Dr. Griggs and her own testimony support this conclusion.

The employee testified that she first noted symptoms in her left thumb and wrist while she was driving home after appearing in court in November 2002. She indicated that she utilized her left hand more in doing tasks because she was wearing a splint on her right hand. Tr. p. 40.

However, the history recorded by Dr. Griggs at his initial visit on July 22, 2003, only mentions the driving from the courthouse triggering the symptoms. During the doctor's deposition, counsel for the employee posed a hypothetical to the doctor in order to elicit his opinion on the cause of the left deQuervain's tenosynovitis.

> "Q. Doctor, I'm going to pose a hypothetical question to you: Doctor, I want you to consider the fact that Ms. Anderson was only approved for her Workers' Compensation on the right side. The left side had never been made part of her work-related injury. I want you to further consider whether the activities as a result of her right-sided work-related injury affected her left hand. Could you state what you feel the cause of her left-sided tenosynovitis and deQuervain's?"
>
> "A. Basically, the only thing I have to really go on is the patient's history which she describes having developed left thumb pain due to driving back and forth to court. Typically, if somebody has pain in one hand, they will use the other hand more often; and you know, could that have caused her problems? It's not a typical cause of de Quervain's; but if just in day-to-day activity of using her left hand, she could have had increased use of that thumb and could have development of pain from that."

Jt. Exh. B, pp. 12-13.

Further questioning did not provide a more definitive answer.

> "Q. Doctor, would it be fair to state that the difficulties that Ms. Anderson suffered with her left hand flowed from the injury to her right hand?"
>
> "A. Having not seen her initially, and only going on her history of her pain occurring after she was out of work and going to her court dates, you know, based on that history, you would think it was related to at least her driving to court but not related to using her hand in a work capacity."

Id. at pp. 14-15.

Dr. Griggs acknowledged that he had no information as to what type of activities the employee was doing with her left hand or the frequency of those activities. He had no idea how

often the employee went to court or how long the trip was to get there. The "hypothetical" question posed to the doctor did not provide any details as to the employee's activities using her left hand which would provide the foundation for an expert opinion regarding causation. In his response, Dr. Griggs stated that overuse of the uninjured hand in a situation like this would not typically cause deQuervain's tenosynovitis. His statement that the employee could have used her left thumb more in daily activities because the right thumb was injured and, as a result, could have developed pain in the left thumb clearly lacked the degree of certainty necessary to support an expert opinion regarding the cause of the condition. It is well-established that when offering testimony as to causal relationship, a medical expert must state his opinion in terms of "probabilities," rather than "possibilities." Hicks v. Vennerbeck & Clase Co., 525 A.2d 37, 42 (R.I. 1987). The "catch-all" question and response at the end of Dr. Griggs' direct examination stating that all of his opinions were rendered to a reasonable degree of medical certainty is not sufficient to overcome the lack of foundation and equivocation in his statements.

The employee contends that her own testimony that she utilized her left hand more frequently to perform daily activities after the injury to her right hand is sufficient to establish the causal connection. However, the use of lay testimony to prove causal relationship is recognized in only very limited circumstances.

> ". . . when a physical injury appears reasonably soon after an accident with symptoms observable to the ordinary person in that part of the body where force was applied, a natural inference arises, in the absence of credible testimony to the contrary, that the injury resulted from the employment."

Id. at 42; *see* Valente v. Bourne Mills, 77 R.I. 274, 279, 75 A.2d 191, 194 (1950). Generally, the question of causal relationship is not so clear cut and requires resolution through the presentation of expert medical testimony. Hicks, 525 A.2d at 42; Valente, 77 R.I. at 278-279, 75 A.2d at 194.

In the present matter, the "injury" was not the result of any observable trauma or accident causing immediate and obvious symptoms. On the contrary, the allegation that the left-sided deQuervain's tenosynovitis was caused by overuse as a result of compensating for the injured right hand is a sufficiently complex issue as to require expert testimony.

The medical testimony presented by the employee was equivocal and lacking in adequate foundation. We find no error on the part of the trial judge in concluding that the evidence was insufficient to establish that the employee developed problems with her left thumb and wrist due to the effects of the work-related injury she sustained to her right hand.

In her second reason of appeal, the employee argues that the position of exit greeter did not satisfy the criteria for suitable alternative employment because it did not bear a reasonable relationship to her qualifications, background, education and training. The employee contends that the job was "trifling work" and was not the type of position available in the general job market. However, the record reveals the exact opposite.

Suitable alternative employment is defined as follows:

> " 'Suitable alternative employment' means employment or an actual offer of employment which the employee is physically able to perform and will not exacerbate the employee's health condition and which bears a reasonable relationship to the employee's qualifications, background, education, and training. The employee's age alone shall not be considered in determining the suitableness of the alternative employment."

R.I.G.L. § 28-29-2(10). The employee testified that she was physically capable of performing the position of exit greeter and Dr. Griggs indicated that Ms. Anderson's hand problems were not the reason she would not do the job.

The employee focuses on the concern that the position of exit greeter is not commensurate with the skill level required in her previous positions as department manager and

licensed practical nurse, nor did it involve any supervisory or managerial duties. We find this argument to be without merit.

Ms. Anderson ceased working as a licensed practical nurse about six (6) months before beginning employment at Wal Mart because, by her own admission, she was "burnt out." She had no desire to return to the field of nursing. Instead, she opted to take a job at Wal Mart as a salesperson in the jewelry department. Obviously, this job required less skill and no managerial or supervisory duties. This position involved retail sales, customer service, and stocking. After about six (6) months, she was promoted to manager of the fabrics and crafts department. Although her attorney makes much ado about the supervisory and managerial duties required of this position, the employee significantly downplayed her role as a "manager."

In her deposition, which was introduced into evidence jointly by the parties, the following exchange took place on cross-examination:

> "Q. Was there anybody in you department that you supervised?
>
> "A. Well, they called me a department manager. There was one other girl that worked in the evenings five days a week. There was a part-time girl who was still in high school that worked covering other odd shifts."

Jt. Exh. A, p. 8. She testified that during her shift, she was the only person in the department. Consequently, she did not directly supervise anyone. Her only supervisory/managerial duties were to produce the work schedule for the other two (2) employees of the department and to complete a portion of their performance review form. She did stay busy most of the day with stocking, ordering, making price changes, and waiting on customers. However, by the employee's own admission, her supervisory/managerial duties were minimal.

The position of exit greeter did not entail the variety of tasks performed in her previous positions, but it was in the same retail sales setting and involved customer service, which was the

primary duty in her prior jobs at Wal Mart. The job as an exit greeter was not specifically designed solely for Ms. Anderson. On the contrary, exit greeters are employed at various locations at Wal Mart, and the two (2) vocational rehabilitation counselors observed other individuals performing these jobs. Unfortunately, Ms. Anderson found the job as an exit greeter boring and left the position of her own volition. The mere fact that she was not as busy with a variety of tasks as she had been in her former positions does not dictate a finding that the position is not suitable alternative employment. As noted above, the job bore many of the primary characteristics of her previous positions with Wal Mart. We agree with the trial judge that the position satisfies the statutory criteria for suitable alternative employment, despite the fact that Ms. Anderson personally found that it was not suited to her disposition.

Finally, the employee argues that the employer should be barred from establishing a second and higher earnings capacity based upon her refusal of the offer of the same position as exit greeter at a higher wage than previously offered. She contends that the first offer established the market wage for the position of exit greeter and there was no evidence that such a position was readily available in the general job market at the higher wage. We find no merit in this argument.

The second offer of suitable alternative employment, which is the subject of W.C.C. No. 04-04024, was made to the employee in May 2004. The position offered was that of an exit greeter, the same job previously offered to Ms. Anderson in the summer of 2003. However, in the second offer, the employer raised the hourly wage which resulted in a weekly earnings capacity in excess of the employee's pre-injury average weekly wage, exclusive of overtime pay. The employee declined to accept the position. The trail judge found that the employee had

refused an offer of suitable alternative employment at the higher wage. This resulted in the elimination of any payment of workers' compensation benefits to the employee.

We have found no statutory authority or relevant case law which would preclude the employer from offering the identical suitable alternative employment position a second time at a higher wage. The employee cites a decision from North Carolina, Moore v. Concrete Supply Co., 561 S.E.2d 315 (N.C. App. 2002), in support of her appeal. However, after reviewing that decision, we find that the case is clearly distinguishable from the matter at hand.

In Moore, *supra,* the injured employee reached maximum medical improvement and was unable to return to his prior position. The employer contacted a vocational rehabilitation expert to work with the injured employee and the expert created a position specifically for the employee at the employer's place of business. The employee refused this employment. The court determined that an employer "cannot avoid its duty to pay compensation by offering the employee a position that could not be found elsewhere under normally prevailing market conditions." Moore, 561 S.E.2d at 320.

There is no indication that the Moore case involved a statute similar to R.I.G.L. § 28-33-18.2, the suitable alternative employment provision. Contrary to the relevant case law cited by the North Carolina court, Rhode Island does not require that an employer produce evidence that the suitable alternative employment position exists in the general employment market and that other employers would hire the employee in that position. Furthermore, in the matter presently before this panel, the Wal Mart did not specifically create the exit greeter position for the employee. Although the job of "exit greeter" is not defined in the Dictionary of Occupation Titles, a common reference tool containing detailed descriptions of a multitude of job categories utilized by vocational experts, it is still a recognized position in the general marketplace. The

employee's own vocational rehabilitation expert testified that the position of an exit greeter "is a rather current type of position that is utilized by retailer [sic] stores." Tr. p. 29. The employee's expert even went to Wal Mart to observe other employees performing the job duties of an exit greeter. Therefore, this was not a position created solely for the employee that could not be found elsewhere under normal market conditions.

The fact that the employer offered the employee the same position a second time at a higher salary is inconsequential. Perhaps the employer believed that the employee might be persuaded to accept the position she found "mentally intolerable" if she was being paid at a higher wage. There is nothing in the record to indicate that this second offer of employment was not a bona fide job offer. The employee refused the job offer at her own peril and assumed the risk that the position would be found to be suitable alternative employment and subjecting her to the penalty for refusal pursuant to R.I.G.L. § 28-33-18.2(c). Based upon the foregoing, we affirm the trial judge's finding that the employer sustained its burden and established an earnings capacity of Three Hundred Ninety-five and 20/100 ($395.20) Dollars based upon the employee's refusal of the second offer of suitable alternative employment.

For the aforesaid reasons, the employee's 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 Workers' Compensation Court, final decrees, copies of which are enclosed, shall be entered on

Ricci and Hardman, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Ricci, J.

_____
Hardman, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

WAL-MART STORES, INC.	)	
	)	
VS.	)	W.C.C. 03-07047
	)	
LINDA ANDERSON	)	

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 February 27, 2006 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Ricci, J.

_____
Hardman, J.

I hereby certify that copies of the Decision of the Appellate Division and Final Decree of the Appellate Division were mailed to Joseph F. Hook, Esq., and Christine D'Orsi Fitta, Esq., on

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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

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APPELLATE DIVISION

LINDA J. ANDERSON)
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VS.) W.C.C. 04-04042
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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

LINDA ANDERSON)
)
VS.) W.C.C. 05-05778
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WAL MART STORES, INC.)

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