STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

KENT HOSPITAL/CNE	)	
	)	
VS.	)	W.C.C. 2006-05988
	)	
JANET RICHARD	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's appeal from the decision and decree of the trial judge granting the employer's petition to review. The trial judge found that the employee, Janet Richard, was no longer disabled as a result of the work-related injury she sustained on December 29, 2003, thus allowing the employer to terminate the payment of workers' compensation benefits. After thoroughly reviewing the record in this matter and considering the arguments of both parties, we find no error on the part of the trial judge and affirm the decision and decree.

The employee was injured on December 29, 2003, when she began experiencing pain and discomfort in her lower back. The employee did not identify a specific incident as the cause of her injury. She was unable to report to work the next day when the pain was worse. She then sought treatment with her primary care physician. The employee began receiving weekly benefits for partial incapacity pursuant to a Memorandum of Agreement as of December 30, 2003. The injury was described simply as "low back." (Er's Ex. 3.)

At the time of the injury, Ms. Richard was employed as a registered nurse in the Intensive Care Unit (hereinafter I.C.U.) of Kent Hospital. The employee testified that her duties included toileting, bathing, and assisting in the transfer of critically ill patients; duties she considered very physically demanding. She estimated that half of her day was spent alone with the patients. She further testified that a nurse in this unit is often required to respond to unpredictable situations, such as a crisis or life threatening intervention.

In 2005, the employee applied and was hired for a position in the hospital's education department. She works twenty (20) hours a week providing computer training for newly hired nurses and physicians. She indicated that her hourly wage is less in this light duty position than in her former job as a Level 4 expert critical care nurse. She does not feel she can return to her former position due to its physically demanding and unpredictable nature. In particular, Ms. Richard expressed concern that she would reinjure herself if she had to respond to the needs of a patient in a crisis or life threatening situation.

Both the employee and Susan Perry-Prive, the employer's workers' compensation program manager, testified that in 2003, nurses were strongly encouraged to seek assistance with lifting patients and that such assistance was available. Since the employee stopped working in the I.C.U., the hospital began implementing lift teams. The primary responsibility of these teams is to assist nurses when they need to lift patients. On cross-examination, Ms. Perry-Prive acknowledged that lift teams would not be available at all times, especially when emergencies arose. Further, she testified that nurses were under orders to protect their patients should they start to fall.

At trial, the employee presented the reports and affidavit of Dr. Jerrold Rosenberg, who specializes in electrodiagnostic and rehabilitation medicine. The last report made available was

dated June 14, 2007. On May 18, 2006, the doctor recommended the employee continue working in the education department for twenty (20) hours per week. He did not feel she could return to work as a registered nurse due to the increased lifting involved. In a disability form dated August 28, 2006, Dr. Rosenberg indicated that the employee could return to work for twenty (20) hours a week with no lifting in excess of ten (10) pounds and no twisting, bending, or crawling. He also noted that she should be given preferential parking in order to minimize the amount of walking. On October 3, 2006, the doctor wrote that the employee had reached maximum medical improvement and would require his previously noted restrictions indefinitely.

The employer presented the deposition and report of Dr. A. Louis Mariorenzi, an orthopedic surgeon, who examined the employee on August 17, 2006. The doctor testified that the employee had sustained an injury to the soft tissue in her lower back with satisfactory recovery. After conducting a physical examination and reviewing the results of two (2) MRI studies and two (2) EMG studies, Dr. Mariorenzi concluded that the employee could return to her duties as an I.C.U. nurse without restriction.

The court appointed Dr. Norman Kornwitz, an orthopedic surgeon, to conduct an impartial medical examination which took place on January 4, 2007. The trial judge relied heavily on his subsequent report and deposition testimony. The doctor testified that he had reviewed the employee's medical history and diagnostic studies and completed a physical examination. In his report, Dr. Kornwitz noted that the employee's physical findings were minimal. It was his opinion that she could return to her former position with the restriction that she receive assistance when lifting or moving patients. The doctor was aware of the fact that Kent Hospital utilized lift teams, but was unclear as to their make-up or availability. On cross-

examination, the doctor admitted that should a patient fall, a nurse would be expected to stop them from falling to the floor.

After evaluating the evidence, the trial judge, in a decree entered on September 4, 2008, found the employer sufficiently demonstrated that the employee could return to her former position as an I.C.U. nurse. Benefits were discontinued and the employee subsequently filed this claim of appeal.

The employee has filed three (3) reasons of appeal in which she contends that the trial judge overlooked or misinterpreted the testimony of Dr. Kornwitz which established that Ms. Richard could not perform all of the duties of her former position as an I.C.U. nurse. In particular, the employee argues that she would be required to lift patients independently which was the only restriction Dr. Kornwitz placed on her activities. She, therefore, urges this panel to reverse the finding of the trial judge that she is no longer disabled.

In accordance with R.I.G.L. § 28-35-28(b), "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." In the absence of a determination that the trial judge was clearly wrong, we are precluded from undertaking a *de novo* review of the evidence and substituting our judgment for that of the trial judge. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). In the present matter, we find no error on the part of the trial judge in reaching his ultimate conclusion.

The petitioner in a workers' compensation proceeding carries the burden of producing credible evidence of a probative force to support their petition. DeLage v. Imperial Knife Co., 121 R.I. 146, 148, 396 A.2d 938, 939 (1979). On a petition to review seeking the termination of an employee's weekly benefits, the employer must establish that the employee can perform all of the normal duties of her former employment without harmful consequences. Leviton Mfg. Co. v.

Lillibridge, 120 R.I. 283, 287-88, 387 A.2d 1034, 1037 (1978). We have previously noted that "medical evidence is needed to demonstrate that a return to employment would pose *no undue risk or hazard* to the employee's health." ACS Indus. v. Tokarski, W.C.C. No. 1994-06607 (App. Div. 01/25/95) (emphasis added). Once this burden is met, the employee is no longer entitled to weekly compensation benefits. Builders Iron Works, Inc. v. Murphy, 104 R.I. 637, 639, 247 A.2d 839, 841 (1968).

First, the employee's contention in the present matter that the trial judge rejected or ignored the opinion of Dr. Kornwitz is clearly incorrect. The trial judge specifically distinguished the doctor's testimony as "the most important piece of evidence." (Decision at 8.) He discussed it extensively in his decision and relied upon Dr. Kornwitz's opinions, along with the opinions rendered by Dr. Mariorenzi, in reaching his determination that the employee was capable of performing the job duties of an I.C.U. nurse. The trial judge appropriately exercised his discretion in relying upon those medical opinions, in conjunction with the testimony of the employee and Ms. Perry-Prive regarding the availability of assistance in lifting. *See* Parenteau v. Zimmerman Eng'g, Inc., 111 R.I. 68, 200 A.2d 168 (1973). The root of the employee's argument lies in the trial judge's interpretation and application of this evidence.

The employee contends that Dr. Kornwitz's testimony established that she could not resume her former duties without an undue risk or hazard to her health. The doctor testified that in his opinion, Ms. Richard was able to return to work as an I.C.U. nurse so long as she had assistance when lifting or moving patients. (Er's Ex. 2 at 8.) Both Ms. Perry-Prive and the employee stated that at the time of the injury in 2003, nurses were encouraged to obtain assistance from co-workers in lifting or moving patients when needed. Ms. Perry-Prive and Dr. Kornwitz noted that the staffing in the I.C.U. unit was one (1) nurse for every one (1) or two (2)

patients and the doctor pointed out that a nurse was "probably safer in an ICU than a floor nurse because of the degree of staffing. . . ." (Er's Ex. 2 at 18.) Based upon the assumption that the employee could call for assistance in lifting and moving patients, Dr. Kornwitz testified that the employee was capable of returning to her former employment. (Er's Ex. 2 at 9.)

If the employee chooses to forego calling for assistance and engages in lifting a patient on her own, she is essentially voluntarily performing activities outside of her regular job description. We have previously held that "[t]he mere fact that [an] employee was in the habit of performing voluntary activities which exceeded her physical restrictions does not in any way change the employer's burden of proof" in establishing an ability to return to work. A.T. Cross v. Medeiros, W.C.C. No. 1991-3921 (App. Div. 12/23/1992). In Medeiros, we found that an employee who "would voluntarily perform activities in excess of those required by her job" could still perform all of the *regular* tasks of her job despite being "unable to continue to perform these additional voluntary acts." Id. Consequently, the employee's weekly benefits were discontinued.

In this case, at the time of the employee's injury, as noted by the trial judge, "[t]here was assistance with lifting available and she was encouraged to use the help." (Decision at 9.) Furthermore, the impartial medical examiner testified that the employee could return to work so long as she had assistance when lifting. Notwithstanding an emergency situation, if the employee chose to lift patients without assistance she would be doing so voluntarily and such voluntary acts fall outside the umbrella of her regular duties. Accordingly, the employer does not need to establish that the employee is capable of lifting patients without assistance.

The basis of the employee's contention that Dr. Kornwitz's testimony establishes she cannot perform the regular duties of an I.C.U. nurse is that in certain situations assistance would

not be available in a timely manner to lift or move a patient. In support of this argument, the employee apparently relies on the following exchange between the employee's attorney and Dr. Kornwitz after he testified she could return to work so long as she had assistance available to lift patients:

> Q: Okay, but you obviously understand in some sort of if there was an emergency that came up to say like a patient was falling or something --
>
> A: I understand.
>
> Q: -- then obviously --
>
> A: Then I would say that if somebody was falling in front of you, yes. Obviously you're not going to let them fall to the floor.

(Er's Ex. 2 at 18.) The question is whether the potential risk that the employee will be confronted with an emergency situation that would require her to lift or move a patient on her own poses an undue risk or hazard to the employee's health if she returned to work.

In affirming the trial judge's determination, we find guidance in our reasoning in Providence Water Supply Board v. Berarducci, W.C.C. No. 1994-00212 (App. Div. 01/22/1994). In Berarducci, an employee appealed the trial judge's decree discontinuing benefits on the ground that the judge overlooked evidence demonstrating an undue risk or hazard to the employee's physical well being should he return to work. In explaining the basis for his opinion that an employee suffering from a testicular injury could return to a light duty job, the impartial medical examiner testified that while he "[could]not guarantee" there would be no further injury and acknowledged it was not "impossible for [further injury] to happen," it was unlikely. Id. This court reasoned that any employee who suffers an injury carries a certain risk of re-injury. Id. However, the mere possibility of re-injury was insufficient to justify the continuation of benefits. Id.

While we agree with Ms. Richard's apparent contention that there is no guarantee against further injury in this instance, we find that the possibility of re-injury does not constitute an undue risk or hazard to the employee's health. The evidence in the record establishes that the I.C.U. has a high nurse to patient ratio and that nurses are strongly encouraged to seek out assistance when lifting patients. There was no evidence in the record as to the frequency of incidents in which the employee would be required to lift patients without assistance. The trial judge also noted that Dr. Mariorenzi's examination was normal and Dr. Kornwitz indicated that the employee's physical findings were minimal. Finally, the impartial medical examiner expressed familiarity with the duties of an I.C.U. nurse and still maintained that the employee could return to her former position with assistance in lifting patients. With the evidence available in the record, the trial judge implicitly, and without error, reasoned that the potential for an emergency situation requiring the employee to independently lift patients was not an undue risk.

We would also note that since the time of the employee's injury, the hospital has adopted a policy that no direct patient care handlers are to lift a patient manually. (Tr. at 18.) Employees are to utilize a mechanical assistive device, seek assistance from co-workers, or contact the lift team. The hospital has made available lift teams consisting of personnel solely responsible for assisting in lifting and maneuvering patients. Ms. Perry-Prive testified that depending upon the time of day, there are two (2) to five (5) teams available in the hospital. While the employee could perform her regular duties without undue risk of harm or injury regardless of the existence of lift teams, their presence further minimizes the possibility that she would be forced to lift a patient without assistance.

The employee testified that she felt that she was unable to return to work as an I.C.U. nurse because she feared re-injuring herself in an emergency situation. (Tr. 12-13.) Her concern, without other substantiating evidence, is not sufficient to deny the employer's petition. *See* Geigy Chemical Corp. v. Zuckerman, 106 R.I. 534, 538, 261 A.2d 844, 847 (1970). In Zuckerman, the Court relied on the doctor's uncontested opinion that there was "an increased susceptibility and a real danger of re-injury to employee's back if he resumed his former job" in finding the commission erred in requiring the employee to return to work as a chemical operator. Id. at 847. The employee's position as a chemical operator required "tugging, hauling and lifting of heavy objects." Id. at 846. The doctor had recommended that the employee seek lighter work. In light of this expert testimony of a significant risk of re-injury, the Court concluded that the employer had not established that the employee was capable of resuming his former employment.

In the case at hand, none of the physicians stated that a return to her former position presented a "real danger" of her injury recurring. Dr. Mariorenzi testified that a return to her regular duties would not be unduly injurious to her health. (Er's Ex. 1 at 7.) Dr. Kornwitz stated that the employee could return to her former employment so long as she had assistance lifting and moving patients. The trial judge was satisfied with the evidence presented as to the availability of assistance both in 2003 and presently. Unlike the situation in Zuckerman, there is no evidence to establish that there is "an increased susceptibility and a real danger" of reinjury to the employee's back if she returns to her former duties as an I.C.U. nurse. Id. at 847.

After our thorough review of the record, we find no error in the trial judge's assessment of the evidence and ultimate determination that the employee is no longer disabled from her

regular job. Consequently, we deny the employee's appeal and affirm the decision and decree of the trial judge.

In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, a copy of which is enclosed, shall be entered on

Hardman and Ferrieri, JJ., concur.

ENTER:

_____
Olsson, J.

_____
Hardman, J.

_____
Ferrieri, J.

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division on the respondent/employee's claim of appeal 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 September 4, 2008 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Hardman, J.

_____
Ferrieri, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Thomas J. Ford, Esq., and Mark P. McKenney, Esq., on

_____