STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

FAUSTO MARQUEZ	)	
	)	
VS.	)	W.C.C. 98-06503
	)	
DBC OCCUPATIONS UNLIMITED, INC.	)	
FAUSTO MARQUEZ	)	
	)	
VS.	)	W.C.C. 96-03334
	)	
OCCUPATIONS UNLIMITED	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. These two (2) matters have been consolidated for hearing and decision by the court. Both matters are before the Appellate Division on the appeals of the petitioner/employee. After careful review of the entire record in these matters and consideration of the arguments of counsel, we conclude that the findings of the trial judge are not clearly erroneous and we therefore deny and dismiss the employee's appeals.

The employee was initially paid weekly benefits for total incapacity pursuant to a Memorandum of Agreement dated March 9, 1993. This document

indicated that the employee sustained amputations of his left index, middle and ring fingers at the first joint on September 18, 1992, resulting in total incapacity beginning September 19, 1992. On March 7, 1995, a decree was entered in W.C.C. No. 93-05222 finding that the employee was partially disabled and that his condition had reached maximum medical improvement as of July 2, 1993. His weekly benefits were reduced to seventy percent (70%) of his weekly compensation rate and then further reduced based upon a finding that he had an eighteen percent (18%) functional impairment of his whole body as a result of the work injury.

On November 1, 1995, a decree was entered in W.C.C. No. 94-07947 denying the employee's allegation that his disability had increased to total incapacity, denying the payment of certain medical bills for psychiatric treatment, and approving his request for permission for further surgery on his fingers to remove neuromas. This surgery was finally done on May 14, 1996.

W.C.C. No. 96-03334 is an Employee's Petition to Review alleging that the employee's incapacity has increased from partial to total disability due to the effects of the work-related injury he sustained on September 18, 1992. In the alternative, the employee contends that he remains partially disabled, but his condition is no longer at maximum medical improvement and he is therefore entitled to reinstatement to full benefits for partial incapacity. At the pretrial conference, the employee's petition was denied and he claimed a trial in a timely manner.

W.C.C. No. 98-06503 is an Employee's Petition to Review in which the employee seeks continuation of his weekly benefits for partial incapacity beyond the period of 312 weeks. This petition was also denied at the pretrial conference and the employee filed a claim for trial.

The employee, who was fifty-seven (57) years old at the time of his testimony in 1997, testified through an interpreter. He explained that he was working as a "cutter" machine operator at the time of his injury in 1992. He would place material in the machine, measure it, press a button which caused a blade to cut the material, and then remove the material from the machine. He has been treating with Dr. Leonard Hubbard since 1992. He receives Social Security Disability Insurance benefits and asserted that he cannot work because his fingers are very sensitive and painful. He is left handed and the injury was to three (3) of the fingers on his left hand.

The employee stated that around September 1995, he was walking down a set of stairs when he slipped on some loose plastic on a step. As he lost his balance, he tried to grab the wall with his left hand, but it was so painful that he let go and fell, injuring his left hand. He contends that he would not have fallen if his left hand and fingers were normal.

The medical evidence consists of the affidavit, deposition and records of Dr. Leonard Hubbard, the deposition and records of Dr. Arnold-Peter Weiss, and the report of Dr. Gregory Austin. The employee has treated with Dr. Hubbard since October 13, 1992. The doctor had recommended neuroma excision

surgery in early 1993, but it was not done until 1996. At an office visit on September 27, 1995, Dr. Hubbard noted that the employee fell down some stairs about ten (10) days earlier. The employee told the doctor that he grabbed a railing with his left hand but could not hold on and fell down the stairs, landing on his left hand. Dr. Hubbard found that the employee had a fracture of the left pisiform which is a bone at the base of the hand.

The doctor testified that the employee's inability to grab the railing could be causally related to the work injury, but he could not state with any certainty that the inability to grab the railing caused the fall because the employee might have fallen anyway.

On May 14, 1996, Dr. Hubbard performed the neuroma excision surgery on the third and fourth fingers. In his operative report, he noted that he did find large neuromas at four (4) sites. He indicated that the employee was totally disabled as of the date of surgery. As of July 24, 1996, the doctor stated that the employee could do some light work despite some tenderness in his fingertips.

Dr. Weiss evaluated the employee on four (4) occasions at the request of the insurer. At the last examination on December 12, 1996, the employee stated that he felt no change in his symptoms since the neuroma excision surgery and his fingertips were still sensitive. However, Dr. Weiss noted that the fingertips were not sensitive to palpation during the examination and he found no other physical evidence to substantiate the employee's complaints of pain. The doctor

concluded that the employee was capable of using his left hand in a normal fashion and his condition had reached maximum medical improvement.

Dr. Austin conducted an impartial medical examination of the employee on September 26, 1997 at the request of the court. He noted a fair amount of sensitivity in the fingertips, some restricted range of motion (although the doctor noted that the employee seemed to be intentionally restricting the movement), and substantially weakened grip strength on the left. The doctor indicated that the degree of recovery seemed worse than the average amputation of this type and there were signs of "posturing" during the examination. He raised some questions as to whether the employee's problem was now the result of a pain syndrome rather than the physical effects of the injury.

Dr. Austin concluded that the employee was able to use the left hand for many types of machine operations so long as the work was not overly strenuous and there was no exposure to excessive heat, cold, or vibration.

In addition to the medical evidence, the employee also presented the testimony and report of Stephen Colella, a vocational rehabilitation counselor. The report is dated February 7, 1998. Mr. Colella concluded that Mr. Marquez was not employable because he would have difficulty meeting production quotas and maintaining employment in the unskilled light sedentary jobs for which he would be qualified.

After considering all of the evidence, the trial judge found that the fall down the stairs and resulting injury was not due to the effects of the work-related injury.

He noted that pursuant to a decree entered in W.C.C. No. 94-07947, the neuroma excision surgery was found to be necessary to treat the effects of the work-related injury. Therefore, the employee was entitled to benefits for total incapacity from May 14, 1996 to July 23, 1996 as a result of that surgery. He remained partially disabled thereafter. Based upon the evaluation by Dr. Weiss, the trial judge also found that the employee's condition had reached maximum medical improvement as of December 12, 1996 and his weekly benefits should be reduced to seventy percent (70%) of his weekly compensation rate as of that date.

With regard to the employee's petition in W.C.C. No. 98-06503, the trial judge found that the employee had not established that his partial incapacity was a material hindrance to finding employment and he did not prove that he should be deemed totally disabled pursuant to either the common law or statutory "odd lot" doctrine. In addition, the trial judge indicated that the brief period of total incapacity in 1996 did not operate to restart the running of the 312 week limit for the payment of partial incapacity benefits.

Our review of a trial judge's findings of fact is strictly circumscribed by statute and case law. Rhode Island General Laws § 28-35-28(b) states that the findings of fact made by the trial judge are final unless the appellate panel specifically finds that they are clearly erroneous. See also Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). Only then may the appellate panel

undertake a *de novo* review of the evidence. Id., (citing Grimes Box Co., Inc. v. Miguel, 509 A.2d 1002 (R.I. 1986)).

The employee has filed seven (7) duplicate reasons of appeal in both cases. The first three (3) reasons are merely general statements that the decree is against the law, the evidence and the weight thereof. They are clearly lacking the specificity required by statute and case law. See R.I.G.L. § 28-35-28(a); Bissonnette v. Federal Dairy Co., 472 A.2d 1223, 1226 (R.I. 1984). Therefore, they are summarily denied and dismissed.

The fourth, fifth, and sixth reasons of appeal can be addressed together. The employee basically contends that the trial judge was wrong to consider the recitation of testimony found in the decision regarding a prior petition to reject the opinion of Mr. Colella that the employee was not employable. During the course of the trial of these matters, counsel for the employer moved to introduce into evidence the decision rendered in a prior petition involving the same parties, W.C.C. No. 93-05222. Counsel for the employee did not object and in fact indicated that he saw no reason to exclude it from the record. It is well-settled that once evidence is admitted, it can be utilized for any and all purposes.

In the decision rendered in W.C.C. No. 93-05222, the trial judge recites the testimony of Manuel Revis, an employment counselor at Occupations Unlimited at the time, who had interviewed the employee. Mr. Revis apparently testified that Mr. Marquez completed an employment application in English, he spoke to him in English, and afterwards, Mr. Revis used the employee as a translator for other

Spanish-speaking applicants. On the employment application, Mr. Marquez indicated that he had gone to school for two (2) years at Community College of Rhode Island and he had previously worked as a machine operator, in a cleaning business, and as an insurance claims reviewer. The trial judge also noted the content of other records regarding a prior workers' compensation claim which indicated that the employee had worked as a private duty nursing aide, as a van driver for United Cerebral Palsy, as a truck driver in New York City, and as a bank teller in Ecuador. Other records which were mentioned in the trial decision indicated that medical providers and representatives of the employer and insurer had no difficulty communicating with the employee in English.

The trial court in the present matters did cite the above-noted information from the decision in W.C.C. No. 93-05222 in determining that the foundation of Mr. Colella's opinion that the employee was unemployable was faulty. We find no error on the part of the trial judge in this regard. When counsel for the employee permitted the decision in W.C.C. No. 93-05222 to be introduced as a full exhibit without limitation, he should have been aware of the content of it and the fact that it could be used against him.

Mr. Colella testified that part of the basis for his opinion was his understanding that the employee only had a GED, was unable to read or write in English, could only speak English with minimal understanding, and had only previously worked as a machine operator. Based upon the information gleaned from the decision in W.C.C. No. 93-05222, these conclusions were obviously

incorrect. In addition, it appears that Mr. Colella's interpretation of the report of Dr. Austin is overly restrictive as to the use of the employee's left hand. Mr. Colella stated that he utilized the opinions of Dr. Austin as to physical restrictions in formulating his opinion. Dr. Austin stated that the employee was able to use his left hand for many machine operations so long as the activity was not overly strenuous and there was no exposure of the left hand to excessive heat, cold, or vibration. It is clear from Mr. Colella's report and testimony that he assumed that the employee basically could not use his left hand for anything significant and he searched for potential jobs where only one (1) hand would be needed. This excessive restriction, which is not supported by the medical evidence, further discounts the validity of Mr. Colella's opinion on employability.

After the rejection of Mr. Colella's opinion for lack of proper foundation, there is no other evidence in the record that the employee is not able to earn wages in any employment due to the effects of his work-related injury and taking into account his age, education, background, abilities, and training. The employee did not establish that he satisfies the criteria of the so-called "odd lot" doctrine. Consequently, we deny the employee's fourth, fifth and sixth reasons of appeal.

In his final reason of appeal, the employee contends that the three hundred and twelve (312) week limitation on partial incapacity benefits starts over after any period of total incapacity and therefore, the three hundred and twelve (312) week period would begin on July 24, 1996, after his most recent period of total

incapacity had ended. After examining the language of the statutes involved, we find no merit in the employee's argument.

Rhode Island General Laws § 28-33-18(d) provides as follows:

> "In the event partial compensation is paid, in no case shall the period covered by the compensation be greater than three hundred and twelve (312) weeks. In the event that compensation for partial disability is paid under this section for a period of three hundred and twelve (312) weeks, the employee's right to continuing weekly compensation benefits shall be determined pursuant to the terms of § 28-33-18.3."

Section 28-33-18.3(a)(1) states in part:

> "Any period of time for which the employee has received benefits for total incapacity shall not be included in the calculation of the three hundred and twelve (312) week period."

Giving these words their plain and ordinary meaning, the only interpretation of this language is that those weeks are excluded when counting the number of weeks. If the legislature had intended that the three hundred and twelve (312) week period must be continuous and should start again from the last day of total incapacity, it would have been very simple to state that intention, rather than use the language quoted above. There is nothing in the statutory language that mandates that the three hundred and twelve (312) weeks run continuously. Therefore, we deny the employee's final reason of appeal.

The employee in this matter had received a notice from the insurer that the three hundred and twelve (312) week period of partial incapacity payments would end on June 15, 1999. As the trial judge noted in his decision, due to the finding

of a period of total incapacity from May 14, 1996 to July 23, 1996, this deadline would be extended by that period of about eight (8) or nine (9) weeks. We leave it to the insurer to properly make that calculation. Based upon our decision in this matter, the employee's weekly benefits would then be terminated at the end of that additional period as he has not established that he qualifies for the continuation of his weekly benefits.

Based upon the foregoing, the employee's appeals in both matters are denied and dismissed in their entirety and the decision and decrees of the trial judge are affirmed.

In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, final decrees, copies of which are enclosed, shall be entered on

Healy, and Connor, JJ. concur.

ENTER:

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Healy, J.

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Olsson, J.

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Connor, 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 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 June 29, 2001 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

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ENTER:

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Healy, J.

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Olsson, J.

____
Connor, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq., and Ronald A. Izzo, Esq., on

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