STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

ROBERT D. PACE, III	)	
	)	
VS.	)	W.C.C. 2011 - 02288
	)	
TWIN RIVER CASINO	)	

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 granting the employee's motion to dismiss his petition without prejudice. In his petition to review, the employee requested permission for major surgery, which the employer had refused to grant. The employer contends that the motion to dismiss should have been denied or granted with prejudice. After a thorough review of the record and consideration of the arguments of the respective parties, we deny the employer's appeal and affirm the decision and decree of the trial judge.

On January 27, 2011, the employer, Twin River Casino, issued a Memorandum of Agreement listing an injury date of December 19, 2010 and describing the injury as a contusion to the right knee. Pursuant to this Memorandum of Agreement, the employee began receiving weekly benefits for partial disability as of December 20, 2010. On April 26, 2011, the employee filed a petition to review seeking authorization for surgery, specifically, a "combined arthroscopically-assisted B-T-B autograft ACL reconstruction and UKA of the right knee." At the initial pretrial conference on May 18, 2011, the trial judge was confronted with conflicting

medical opinions regarding the need for surgery and whether the surgery would address the effects of the work-related injury or the employee's pre-existing condition. The trial judge opted to appoint Dr. J. Winslow Alford as an impartial medical examiner (IME).

After examining Mr. Pace on July 19, 2011, Dr. Alford issued a report in which he recommended a conservative course of treatment rather than surgery. The doctor noted that surgery may be necessary in the future due to the significant degenerative changes in the knee caused by several previous non-work-related injuries. The trial judge accepted Dr. Alford's opinions and issued a pretrial order on August 23, 2011 in which he denied the employee's petition and found that he was in need of a hinged knee brace, a cortisone injection and physical therapy, as recommended by Dr. Alford. The employee filed a timely claim for trial based on the denial of permission for the surgery proposed by his treating physician.

Prior to the trial date, Mr. Pace complied with the recommendations of the court-appointed IME, Dr. Alford, and recovered sufficiently to return to his regular job with the employer. At a hearing before the trial judge on December 1, 2011, the employee's attorney informed the trial judge that the employee had returned to work and no longer desired to have surgery. The employee orally requested that the trial judge enter an order dismissing the employee's petition without prejudice, arguing that there was no justiciable issue before the court, and the petition was moot. The trial judge agreed and dismissed the matter without prejudice pursuant to Workers' Compensation Court Rule of Practice 2.23 (A)(2) over the objection of the employer. The trial judge found that the employee's request for surgery was moot in that he no longer wished to have surgery, had complied with the recommendations of the court-appointed IME, and had returned to work. The employer filed a timely claim of appeal from the decision and decree of the trial judge.

The appellate standard of review is very limited and is clearly delineated in R.I.G.L. § 28-35-28(b), which dictates that "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." 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). The facts underlying this appeal are not in dispute and consequently, our review is limited to whether the law was properly applied in this factual context. After a thorough review of the record, we find no error on the part of the trial judge and deny the employer's appeal.

The employer has filed five (5) reasons of appeal. In the first four (4) reasons, the employer argues that the trial judge abused his discretion in dismissing the employee's petition without prejudice because he failed to consider certain factors or apply the legal standards utilized in the federal courts in addressing the motion to dismiss. In the fifth reason of appeal, the employer argues that the trial judge abused his discretion in failing to require the employee to present his motion to dismiss in writing and by failing to require that the motion be delivered to opposing counsel in accordance with Workers' Compensation Court Rule of Practice 2.17.

The trial judge viewed this matter as failing to present a justiciable controversy and therefore, dismissed the petition for authorization of surgery without prejudice based on the matter being moot. We agree with the trial judge that the matter was moot because the employee no longer wished to undergo the surgery after having complied with the conservative treatment recommended by Dr. Alford and returning to work.

A matter is moot under Rhode Island law "if the original complaint raised a justiciable controversy, but events occurring after the filing have deprived the litigant of a continuing stake

in the controversy." Cicilline v. Almond, 809 A.2d 1101, 1105 (R.I. 2002) (per curiam) (quoting Associated Builders & Contractors of Rhode Island, Inc. v. City of Providence, 754 A.2d 89, 90 (R.I. 2000) (per curiam)). The Rhode Island Supreme Court has stated that it will not decide a moot case unless the issues raised are "of extreme public importance, which are capable of repetition but which evade review." Sullivan v. Chafee, 703 A.2d 748, 752 (R.I. 1997) (quoting Morris v. D'Amario, 416 A.2d 137, 139 (R.I. 1980)). "[C]ases demonstrating extreme public importance are usually matters that relate to important constitutional rights, matters concerning a person's livelihood, or matters concerning citizen voting rights." Associated Builders, 754 A.2d at 91 (quoting Sullivan, 703 A.2d at 753).

At the time of the filing of his claim for trial, the employee was pursuing authorization from the court to undergo an operation which he felt was necessary for his recovery and return to work. The matter presented a justiciable controversy for resolution by the court. Subsequent events, specifically the employee obtaining a knee brace, receiving a cortisone injection and participating in physical therapy, resulted in his return to work at his regular job and eliminated any present need for surgery. Consequently, Mr. Pace no longer desired to have the surgery, thereby eliminating his continuing stake in the controversy. Clearly, the employee has no continuing stake in the controversy if a successful trial outcome would authorize a surgery that he no longer wishes to have. In addition, the issues raised by the petition did not involve matters "of extreme public importance, which are capable of repetition but which evade review," and therefore the matter does not fall within the exception to the mootness doctrine. Sullivan, 703 A.2d at 752. As such, the trial judge was correct in concluding that the employee's request for permission for surgery was moot as there was no justiciable controversy before the court.

In the first reason of appeal, the employer argues that the trial judge abused his discretion by dismissing the employee's petition without prejudice, rather than with prejudice, pursuant to Workers' Compensation Court Rule of Practice 2.23(A)(2). That rule, entitled "Dismissal/Withdrawal of Action," states:

> (A) *Voluntary Discontinuance: Effect Thereof.*
>
> * * * *
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> (2) *By Order of Court.* Except as provided in paragraph (1) of this section, a proceeding shall not be discontinued, nor a claim for trial withdrawn, at a party's insistence save upon order of the Court after hearing, and upon such terms and conditions as the Court deems proper. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

The employer argues that the trial judge was required to evaluate certain factors to determine whether the employer would suffer substantial prejudice before dismissing the petition without prejudice. In support of this contention, the employer cites a number of federal cases discussing these factors with regard to a voluntary dismissal pursuant to Federal Court Rule of Procedure 41(a). Before turning to the federal system for guidance in applying our rules of practice, we first look to the decisions of this court in which the application of our rule was addressed.

In Beausoleil v. Supreme Truck Body, W.C.C. No. 93-02621 (App. Div. 1996), the appellate panel affirmed the decision and decree of the trial judge who granted the employee's motion to withdraw his original petition and denied the employer's request for an assessment of costs against the employee. On appeal, the employer argued that the trial judge erred in permitting the employee to withdraw his petition after the case had been concluded and while awaiting the decision, without awarding the employer costs and counsel fees. Id. The Appellate Division noted that, "[a]lthough both parties did not stipulate to dismissing the petition in

compliance with Rule 2.23(A)(1), Rule 2.23(A)(2) provides the court with authority to order the matter discontinued." Id. In affirming the trial judge's ruling, the court stated that the rule "expressly permits the court to order the matter to be discontinued, after a hearing notwithstanding the fact that the employer has entered an appearance and defended the case." Id.

We have previously stated that "a balance must exist between ardent advocacy and wasteful, groundless and spiteful litigation." Shadoian v. NBC Steel Corp., W.C.C. No. 96-03123 (App. Div. 2000). In order to prevent the waste of judicial time and resources, we have stated that "[w]here there is no basis in fact or law for the prosecution or defense of a petition, the trial judge must have the discretion to act sua sponte in order to protect the integrity of the process and to insulate both employers and employee [sic] from frivolous litigation." Id. In the present matter, the trial judge dismissed the petition under Rule 2.23(A)(2) because there was no justiciable issue before the court. The trial judge had the authority to dismiss the case pursuant to Rule 2.23(A)(2). Beausoleil, W.C.C. No. 93-02621. The trial judge appropriately exercised his discretion in dismissing the case because there was no basis in fact for the prosecution of a petition that the employee was no longer interested in pursuing. Shadoian, W.C.C. No. 96-03123.

The employer contends that the trial judge abused his discretion in dismissing the employee's petition without prejudice because he failed to consider any of the factors which have been utilized by the federal courts in determining whether substantial prejudice to the opposing party would result from the dismissal of a case without prejudice. Those factors include: (1) the opposing party's effort and expense in preparing for trial, (2) excessive delay and the lack of diligence on the part of the movant, (3) the sufficiency of the explanation for dismissal, and (4) the present stage of litigation. Ohlander v. Larson, 114 F.3d 1531, 1537 (10th

Cir. 1997). Even if this court were to adopt the factors utilized by the federal courts in considering whether to dismiss a matter without prejudice, a review of the circumstances of the case before the panel does not provide any basis for reversing the trial judge's decision.

The employee filed his petition on April 26, 2011. At the initial pretrial conference on May 18, 2011, the trial judge appointed an impartial medical examiner, Dr. J. Winslow Alford, to evaluate the employee and address the need for surgery. Prior to filing his petition, the employee had requested permission for surgery from the insurer. In response to that request, the insurer had the employee examined on March 17, 2011 by Dr. Michael J. Hulstyn. After the court received Dr. Alford's report on August 17, 2011, the parties appeared before the trial judge on August 23, 2011 who entered a pretrial order denying the petition. The employee filed a claim for trial that day.

An initial hearing was held on September 12, 2011 for the parties to advise the court as to their plans for the trial. The trial judge's notations on the docket sheet for that date indicate that the employee was participating in physical therapy and undergoing injections in an effort to return to work. Consequently, the matter was continued to October 3, 2011 for status. On that date, the initial hearing was held and the matter was assigned to October 25, 2011 for the employee's testimony. The trial judge's notations in the docket for that date state that the employee was seeing his treating physician on November 9, 2011 and would ask that he be released to return to work. On November 17, 2011, the docket indicates that the matter was continued for submission of a stipulation by the parties. Apparently the parties were unable to agree on the terms of the stipulation. On December 1, 2011, the trial judge, after hearing from both parties, dismissed the matter without prejudice.

The employer argues that in granting the dismissal without prejudice, the trial judge failed to consider the significant expenses incurred by the employer in defending against the employee's petition. Specifically, the employer cites the expense of having the employee evaluated by its own medical expert and also the impartial medical examiner, litigation expenses incurred in defending the petition at the pretrial conference, the expense of representation at the initial hearing, and expenses associated with preparing for the trial. Most of these "expenses" were associated with the pretrial stage of the matter which resulted in a pretrial order that motivated the employee to try the recommended treatment, successfully return to his regular job, and forego the surgery. This was a very successful outcome that was beneficial to both parties. The employer saved the potential cost of a surgical procedure and was able to terminate the payment of workers' compensation benefits when the employee returned to work. One could argue that any expenses incurred in achieving this result was money well spent.

There is nothing in the record indicating that the employer had incurred any additional expenses in preparation for trial other than the cost of representation by defense counsel. From the first scheduled hearing date in September, the employer was aware that the employee was following the recommendations of Dr. Alford in an effort to return to work without surgery. No depositions were taken and no testimony was taken in court. The docket notes clearly reflect that defense counsel was aware that the employee was being released to return to work prior to the trial date. The proceeding was basically being held in abeyance in anticipation of the employee returning to work and a mutual resolution of the pending petition. Under these circumstances, the limited expenses incurred by the employer did not warrant the denial of the employee's motion to dismiss his petition without prejudice.

Additionally, the employer argues that it will suffer substantial prejudice if we allow the dismissal of the petition without prejudice to stand because the employer will incur additional expenses if the employee files another petition requesting the same surgery sometime in the future. The employer infers that if the matter were dismissed with prejudice, the doctrine of *res judicata* would prevent the employee from filing such a petition in the future. It is well-established that the doctrine of *res judicata* has limited application in the area of workers' compensation because of the continually evolving nature of a workers' compensation claim. *See* DiVona v. Haverhill Shoe Novelty Co., 85 R.I. 122, 125, 127 A.2d 503, 505 (R.I. 1956). In the present matter, Mr. Pace has returned to work at his regular job. Due to the passage of time and the physical stress of working, he may need surgery in the future and the doctors' opinions as to whether the surgery is needed due to his pre-existing condition or the effects of his employment may change. In addition, the employer would not be precluded from introducing the medical opinions of Dr. Alford and its own examining physician which were utilized in this petition. Consequently, the employer's contention that the potential expense of future litigation regarding the same surgery causes substantial prejudice is without merit.

In its third and fourth reasons of appeal, the employer argues that the trial judge abused his discretion in granting the motion to dismiss without prejudice by failing to consider the present stage of the litigation and the excessive delay and lack of diligence on the part of the employee. In support of its contention, the employer notes that the matter had been pending before the court for seven (7) months before the employee moved for dismissal on the first day the matter was scheduled for trial. It is true that about seven (7) months elapsed from the date the petition was filed with the court to the date of dismissal, but there was significant activity during that period. The matter was at the pretrial stage for about four (4) months during which

an initial pretrial conference was held, an impartial medical examination was ordered and conducted, and a final pretrial conference took place after receipt of the impartial medical examiner's report.

After the pretrial order was entered on August 23, 2011, the employee embarked upon the course of treatment recommended by Dr. Alford. The matter was continued on several occasions over the next few months in the hope that upon completion of the treatment, the employee would be able to return to work, which he did some time in November. As stated previously, the docket notes indicate that the employer was well aware of the course of events, including that the employee returned to work and was not interested in having the surgery. When the parties did not mutually agree to a resolution of the matter in November, counsel for the employee moved for dismissal of the petition at the next scheduled hearing date on December 1, 2011. We find no grounds for the employer's contentions that it was prejudiced by the dismissal at this stage of the proceedings and that there was excessive delay and a lack of diligence on the part of the employee in bringing this matter to a conclusion.

In summation, even if we consider the factors utilized in the federal system which the employer urges us to adopt, we would still affirm the decree and decision of the trial judge as there was no substantial prejudice to the employer in dismissing the matter without prejudice.

Finally, the employer argues in its fifth reason of appeal that the trial judge abused his discretion by failing to require that the employee adhere to the provisions of Workers' Compensation Court Rule of Practice 2.17, which states:

> Motions. – Motions shall be addressed to and heard at the discretion of the Trial Judge. All motions, except motions to amend the pleadings, shall be in writing and filed with the Court and a copy thereof and notice of hearing delivered to the opposing party.

After reviewing the transcript of the hearing on the motion to dismiss which took place on December 1, 2011, we deny the employer's reason of appeal because counsel for the employer did not raise this issue before the trial judge.

The employer is correct that the employee did not present his motion to dismiss without prejudice in writing, and he did not deliver a copy of the motion to opposing counsel. Rather, the employee orally requested that the trial judge rule on his motion. The employer vigorously objected, stating it would be prejudiced by a dismissal without prejudice due to expenses already incurred and the potential expense of future litigation regarding the same surgery. Counsel for the employer never took issue with the fact that the motion was not in writing or even mentioned Rule 2.17. Considering the first time this argument was raised was at the appellate level, we deem the objection waived. *See* Yates v. Dr. J. H. Ladd School, 120 R.I. 294, 298, 387 A.2d 1043, 1045 (1978) (employee precluded from raising argument in Supreme Court when issue not raised before the commission, nor included in reasons of appeal to full commission or Supreme Court).

In conclusion, we find no error in the trial judge's decision to grant the employee's motion to dismiss without prejudice and consequently, we deny and dismiss the employer's appeal. The trial judge's decision and decree is hereby 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:

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Olsson, J.

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Salem, J.

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Hardman, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

ROBERT D. PACE, III)
)
VS.) W.C.C. 2011-02288
)
TWIN RIVER CASINO)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the respondent/employer, and upon consideration thereof, the employer's claim of appeal is denied and dismissed, and it is

ORDERED, ADJUDGED, AND DECREED:

1. The findings of fact and the orders contained in a decree of this Court entered on December 20, 2011 be, and they hereby are, affirmed.

2. The respondent/employer shall pay a counsel fee in the sum of Three Thousand and 00/100 ($3,000.00) Dollars to Alfredo T. Conte, Esq., attorney for the employee, for the successful defense of the employer's appeal.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
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 Alfredo T. Conte, Esq., and Bruce J. Balon, Esq., on

_____