STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

BROADWAY TIRE, INC.	)	
	)	
VS.	)	W.C.C. 08-03446
	)	
EDUARDO SOUZA	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's appeal from the trial judge's finding that he was no longer totally disabled as of May 9, 2008 due to the effects of the work-related injury he sustained to his left knee on June 16, 1997. The employee had previously received benefits for partial incapacity for at least 312 weeks. Consequently, pursuant to R.I.G.L. § 28-33-18(d), the change from total to partial incapacity resulted in the discontinuance of the payment of any weekly benefits to the employee. After thorough review of the record in this matter and consideration of the arguments of the parties, we deny the employee's appeal and affirm the decision and decree of the trial judge.

The employee initially began receiving weekly benefits for partial incapacity pursuant to a Memorandum of Agreement dated December 19, 1997. That document indicates that he sustained a left knee strain on June 16, 1997 resulting in partial incapacity beginning June 18, 1997. A pretrial order was entered in W.C.C. No. 00-00939 on April 4, 2000 stating that the employee's condition had reached maximum medical improvement and ordering that his weekly benefits be modified in accordance with an earnings capacity of Two Hundred Ninety and

00/100 ($290.00) Dollars. In 2003, the payment of weekly benefits ceased upon the expiration of 312 weeks pursuant to R.I.G.L. § 28-33-18(d). On May 23, 2007, a pretrial order was issued in W.C.C. No. 07-02852 granting permission for the employee to undergo total knee replacement surgery. Subsequently, the parties entered into a Mutual Agreement to modify the employee's status from partial incapacity to total incapacity as of February 21, 2008, the date of the surgery. As a result, the employee began receiving weekly benefits for total incapacity.

On May 22, 2008, the employer filed the instant petition to review alleging that the employee is partially disabled and no longer entitled to receive benefits because he has already received partial incapacity benefits for 312 weeks. The petition was granted at the pretrial conference on June 11, 2008 and the employee's weekly benefits were discontinued as of that date. The employee filed a claim for trial in a timely manner.

Mr. Souza testified that prior to his injury he was employed by Broadway Tire for about three (3) years as an alignment technician performing wheel alignments on vehicles. He also did brake and exhaust jobs and other types of vehicle maintenance work. He spent his entire day on his feet. After he injured his left knee in 1997, he worked briefly for Pep Boys but found that the automotive work was too difficult and painful for his knee. Some time in 2000 or 2001, the employee began working about five (5) hours a day, five (5) days a week, for Universal Plastering as a maintenance man. He explained that his duties involved scraping floors, trimming windows, floors and lights, and washing windows. He described the job as light duty, although he was on his feet the whole time.

The employee testified that he stopped working in November 2006 after an incident when he stumbled and injured his knee again. He did not receive benefits at that time because his benefits were stopped sometime in 2003 when the 312 week limit was reached. When he

underwent the total knee replacement surgery in February 2008, the insurer agreed to pay benefits for total incapacity as of the date of surgery. Mr. Souza attended physical therapy twice a week for at least eight (8) months after the surgery. During the summer of 2008, the insurer approved a vocational rehabilitation plan submitted by the employee which involved working with Albert Sabella, a vocational counselor, to attempt to find employment. At the time the parties rested in December 2008, Mr. Souza was participating in a computer course.

The only medical evidence submitted to the trial judge is the deposition, affidavit and reports of Dr. John Froehlich, the employee's treating physician since he was injured in 1997. Dr. Froehlich, an orthopedic surgeon, performed total knee replacement surgery on the employee's left knee on February 21, 2008. The doctor explained that the surgery was more complex in Mr. Souza's case because he had previously undergone several procedures on the knee, including a high tibial osteotomy. He indicated that immediately following the surgery Mr. Souza was totally disabled for a period of time, but as of May 9, 2008, the employee was capable of performing sedentary work on a part-time basis initially and then gradually increasing his hours. The doctor recommended that the employee pursue some type of vocational rehabilitation because it was unlikely he could return to his former employment in the automotive repair field.

The trial judge, noting the uncontradicted medical testimony of Dr. Froehlich, found that the employer had proven that the employee was no longer totally disabled as a result of his work-related injury, but remained partially disabled. Due to the fact that the employee had received benefits for partial incapacity for the maximum allowable period, the employer was ordered to cease the payment of weekly benefits to Mr. Souza. The employee filed a claim of appeal from this decision.

Our review of the decision and decree of the trial judge is limited by the terms of the Workers' Compensation Act. Rhode Island General Laws § 28-35-28(b) provides 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 must initially conclude that the trial judge was clearly wrong before undertaking its own *de novo* review of the evidence. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). In the present matter, we find that the trial judge was not clearly wrong in her conclusions.

The employee has filed five (5) reasons of appeal. In the first and fourth reasons, he contends that the decree of the trial judge is against the law, specifically R.I.G.L. § 28-33-41(c), which provides that an employee's weekly benefits shall not be diminished or terminated while he is participating in an approved rehabilitation program. We find no merit in this argument.

The employer filed the present petition to review on May 22, 2008, shortly after receiving the office note of May 9, 2008 from Dr. Froehlich stating that the employee was capable of some sedentary work. Notices were sent to the parties scheduling the pretrial conference to be held on June 11, 2008. Apparently after receiving this notice, the employee's attorney arranged for Mr. Souza to meet with Albert Sabella, a vocational rehabilitation counselor. On June 9, 2008, the employee filed a petition requesting approval of a vocational rehabilitation plan developed by Mr. Sabella. On June 11, 2008, the pretrial conference was held regarding the employer's request to modify the employee's status from total to partial incapacity. That request was granted and the employee claimed a trial.

The trial judge declined to address the employee's petition for approval of the rehabilitation plan because the employee had failed to comply with R.I.G.L. § 28-35-12(a) which states that no petition shall be filed until 21 days after written demand is sent to the employer or

insurer. Rather than dismiss the petition due to this procedural defect, the trial judge continued the matter to allow the parties to attempt to resolve the issue. On July 10, 2008, the parties advised the trial judge that the insurer agreed to the vocational rehabilitation plan and a pretrial order to that effect was entered. On December 24, 2008, the trial judge's decree in the present matter was entered in which she essentially affirmed the pretrial order modifying the employee's status from total to partial disability and effectively terminating his benefits. At that time, Mr. Souza was still participating in the vocational rehabilitation plan.

In relying upon § 28-33-41(c), the employee ignores the clear language of § 28-35-20(c), which states that a pretrial order is effective upon entry despite the filing of a claim for trial. The parties must comply with the pretrial order until a decree is entered after the conclusion of the trial. The sequence of events in this case reveals that Mr. Souza's benefits were terminated prior to the approval of the rehabilitation program. To apply § 28-33-41(c) in this instance would effectively vacate or render null and void the pretrial order which had been entered. This is clearly not a proper application of the statute and the trial judge properly rejected the employee's argument on this issue.

The employee next argues that the trial judge disregarded Dr. Froehlich's testimony that the employee was in need of vocational rehabilitation when she found that he was no longer totally disabled. He also contends that the doctor's testimony that he was capable of sedentary work for four (4) hours a day is not sufficient to conclude that he is partially disabled. As noted by the trial judge, the determination of partial disability in this case was a medical issue which was necessarily based upon the physical capabilities of the employee. As stated in R.I.G.L. § 28-33-17(b)(2), "total disability shall be determined only if, as a result of the injury, the employee is physically unable to earn any wages in any employment." Dr. Froehlich, the treating physician,

clearly stated that the employee was capable of some type of work. An employee would not be in a position to participate in a vocational rehabilitation program unless he or she was partially disabled since total disability is generally equated to the inability to perform any type of work. One would logically need to have the physical ability to perform some type of work in order to engage in a job-seeking or job training program. Therefore, the change in status from total to partial disability is entirely consistent with the initiation of a vocational rehabilitation program.

The employee cites a footnote in Lombardo v. Atkinson-Kiewit, 746 A.2d 679 (R.I. 2000), in support of his argument that his ability to perform sedentary work for four (4) hours a day is insufficient to conclude that he is no longer totally disabled. Dr. Froehlich testified that as of May 9, 2008, which was about eleven (11) weeks post-surgery, the employee could work five (5) hours a day, five (5) days a week, and then gradually increase his hours after that. The doctor also stated that as of his office visit on July 3, 2008, Mr. Souza was capable of sedentary work on a full-time basis. This testimony clearly supports the determination that the employee is no longer totally disabled. The employer is not required to find employment for the employee in order to prove partial disability.

The Lombardo case involved a determination of so-called "odd-lot" status under R.I.G.L. § 28-33-17(b)(2). This statute permits a finding of total disability if the employee can establish that he is incapable of performing his regular job duties and any alternative employment. In the footnote to the decision cited by Mr. Souza, the Rhode Island Supreme Court, in discussing the qualifications for application of "odd-lot" status, stated:

> "Therefore, even though the employee could conceivably do some light, sporadic, or intermittent work, the employee still should be able to establish odd-lot status if he or she can prove that such employment does not constitute a practical or regular alternative to the employee's former job."

Lombardo, 746 A.2d at 686, fn. 5. The ability to do sedentary work five (5) hours a day, five (5) days a week is hardly "light, sporadic or intermittent work." Furthermore, Dr. Froehlich stated that by July 3, 2008, the employee was capable of full-time work. The employee did not present any evidence which would support a finding of "odd-lot" status and a conclusion that he should be deemed permanently totally disabled.

In his final reason of appeal, the employee argues that the statutory requirement of a 21 day demand letter prior to the filing of his petition for approval of his vocational rehabilitation plan denied him equal protection and due process because no such requirement is imposed upon the employer. A challenge to the constitutionality of a statute must be raised at the trial level with notice to the Attorney General. We find nothing in the record to indicate that these requirements were met and, therefore, any constitutional challenge is not properly before this panel.

We would point out that Mr. Souza is not being deprived of an opportunity to participate in a vocational rehabilitation plan paid for by the insurer. The effect of the decree in this matter was to terminate the payment of any weekly compensation benefits because he had exhausted the allowable period of partial disability benefits in 2003. Mr. Souza has been placed back in the same situation he was in for five (5) years prior to the surgery in February 2008. He never sought to engage in any type of vocational rehabilitation from the time he was injured in 1997 until May of 2008. We find the employee's argument that fundamental fairness now requires that we reinstate his weekly benefits due to his participation in the vocational rehabilitation plan to be unpersuasive.

For the foregoing reasons, the employee's appeal is 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

Salem and Hardman, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Salem, J.

_____
Hardman, J.

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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 December 24, 2008 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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Salem, J.

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Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Dennis J. Tente, Esq., and Berndt W. Anderson, Esq., on

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