STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

JAN CO., INC.	)	
	)	
VS.	)	W.C.C. 2009-06777
	)	
MARI WOODARD	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employer's claim of appeal from the decision and decree of the trial judge in which he found that the employer failed to prove that the position offered as suitable alternative employment was within the employee's physical limitations resulting from the work-related injury she sustained on July 8, 2009. The issue before the trial judge was whether the employer's offer of suitable alternative employment as an order taker/cashier was refused by the employee and thus an earnings capacity should have been set pursuant to R.I.G. L. § 28-33-18.2(c). After a thorough review of the record and consideration of the arguments of the respective parties, we deny the employer's appeal and sustain the decision and decree of the trial judge.

Mari Woodard, the employee, suffered an injury on July 8, 2009 in the course of her employment with Jan Co., Inc., the employer, at one of their Burger King locations. A Memorandum of Agreement dated October 14, 2009 described the injury as a "brachial plexus contusion left" and provided for the payment of partial incapacity benefits beginning July 16, 2009. In a letter dated October 1, 2009, the employer offered the employee "light duty work" as

a “Front Order Taker.” The employer’s letter to the employee describes the duties of a “Front Order Taker” as including taking a customer’s order and punching it into the computer, taking the customer’s money, giving the customer their change, and handing a completed order weighing less than five (5) pounds to the customer, all to be completed with the right arm only. On October 10, 2009, the employee attempted this “light duty position” for one (1) hour and thirty (30) minutes before leaving.

On October 14, 2009, the employer sent a second letter to the employee offering the position of “order taker/cashier” as suitable alternative employment in accordance with R.I.G.L. § 28-33-18.2. The employer’s letter classified the position as “order taker/cashier” to begin on October 30, 2009, but did not include any description of the job duties of the position. Testimony given during the trial revealed that the position involved the same activities as the offer for “light duty work.” When Ms. Woodard did not report for work on October 30, 2009, the employer filed a petition requesting that the court set an earning capacity pursuant to R.I.G.L. § 28-33-18.2(c).

At a pretrial conference on December 7, 2009, the trial judge requested that the employee try the suitable alternative employment position. The employee proceeded to call out of work on December 10, 2009 due to snow and December 12, 2009 due to illness. She worked in the suitable alternative employment position on December 13, 2009 from 6:30 a.m. until 12:00 p.m. and did not report to work after that date. On December 17, 2009, a pretrial order was entered denying the employer’s petition to set an earning capacity. Thereafter, the employer filed a timely claim for trial.

The only medical evidence introduced at trial was the deposition of Dr. Randall L. Updegrove, a specialist in occupational medicine, who began treating Ms. Woodard on July 30,

2009. The employee related to the doctor that she was injured when a box of frozen French fries fell and hit her head and neck area on the left side. Based upon the history provided by the employee and his examination, Dr. Updegrove diagnosed the employee with a brachial plexus contusion, or stretch injury, on the left side. Er's Ex. C at 5:6-5:9. As of September 30, 2009, the doctor reported that the employee's examination was unchanged as he continued to find tenderness on the left side of the neck extending to the upper back and inside of the shoulder blade as well as along the top of the shoulder. Id. at 9:4-9:11. In his office note of that date, Dr. Updegrove opined that the employee would be able to return to work "if no use of the left arm can be guaranteed." Er's Ex. C, report dated 9/30/09.

During the doctor's deposition, counsel for the employer described the position of order taker/cashier which would be performed using only one (1) hand and asked Dr. Updegrove whether the employee could perform that job based upon his September 30, 2009 examination. The doctor responded that she was capable of performing those activities so long as she would also not be reaching repetitively or raising her left arm. Subsequent to Dr. Updegrove's September 30, 2009 note, the employer provided the doctor with surveillance footage of the employee lifting a young child into a car seat several times as well as carrying several bags of groceries. After reviewing the videotape and a report of the surveillance activity, Dr. Updegrove remained of the opinion that the employee would be able to do the job described in the suitable alternative employment letter "if the actual execution of those activities did not involve repetitive reaching, particularly over mid-chest height of her left arm..." Er's Ex. C at 17:9-17:12. Dr. Updegrove drafted a letter to the employer after review of the surveillance video stating his medical opinion on the employee's restrictions remained essentially unchanged. Er's Ex. C, letter dated 10/1/09.

Mari Woodard testified before the court that while she understood the suitable alternative employment position was to be done with her unaffected right arm only, the actual performance of the position with only her right arm was not realistic. It should be noted that Ms. Woodard is left hand dominant. She acknowledged receipt of the employer's October 14, 2009 letter offering the position of "order taker/cashier" as suitable alternative employment to begin on October 30, 2009. Tr. at 6. Ms. Woodard stated that while the letter offered the position of order taker/cashier, the position was the same as the "light duty" work she attempted on October 10, 2009. Id. at 8. She asserted that the "light duty" position was "not something that I could do, not all day long." Id. at 9. The employee then worked in the suitable alternative employment position on December 13, 2009 and testified she could not perform the duties of the position with only her right arm. She further explained that an employee is expected to "chip in" and help out in the restaurant beyond the scope of their job description. Ms. Woodard related that she was asked to exceed the scope of the job description by other employees, but was uncertain as to their identity. The employee stated, "that's the environment when you're in a fast food restaurant, people just yell, you just do it." Id. at 32-33.

Susan McNulty, the insurance manager for Jan Co., Inc., testified on behalf of the employer that she sent the October 14, 2009 letter offering suitable alternative employment to the employee. The letter states that the employee is being offered the position of order taker/cashier as suitable alternative employment but it does not contain any description of the job duties. Ms. McNulty indicated that as the insurance manager she was familiar with the employee's injuries and resulting work limitations. She explained that the position offered to the employee would require her to "stand at the front counter, take a customer's order, punch it in the register or computer, take the customer's money, give back the customer's change, wait for

the order to be bagged or put on a tray and pushed to the employee, who would then hand it to the customer." Id. at 41. She acknowledged that normally the order taker/cashier would assemble the food and drinks but to accommodate the employee an additional person would perform this function for her. The witness further testified that there were no time restrictions placed on the employee to complete her tasks with her unaffected right hand; however, Ms. McNulty later testified that while there are no time restrictions on an employee in the fast food setting, there are some subjective time constraints to provide speedy service. Id. at 54. Despite the subjective time constraints, the witness asserted that the job of order taker/cashier could be performed using only one hand with no need at any time to use both hands. Id. at 54-55.

Christine O'Connor, a breakfast coordinator at Jan Co., Inc., testified on behalf of the employer. Ms. O'Connor's role as the breakfast coordinator required her to oversee the employee in her suitable alternative employment position. She testified she was aware of the employee's physical restrictions in the suitable alternative employment position and observed the employee work on December 13, 2009 using only her right arm. On cross-examination, the witness acknowledged that because the employee cannot fill an order, a customer may have to wait for a second employee to finish their tasks before the customer's order can be filled. On the day that Ms. Woodard tried the suitable alternative employment position, the person who was to assist her was also the drive-thru order taker. When asked whether the employee would hand the tray to a customer or push it across the counter, Ms. O'Connor initially responded the tray would be handed to the customer. She then corrected herself to state that the employee would push the tray to the customer and that she discussed this issue with Ms. McNulty and Ms. Miller prior to testifying.

Amanda Miller testified on behalf of the employer that she was a part-time shift supervisor in December of 2009. She testified she did not ask the employee to perform any job duties with her left arm or observe the employee perform any job duties with her left arm while the employee was working in the suitable alternative employment position. On cross-examination, the witness acknowledged that it is her job to oversee the entire restaurant during her shift and she did not remember if she observed the employee the entire time she was working.

Based on the information provided, the trial judge found that the employer did offer Ms. Woodard a position of suitable alternative employment as an "order taker/cashier" in a letter dated October 14, 2009; however, he concluded that the medical evidence provided by the employer failed to establish that Ms. Woodard could physically perform the suitable alternative job. The trial judge was particularly concerned about the ability of the employee to perform this one-handed job in the fast paced environment of a fast food restaurant such as Burger King. Therefore, the trial judge denied the employer's petition to set an earning capacity based upon the employee's alleged refusal of suitable alternative employment.

The appellate standard of review is very limited and is clearly delineated in R.I.G.L. § 28-35-28(b), which states that "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." Pursuant to this standard, we are precluded from engaging in a *de novo* review of the evidence and substituting 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). After a thorough review of the record, we find no error on the part of the trial judge, and deny the employer's appeal and affirm the decision and decree of the trial judge.

The employer has filed three (3) reasons for appeal in this matter. In the employer's first reason of appeal, the employer asserts that the trial judge clearly erred in his finding that the medical evidence failed to establish that Ms. Woodard could perform the suitable alternative job because the medical evidence provided was uncontroverted that Ms. Woodard could perform such work. After review of the record, it is clear Dr. Updegrove did opine that Ms. Woodard would be able to perform the suitable alternative job as described to him, as long as his restrictions were followed.

Suitable alternative employment is defined by R.I.G.L. §28-29-2(10) as employment, or an actual offer of employment which the employee is physically able to perform and will not exacerbate the employee's health condition. The employer provided Dr. Updegrove with a very specific description of the position offered to Ms. Woodard where she would take customers' orders, enter the orders into a computer, take the customers' money, provide the customer with change, and hand a completed order to the customer all with the use of only her non-dominant right arm. Er's Ex. C at 19. Based on the description of the position provided to him, Dr. Updegrove opined Ms. Woodard would be able to perform the duties of the suitable alternative employment position "order taker/cashier" because the performance of the job activities would not require Ms. Woodard to be reaching repetitively or elevating her arm. Id. at 12. The doctor repeatedly stressed, however, that his opinion was based upon the condition that the employee would not use her left arm in the actual execution of the job at work. The employer is correct that Dr. Updegrove did opine that the employee could perform the job as described to him hypothetically. The issue before the trial judge then became whether the proposed suitable alternative employment position could realistically be performed in the actual work environment with only the employee's non-dominant right arm.

In the second reason of appeal, the employer asserts that the trial judge clearly erred in his determination that Ms. Woodard could not "adequately" perform the duties of an "order taker/cashier" in a fast food restaurant because there is no evidence in the record to support this conclusion. Our review of the testimony of the witnesses and the trial judge's decision reveals that the trial judge, in making his determination, found the testimony of the employee to be more credible and persuasive than the testimony of the employer's witnesses as to the demands of the work environment in which she was expected to perform the duties of an order taker/cashier.

In reviewing a trial judge's decision based upon credibility determinations, the appellate division is particularly deferential.

> [B]efore disturbing findings based on credibility determinations, [the appellate panel] must first find that the trial [judge] was clearly wrong either because the [trial judge] was obviously mistaken in his or her judgment of the credibility of the witnesses or overlooked or misconceived material evidence in arriving at the conclusion reached.

Mulcahey v. New England Newspapers, Inc., 488 A.2d 681, 683 (R.I. 1985). The Rhode Island Supreme Court has determined that the trial judge is "uniquely qualified" to assess the credibility of the witnesses testifying before him. Quintana v. Worcester Textile Co., 511 A.2d 294, 295 (R.I. 1986). "We believe that the trial commissioner is in the best position to observe the appearance of a witness, his demeanor, and the manner in which he answers questions. These impressions are invaluable in assessing the credibility of witnesses and ultimately in determining what evidence to accept and what evidence to reject." Davol Inc. v. Aguiar, 463 A.2d 170, 174 (R.I. 1983) (citing Laganiere v. Bonte Spinning Co., 103 R.I. 191, 236 A.2d 256 (1967)).

In the present matter, the trial judge was not persuaded by the lay witness testimony of Ms. McNulty, Ms. O'Connor, or Ms. Miller that suggested the employee would be able to carry out the suitable alternative employment position adequately in the actual work environment,

given her physical restrictions. The trial judge chose to accept the testimony of Ms. Woodard in conjunction with the medical testimony of Dr. Updegrove, over the testimony provided by the employer's witnesses.

Ms. Woodard explained to the court that the light duty position she worked in on October 10, 2009 was essentially the same as the suitable alternative employment position she attempted on December 13, 2009. The position Ms. Woodard was asked to perform without the use of her dominant left arm proved difficult given the fast food environment. For example, the position required Ms. Woodard to make change quickly for customers with only one hand. Ms. Woodard acknowledged before the court that she would sometimes find herself using her left arm simply out of habit. Tr. at 32. Additionally, Ms. Woodard would engage in activities outside of the scope of the "order taker/cashier" position in an effort to "chip in" at the restaurant. Id. As a result of the physical demands of the position of order taker/cashier, Ms. Woodard felt she was unable to work in the suitable alternative employment position without the use of her left arm. Tr. at 9. We share in the opinions of the trial judge and Ms. Woodard that the actual performance of the job of "order taker/cashier" did not accommodate the physical restrictions Dr. Updegrove recommended as evidenced by Ms. Woodard's testimony before the court.

The testimony of Ms. McNulty, Ms. O'Connor, and Ms. Miller were considered by the trial judge in his determination as to whether the offered position fully embraced and accurately reflected the actual position Ms. Woodard performed. This panel shares in the concerns the trial judge expressed regarding the assertions of Ms. McNulty with respect to an individual's ability to work at their own pace. On behalf of the employer, Ms. McNulty acknowledged on cross-examination that there are subjective time constraints in the fast food business to ensure speedy service. Tr. at 54. This need for speedy service as an "order taker/cashier" is inconsistent with

the employer's assertion that Ms. Woodard would be able to work at her own pace given that she would need to perform the duties assigned to her with only her non-dominant right hand. In addition, Ms. Woodard would be expected to wait for another employee, who may have other duties as well, to fill the order for her. Ms. McNulty admitted that her opinion the job could be performed with one hand was not based on any personal experience, as she had never personally attempted the position of "order taker/cashier."

The testimony of Ms. O'Connor and Ms. Miller also presented credibility determinations as to whether the position of "order taker/cashier" could be performed with one arm. Ms. O'Connor explained Ms. Woodard required the assistance of other employees to help her complete a customer's order given her physical restrictions. This panel finds it difficult to rely on the employer's assertion that someone who is unable to fill orders because of their physical restrictions would be able to operate a computer, make change, and hand out cups given the very same physical restrictions. Additionally, Ms. O'Connor's testimony before the court was somewhat inconsistent as to the logistics of the "order taker/cashier" position as she first stated that orders were handed to customers, only to later correct her testimony to say that orders would be pushed across the counter to the customers. Ms. O'Connor explained the need to correct her previous statement to align her testimony with prior conversations she had with Ms. McNulty and Ms. Miller regarding the physical restrictions of Ms. Woodard.

While the medical evidence supports the employer's position that Ms. Woodard would be able to perform the individual physical tasks required of an "order taker/cashier," we agree with the trial judge's determination that the employer's description of the job does not fully embrace its complete duties and reflect the demands of the actual work environment of a fast food restaurant. We find the employer's assertions that there were no time constraints on the

completion of the employee's tasks and that she could work at her own pace to be entirely unrealistic. By definition, a "fast food restaurant", such as Burger King, is distinguished by the speedy and efficient delivery of its product. We share in the trial judge's concerns that the position of "order taker/cashier" could not be performed with only one hand and at Ms. Woodard's own pace in such an environment. The trial judge was persuaded by the employee's testimony that she experienced significant pain on the two (2) occasions she attempted to work and we find no error in his acceptance of her testimony as credible.

It is clear from the trial judge's decision that he found the testimony of Ms. Woodard to be more persuasive than the testimony offered by the employer's witnesses, particularly regarding the actual execution of the duties of the position in the real world environment of a fast food restaurant. Based upon the record before us, we cannot say that the trial judge was obviously mistaken in his credibility assessment or that he overlooked material evidence in making that determination. Consequently, we find that he was not clearly wrong in denying the employer's petition.

Based upon the foregoing discussion, we find it unnecessary to address the employer's third reason of appeal which was conditioned upon the appellate panel concluding that the trial judge's findings were clearly erroneous. Consequently, we deny the employer'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 Worker's Compensation Court, a final decree, a copy of which is enclosed, shall be entered on

Hardman and Ferrieri, JJ. concur.

ENTER:

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Olsson, J.

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Hardman, J.

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Ferrieri, J.

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PROVIDENCE, SC. WORKERS' COMPENSATION COURT
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	)	
MARI WOODARD	)	

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/employer and upon consideration thereof, the employer's appeal is denied and dismissed, and it is

ORDERED, ADJUDGED, AND DECREED:

1. That the findings of fact and the orders contained in a decree of this Court entered on February 17, 2011 be, and they hereby are, affirmed.

2. That the employer shall pay a counsel fee in the sum of Four Thousand and 00/100 ($4,000.00) Dollars to William A. Filippo, Esq., attorney for the employee, for the successful defense of the employer's claim of appeal.

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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Hardman, J.

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Ferrieri, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Bruce J. Balon, Esq., and William A. Filippo, Esq., on

_____