STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

BELVOIR PROPERTIES, LLC)
)
VS.) W.C.C. 2011-03997
)
WILLIAM JEWETT)

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employer's claim of appeal in which it alleges that the trial judge erred in modifying the employee's weekly benefits from total incapacity to partial incapacity as of the date of the entry of his decree, rather than the date of the physical examination performed by the impartial medical examiner whose opinion formed the basis for the trial judge's decision. After reviewing two (2) prior Appellate Division decisions involving a similar issue, we grant the employer's appeal and enter a new decree modifying the date on which the employee is deemed to be partially disabled.

The employee sustained a work-related injury, specifically a fracture of the L3 vertebrae, on January 4, 2005, which was memorialized in a memorandum of agreement dated July 1, 2005. Pursuant to this agreement, the employee began receiving weekly benefits for partial incapacity as of January 6, 2005. Subsequently, the parties executed a suspension agreement and receipt in which they agree that weekly benefits would be stopped as of February 18, 2006. A second memorandum of agreement was issued on November 15, 2007 indicating that the employee sustained a recurrence of his work-related injury, which was described as low back/left leg

radiculopathy. The employee began receiving weekly benefits for partial incapacity as of October 29, 2007. In a mutual agreement executed by the parties in August 2009, the parties agreed that Mr. Jewett's weekly benefits would be modified from partial incapacity to total incapacity as of March 27, 2008.

On July 18, 2011, the employer filed a petition to review alleging that the employee was capable of performing light, selected work pursuant to the report of an examination performed by Dr. Thomas Morgan at the request of the employer. When the matter came before the trial judge at the pretrial conference, the trial judge ordered that the employee submit to an impartial medical examination by Dr. A. Robert Buonanno. After receiving the report of the impartial medical examination, the trial judge entered a pretrial order on October 20, 2011 denying the employer's petition and continuing the employee's weekly benefits at the rate for total incapacity. The employer promptly filed a claim for trial.

During the trial, the employee testified and the parties submitted the affidavit, reports and deposition of Dr. Morgan, the affidavit and reports of Dr. Alexander Robertson (the treating physician), and the report and deposition of Dr. Buonanno, as well as other documentary evidence. In his decision, the trial judge found the testimony of Dr. Buonanno to be credible and competent evidence that the employee's condition had improved since March 2008 and that he was capable of light duty employment within the restrictions outlined in a functional capacity evaluation performed by the Donley Center. Consequently, the trial judge found that the employer had established that the employee was no longer totally disabled but was partially disabled and he ordered the payment of weekly benefits for partial incapacity from December 21, 2012 and continuing. The decree containing these findings and orders was entered on December 21, 2012.

The employer filed a timely claim of appeal and is alleging that the trial judge erred in setting the date the decree entered as the date the employee's incapacity changed from total to partial, rather than the date of the examination by Dr. Buonanno, whose opinion formed the basis for the trial judge's decision. In support of its contention, the employer cites the decisions rendered by the Appellate Division in Bernardo v. Coats American, W.C.C. No. 96-03642 (App. Div. 1998) and Ocean State Job Lot v. Idarraga, W.C.C. No. 2009-05442 (App. Div. 2011).

In Bernardo, the employee had filed an original petition alleging that she sustained a work-related injury on February 12, 1996 resulting in disability beginning March 5, 1996 and continuing. At the pretrial conference on June 20, 1996, the trial judge granted the petition and awarded the employee weekly benefits for a closed period of time from March 5, 1996 through June 20, 1996. Thereafter, following a trial on the merits, the trial judge entered a decree affirming the pretrial order and awarding weekly benefits for the same closed period. In her decision, the trial judge stated that she relied upon the opinion of Dr. Stanley J. Stutz, who examined the employee on April 22, 1996, in finding that the employee's incapacity had ended.

The employee claimed an appeal. The Appellate Division sustained the trial judge's finding that the employee's incapacity had ended; however, the panel found that the trial judge erred in setting the end of the incapacity as the date of the pretrial conference, rather than the date of Dr. Stutz's examination. In modifying the decree to reflect the end of incapacity as the date of the doctor's examination, the Appellate Division noted that "we are protecting not only the rights of the employer, but, also, the rights of the employee in the event that a subsequent petition for review alleging a return for incapacity is filed." Bernardo at 3.

In Idarraga, the employer had filed a petition alleging that the employee's incapacity resulting from a March 16, 2008 injury had ended. After receiving the report of Dr. David J.

Cicerchia, the impartial medical examiner appointed by the court, the trial judge entered a pretrial order finding that the employee's incapacity had ended and discontinuing his weekly benefits as of February 1, 2010, the date of the pretrial conference. The employee claimed a trial from this order. In his decision, the trial judge stated that he chose to rely upon the opinion of Dr. Cicerchia in finding that the employee's incapacity had ended and he ordered that the employee's weekly benefits be discontinued as of December 21, 2009, the date of Dr. Cicerchia's examination of the employee. The employee claimed an appeal. The Appellate Division, citing its decision in Bernardo, affirmed the decree of the trial judge.

After reviewing these decisions and the factual scenario of the present matter, we see no reason to depart from the precedent set forth in our decisions in Bernardo and Idarraga. In Mr. Jewett's case, the date of December 21, 2012 represents nothing more than the date the trial decree happened to be entered. To say that Mr. Jewett's physical condition changed on that date from total disability to partial disability would be inaccurate and not in conformance with the evidence in the record. In contrast, the date of September 29, 2011 is the date on which Dr. Buonanno conducted his physical examination of the employee and the results of that examination led the doctor to opine that Mr. Jewett was no longer totally disabled, but was capable of some type of light duty work. This date and the physical findings of that examination then become the point of reference for any future petitions alleging a change in the employee's condition.

For the foregoing reasons, we grant the appeal of the employer and shall enter a new decree consistent with our decision containing the following findings and orders:

1. That the employer has proven by a fair preponderance of the credible evidence that the employee is no longer totally incapacitated due to the effects of the work-related injury he sustained on January 4, 2005.

2. That the employer has proven by a fair preponderance of the credible evidence that the employee is partially disabled due to the effects of the work-related injury he sustained on January 4, 2005.

It is, therefore, ordered:

1. That the employer's petition to review is granted.

2. That the employer shall discontinue the payment to the employee of weekly benefits for total incapacity and commence the payment of weekly benefits for partial incapacity from September 29, 2011 and continuing.

We have prepared and submit herewith a new decree consistent with our decision. In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, the final decree, a copy of which is enclosed, shall be entered on

Salem and Ferrieri, JJ., concur.

ENTER:

____
Olsson, J.

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Salem, J.

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Ferrieri, J.

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division on the claim of appeal of the petitioner/employer from a decree entered on December 21, 2012. Upon consideration thereof, the appeal of the employer is granted, and in accordance with the Decision of the Appellate Division, the following findings of fact are made:

1. That the employer has proven by a fair preponderance of the credible evidence that the employee is no longer totally incapacitated due to the effects of the work-related injury he sustained on January 4, 2005.

2. That the employer has proven by a fair preponderance of the credible evidence that the employee is partially disabled due to the effects of the work-related injury he sustained on January 4, 2005.

It is, therefore, ORDERED:

1. That the employer's petition to review is granted.

2. That the employer shall discontinue the payment to the employee of weekly benefits for total incapacity and commence the payment of weekly benefits for partial incapacity from September 29, 2011 and continuing.

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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Ferrieri, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Michael D. Lynch, Esq., and John M. Harnett, Esq., on

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