STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

MARY ROTHEMICH	)	
	)	
VS.	)	W.C.C. 2006-07906
	)	
ST. JOSEPH HEALTH SERVICES	)	

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 in which he found the employee, Mary Rothemich, failed to prove by a fair preponderance of the evidence that she is totally disabled pursuant to Rhode Island General Laws § 28-33-17(b)(2) (commonly referred to as the statutory "odd lot" doctrine), or that in the alternative she is entitled to a continuation of her benefits pursuant to Rhode Island General Laws §§ 28-33-18(d) and 28-33-18.3(a)(1). The employee had been receiving weekly benefits since she sustained a right knee strain at work on September 5, 2000. Those compensation benefits were terminated on November 3, 2006 after the payment of 312 weeks of partial incapacity benefits. After thoroughly reviewing the record in this matter and carefully considering the arguments of both parties, we find no error on the part of the trial judge and affirm the decision and decree.

The procedural history of this case is particularly important. Prior to this action, a decision and decree were entered on March 10, 2005, in the consolidated cases of W.C.C. Nos. 2004-06298 and 2004-00841. The trial judge in those matters denied the employee's petition

seeking a finding of total disability under R.I.G.L. § 28-33-17(b)(2) and granted the employer's petition for a thirty percent (30%) reduction in the employee's benefits pursuant to R.I.G.L. § 28-33-18(b). While the trial was pending, the trial judge entered an interlocutory order directing the employee to attend a vocational evaluation at the Dr. John E. Donley Rehabilitation Center (hereinafter "Donley Center"). Her final decree further ordered the employee to participate in vocational services at the Donley Center. In arriving at her ultimate determination, the trial judge opined that the employee "has never tried to find a light duty job, that she is well educated, and that she is medically capable of some type of alternate work." Rothemich v. St. Joseph Health Servs. of R.I., W.C.C. No. 2004-06298 (03/10/05).

The employee next appeared in the Workers' Compensation Court requesting approval of a vocational rehabilitation plan authored by Albert Sabella, a vocational counselor. On August 2, 2006, a consent decree was entered approving the plan pursuant to R.I.G.L. § 28-33-41(b). The employee's weekly benefits were terminated on November 3, 2006, after the payment of partial incapacity benefits for 312 weeks and completion of the plan. Thereafter, Ms. Rothemich filed the present petition alleging she is totally disabled pursuant to § 28-33-17(b)(2), or in the alternative, her partial incapacity benefits should be continued pursuant to §§ 28-33-18(d) and 28-33-18.3(a)(1).

The employee worked part-time as a licensed practical nurse (hereinafter "LPN") at St. Joseph Health Services of Rhode Island for approximately twenty (20) years. She graduated high school and later received her certification to practice as an LPN from Rhode Island Junior College (now Community College of Rhode Island). While at the hospital she completed continuing education courses in the field of cardiac nursing. This is the extent of her formal education. At the time of trial, the employee was sixty-eight (68) years old.

On September 5, 2000, the employee was injured when she was moving a patient in a bed and experienced pain in her right knee. Eventually, she underwent arthroscopic surgery by Dr. Geret A. DuBois, a board certified orthopedic surgeon, in November of 2000 as a result of the injury. In 2001, the doctor noted that her condition had reached maximum medical improvement and was capable of some form of light work. The employee continued to treat with Dr. DuBois, who has recommended she undergo total knee replacement. She has continued to see Dr. DuBois periodically, with a significant gap from November 2002 to March 2004. At the time of the trial, the employee was delaying the surgery until it was absolutely necessary. She received workers' compensation benefits until they were terminated pursuant to the 312 week limitation under R.I.G.L. § 28-33-18(d).

The employee testified that she continues to have problems with her right knee, experiencing pain that shoots down her leg and into her foot. She wears a brace and often has to apply ice to and elevate her leg to relieve the pain. She uses a cane nearly all the time, except for when she is within the familiar confines of her home. Weight bearing activities cause an increase in pain and she is only able to stand or sit continuously for about thirty (30) minutes. Despite this, she is able to get out on a daily basis and can drive, although for only thirty (30) minutes at a time. She also walks for fifteen (15) to twenty (20) minutes about three (3) times a week and engages in non-weight bearing exercises provided by her doctor.

Despite feeling as though she has done everything possible to find a job, the employee has had difficulty finding employment. She attributes these difficulties to a number of reasons, most notably her physical restrictions, age and limited skill set. Her job search began in earnest in the latter part of 2005 after the trial judge in the prior matters referred her to the Donley Center and she began working with Robert Reall, an employee of the Donley Center. This

program included participation in a computer course, receiving assistance with constructing her resume and attending job fairs. She was discharged from the Donley Center services to continue her job search independently in November 2005.

Ms. Rothemich was subsequently referred by her attorney to Albert Sabella, a vocational rehabilitation counselor, for assistance. In the course of her job search, the employee sent out approximately 350 job applications, both in and out of the medical field, records of which were admitted into evidence. From these applications, she was invited to participate in about thirty (30) interviews over the telephone, but none in-person. Unfortunately, the employee was not offered employment after these interviews. She felt this was because the interviewers would eventually find out her age and limitations. At one point, Mr. Sabella referred the employee to an employment agency to evaluate her computer skills, which were determined to be very limited. Ms. Rothemich testified that when the plan with Mr. Sabella ended in early November 2006, he told her that she did not have to continue to look for employment so she discontinued her job search efforts.

The employee offered the deposition testimony of Dr. DuBois in this case which had been presented in the prior proceedings. The doctor testified that the employee was totally disabled from returning to work as an LPN. He agreed with the report of Dr. Vincent Yakavonis, an orthopedic doctor who examined the employee on behalf of the employer, which stated the employee was capable of select light duty work with restrictions on prolonged standing, walking, or any stooping, kneeling or climbing. Dr. DuBois noted an additional restriction, that she must use a cane in her daily activities. Both doctors were of the opinion that Ms. Rothemich is permanently, partially disabled due to the work-related injury.

Mr. Sabella testified at both this proceeding and the previous trial. In 2004, at the request of the employee's attorney, Mr. Sabella completed a vocational analysis to assess the employee's reemployment and rehabilitation potential for purposes of the prior litigation. During those proceedings, he testified that Ms. Rothemich was not employable. Mr. Sabella had no further involvement with Ms. Rothemich until 2006. In August 2006, he implemented a plan which had been agreed to by the parties to assist Ms. Rothemich in seeking employment. His ultimate conclusion at the time of the trial in the present matter was that the employee was unemployable and materially hindered due to her physical limitations, her age, her lack of transferable skills and her education level. He acknowledged a job *may* exist that suited her employment profile, however, he felt that there was such little likelihood of her finding employment that it constituted a material hindrance.

In denying the employee's petition, the trial judge determined that her claim for total disability status under § 28-33-17(b)(2) was barred by the doctrine of res judicata, explaining that this issue had been fully adjudicated in the earlier proceeding. The trial judge further found the employee had failed to prove by a fair preponderance of the credible evidence that her partial incapacity posed a material hindrance to obtaining suitable employment. He noted that the testimony of Mr. Sabella did not satisfy the standard regarding material hindrance set forth in the statute and relevant case law. *See* R.I.G.L. § 28-33-18.3(a)(1).

In our review of this decision, we are bound by the provisions of R.I.G.L. § 28-35-28(b), which mandates that "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." The appellate panel may not undertake a *de novo* review of the evidence and substitute our judgment for that of the trial judge without first

determining that the trial judge was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996).

The employee brings forward five (5) reasons of appeal which can be adequately pared down to two (2) basic arguments. First, she contends that the trial judge erroneously determined the employee's request for total disability status was barred under the doctrine of res judicata. Second, the employee contends the trial judge misconstrued and misapplied the evidence and legal standards and erroneously found the employee's work-related injury did not pose a "material hindrance" to obtaining suitable employment pursuant to R.I.G.L. § 28-33-18.3(a)(1). We find no error in the trial judge's factual determinations and his application of the relevant legal principles.

The trial judge dismissed the employee's request for a finding of odd lot status after finding it was barred by the doctrine of res judicata. *See* R.I.G.L. § 28-33-17(b)(2). In rare instances, an employee may be found totally disabled where, "taking into account the employee's age, education, background, abilities and training, that he or she is unable on account of his or her compensable injury to perform his or her regular job and is unable to perform any alternative employment." *See* id. However, the trial judge did not reach this analysis and instead determined that this issue had previously been litigated before the court and the earlier decree was res judicata on the issue. The employee now argues that the judge's reasoning was in error because of the limited application of the res judicata doctrine to workers' compensation cases. We disagree.

Generally, the doctrine of res judicata dictates that "[w]hen the parties and the cause of action are the same a judgment rendered on the merits in a former proceeding is a finality as to every issue *that might have been raised therein* as well as to those that were actually raised and

decided." Di Vona v. Haverhill Shoe Novelty, Co., Inc., 85 R.I. 122, 125-26, 127 A.2d 503, 505 (1956) (quoting Coates v. Coleman, 72 R.I. 304, 312, 51 A.2d 81, 85 (1947)). However, recognizing the unique and fluid nature of a workers' compensation action, the Rhode Island Supreme Court has limited this doctrine in workers' compensation cases so that it only bars those issues which were *actually* raised and decided in the earlier action. *See* id.; *see also* Am. Insulated Wire v. Carvalho, W.C.C. 93-02733 (App. Div. 08/02/94). When determining whether the doctrine will attach to a subsequent proceeding, the court must simply ask: "Was the questioned issue of fact raised and decided in the prior case?" Di Vona, 85 R.I. at 126, 127 A.2d at 506. If the answer is yes, the subsequent proceeding is barred under the doctrine of res judicata. Where the answer is no, the issue may properly be considered in the subsequent proceeding. Id.

Thus, the question becomes, was there a determination in the earlier proceeding as to whether or not the employee met her burden of proof under the odd lot statute? We find that this question was raised and decided in the earlier proceeding and given the lack of a significant change in circumstances, the trial judge did not err in his application of the doctrine of res judicata to the allegation in the present petition.

In the earlier proceeding, W.C.C. No. 2004-06298, the employee alleged that she was totally disabled pursuant to § 28-33-17(b)(2). The trial judge was presented with the testimony of Mr. Sabella and the vocational reports of Cynthia J. Baldwin, an assistant administrator and supervisor of vocational services at the Donley Center. The trial judge also considered the deposition of Dr. DuBois. In the present matter, the employee again presented the testimony of Mr. Sabella and the same deposition of Dr. DuBois. However, she now contends that the additional evidence of her extensive, albeit unsuccessful, job search presents a new issue for the

trial judge to rule on. The trial judge evaluated the evidence, which is essentially the same as it was in this proceeding, and determined that the employee did not meet her burden of proof under the odd lot statute. There has been no change in the employee's status which would warrant allowing an exception to the res judicata doctrine and providing the employee the opportunity to re-litigate the issue of her odd lot status. While we certainly empathize with the difficulties the employee has encountered in the course of her current job search, there has been no change in the circumstances affecting her ability to work.

The modified application of res judicata in workers' compensation cases is meant to allow the parties to litigate a petition to review from time to time when the situation calls for it, such as a change from total to partial disability. *See* Garafola v. Cherenzia & Assoc., W.C.C. No. 95-07026 (App. Div. 09/22/00). Reviewing the employee's odd lot status may be appropriate should the employee's injury worsen or she encounters serious, but unrelated, health issues. However, her mere inability to secure employment, despite numerous applications and a limited number of interviews, does not constitute new circumstances worthy of re-visiting this issue. Furthermore, the mere fact that the employee is now several years older cannot form the basis for reconsideration of her status. The modification of the res judicata doctrine in workers' compensation cases is not intended to allow the re-litigation of identical claims every few years simply based upon the increasing age of the employee. Such an interpretation would wreak havoc on the workers' compensation system.

Allowing the employee to re-litigate this issue would betray the underlying purpose of the res judicata doctrine, which is "to conserve judicial resources by eliminating multiple and potentially inconsistent decisions in identical actions." Scetta v. St. Joseph Hosp., W.C.C. No. 02-04731 (App. Div. 03/19/08) (citing Gaudreau v. Blasbalg, 618 A.2d 1272, 1275 (R.I. 1993)).

If we accept the employee's argument, she would be provided a "second bite at the apple" to supplement the evidence from the prior case to secure a different outcome. The Workers' Compensation Act has proscribed the proper vehicle by which to obtain review of trial decisions of the Workers' Compensation Court. If the employee felt the trial judge had erred, she should have appealed the prior decision through the appropriate channels. *See* R.I.G.L. § 28-35-28. In failing to do so, the employee's rights on this issue became fixed. *See* Barbosa v. Brown Univ., W.C.C. No. 98-01245 (App. Div. 12/26/03) (citing Luzzi v. Imondi, 97 R.I. 461, 466, 198 A.2d 671, 673 (1964)).

The employee next argues that the trial judge applied the incorrect standard in finding the employee failed to prove she is entitled to benefits under R.I.G.L. § 28-33-18.3(a)(1). Generally, a partially injured employee may receive benefits for a maximum of 312 weeks. R.I.G.L. § 28-33-18(d). However, the Act has carved out an exception allowing a partially disabled employee to receive benefits beyond this period when "the employee demonstrates by a fair preponderance of the evidence that his or her partial incapacity poses a material hindrance to obtaining employment suitable to his or her limitation." R.I.G.L. § 28-33-18.3(a)(1). In making her argument, the employee asks the panel to revisit and overturn our decision in Brown v. McLaughlin & Moran, Inc., W.C.C. No. 98-03586 (App. Div. 12/01/00). She argues our decision in Brown is inconsistent with our reasoning in Conte v. Fleet Financial Corp., W.C.C. No. 99-05648 (App. Div. 07/22/04), as well as the Rhode Island Supreme Court's reasoning in Lombardo v. Atkinson-Kiewit, 746 A.2d 679 (R.I. 2000). We respectfully disagree with the employee's argument and decline to overturn our holding in Brown.

In Brown, the injured employee was sixty-two (62) years old and delivered cases and kegs of beer in a delivery truck. He was injured when a beer barrel fell and struck him on the

neck and shoulders. W.C.C. No. 98-03586. We found that the employee's partial incapacity resulting from the work injury did not pose a material hindrance to obtaining employment and declined to consider the employee's "personal profile," which reflected that he had other medical issues as well, including undergoing radiation treatment for cancer and having his prostate removed. In declining to consider his "personal profile," we reasoned that the statutory language of R.I.G.L. § 28-33-18.3(a)(1) was clear on its face and thus "the plain and ordinary meaning of the statute must be given effect." Id. (citing Krikorian v. R.I. Dept. of Human Servs., 606 A.2d 671 (R.I. 1992)). We explained that unlike the odd lot statute, "[R.I.G.L. § 28-33-18.3] does not direct the trial judge to examine the employee's age, education, background, abilities and training" when determining employability. Id.

In Conte, the employee, an assistant administrator for the accounting department of a bank, received benefits due to work-related tendonitis of her wrist. W.C.C. No. 99-05648. Despite conducting a diligent job search and interviewing for a number of positions, the employee was unable to find employment that conformed to her restrictions, namely allowing her to take breaks frequently to stretch her hands. The employee was able to find a job through a friend, in which she essentially watched over an office only one (1) day per week for five (5) hours. We explained that the employee's significant job seeking efforts, when coupled with an inability to find a "viable alternative" to her former employment "support[ed] the conclusion that her partial disability resulting from the work injury [was] a material hindrance to her ability to find employment." Id. In Conte, we never opined that factors other than the employee's work-related injury could be considered in determining whether a material hindrance existed. Thus, our decisions in Conte and Brown are not in conflict, and we decline to overturn the ruling in Brown.

We disagree with the employee's contention that the Rhode Island Supreme Court's decision in Lombardo is instructive on this point. In Lombardo, the Court noted the differences between the odd lot and material hindrance statutes, explaining

> [w]e also note that the provisions of § 28-33-18.3 (allowing for the continuation of partial-disability benefits beyond the 312 week cutoff of benefits per § 28-33-18(d)) are available to a partially disabled employee like this petitioner if he or she can show "that his or her partial incapacity poses a material hindrance to obtaining employment suitable to his or her limitation." The existence of this provision, however, serves to underscore a key distinction drawn by the [Workers' Compensation Act] between qualifying for continued-partial-disability benefits and qualifying for total-disability benefits via proof of odd-lot status: namely, to qualify under the latter [Workers' Compensation Act] provisions, it is not enough that partially disabled employees are able to establish that their disability poses a material hindrance to obtaining employment suitable to their limitations. Rather, to qualify for total, as opposed to continued-partial-disability benefits, partially disabled employees must clear an even higher statutory hurdle: they must show not just that their partial incapacity materially hinders them in their efforts to obtain suitable-alternative employment, but also that they are actually unable to perform their regular job and any alternative employment, such that it would be manifestly unjust to deny them total-disability benefits.

Id. at 689. The employee's reliance on this passage is misguided. We agree with her that the Supreme Court never excluded the odd lot factors from the material hindrance standard, however, that issue was not before the Court. The employee in Lombardo was claiming total disability under the statutory odd lot doctrine, not seeking a continuation of partial disability benefits beyond 312 weeks. This failure to explicitly exclude the odd lot factors from the material hindrance analysis, especially where they are not included in the statutory language, cannot be interpreted as an implied incorporation.

Turning our attention back to this case, we find no error in the trial judge's ultimate determination that the employee failed to prove the physical restrictions resulting from her work-

related injury were a material hindrance to finding gainful employment. *See* R.I.G.L. § 28-33-18.3(a)(1). In support of her claim, the employee relied heavily, as she did in earlier proceedings, on the testimony of the vocational expert, Mr. Sabella. He testified that the employee was materially hindered from finding employment because of

> her entire occupational profile including physical limitations imposed that limited her to essentially sedentary type of work and difficulty ambulating on her feet for a prolonged period of time. Age is certainly a factor. This is information from the Department, Rhode Island Department of Labor that states the impact of age on employability. As far as federal restrictions, lack of transferable skills, she had been out of work for even longer and so combine that with she has a lack of computer skills. So there really is no suitable nitch [sic] in the labor market given the occupational profile from the labor market.

(Tr. 80.) It is clear from his testimony that Mr. Sabella took into account factors such as age, transferable skills, education, and a lengthy absence from the work force, in formulating his opinion. He never rendered an opinion as to whether the employee's partial disability, in and of itself, posed a material hindrance to the employee's ability to secure employment.

The trial judge noted this flaw in the vocational expert's opinion in denying the employee's claim for continuing benefits. In addition, the employee testified that in the approximately thirty (30) phone interviews she participated in, she believed employers would often discover her age and limitations one way or another. She felt this led to her eventual failure to secure the positions.

Clearly, any material hindrance the employee experienced was related at least as much to her age and/or lack of experience as to her work-related injury. Under Rhode Island workers' compensation case law, those factors which make up the employee's "personal profile", but are not germane to the work-related injury, may not be considered when making a determination under R.I.G.L. § 28-33-18.3(a)(1). *See* Conte, W.C.C. No. 99-05648; Brown, W.C.C. No. 98-

03586. Consequently, we find no error on the part of the trial judge in concluding that the employee failed to prove that her partial disability posed a material hindrance to obtaining alternative employment.

For the aforementioned reasons, the employee's appeal is hereby denied and dismissed and the decision and decree of the trial judge are affirmed.

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

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. WORKERS' COMPENSATION COURT
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ST. JOSEPH HEALTH SERVICES)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the claim of 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 October 2, 2007 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

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John A. Sabatini, Administrator

ENTER:

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Olsson, J.

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Connor, J.

_____
Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Albert J. Lepore, Esq., and Susan Pepin Fay, Esq., on

_____