STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

CURTIS PONDER	)	
	)	
VS.	)	W.C.C. 99-03199
	)	
GMAC MORTGAGE CORP.	)	
CURTIS PONDER	)	
	)	
VS.	)	W.C.C. 97- 06134
	)	
GMAC MORTGAGE CORP.	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. These two (2) matters are before the Appellate Division on the respondent/employer's appeals from adverse decisions rendered by the trial judge. W.C.C. No. 97-06134 is an Original Petition filed by the employee which alleges that he sustained an injury to his back and right leg on May 6, 1997 during the course of his employment which resulted in partial incapacity from that date and continuing. The trial judge granted this petition with the finding that the employee was disabled from May 7, 1997 to January 29, 1998. The employer has appealed, arguing that the employee was not disabled for such a lengthy period. After

careful review of the record, we agree and reverse the trial judge with regard to the length of the period of disability.

W.C.C. No. 99-03199 is the employee's petition requesting permission for major surgery. The trial judge granted this petition and the employer appealed. We affirm the trial judge's decision and deny the employer's appeal regarding this petition.

On May 6, 1997, the employee was working at the Cranston, Rhode Island office of GMAC Mortgage as a mortgage originator for residential mortgages. He explained that his job involved processing mortgage applications which he obtained either through direct calls from customers or through referrals from real estate brokers. He would generally meet with customers in the office, but occasionally would go to their homes. Processing a mortgage application completely took between three (3) to four (4) hours. He also made visits to local real estate offices, particularly in Coventry and Cranston, in order to solicit business for GMAC.

During the afternoon of May 6, 1997, he and his co-workers were helping another GMAC employee move into a new office within the same building. The employee admitted that moving furniture was not part of his job duties and that he assisted in the move voluntarily, not under the direction of his supervisor. By the end of the day, his back was bothering him somewhat. The next morning, he was unable to get out of bed due to severe back pain radiating down his right leg. He did go to the office that day and notified his supervisor that he had been injured while moving furniture in the office the day before. He eventually went to a walk-in clinic on May 11, 1997 and followed up there on several occasions.

At some point after the incident, the employee stopped working entirely for about four (4) months, although he could not recall the exact dates. The employee testified that at the end of the four (4) month period, he returned to work at GMAC, but was unable to resume the

number of visits to real estate offices he had done previously because driving for any length of time aggravated the back pain. The employee testified that he felt it was unsafe for him to drive after taking Vicodin and Neurontin, which had been prescribed for pain relief. He indicated that he also had problems sitting for long periods of time at his desk at work and would go home and rest for a few hours if the pain became too much and then return to the office later. Because he felt unsafe to drive while on pain medication, he was unable to re-establish and maintain as many contacts in real estate offices as previously, and, therefore, his ability to earn was reduced after the injury.

Also testifying at the trial were Willy Thomas and Lynn LaFontaine, co-workers of the employee, who were present on the day the alleged injury occurred, and Janet Bausch, the employee's supervisor. Mr. Thomas corroborated the employee's testimony regarding the moving of the furniture and also stated that it appeared that the employee was in pain the next day. In the summer of 1997, he was aware that the employee was frequently taking pain medication for problems with his back which he attributed to moving the furniture in May 1997.

Lynn LaFontaine testified that a few days after the move she asked the employee what was wrong because he indicated he was in pain and he told her he hurt himself moving furniture in the office. She stated that she had never heard the employee complain of back pain prior to the May 6 incident. She also testified that prior to his injury, the employee attended conferences in Massachusetts about once a quarter, but since the injury the employee has been unable to go on long car rides.

The pertinent medical evidence consists of the depositions and records of Drs. Mark Palumbo, Robert L'Europa, and A. Louis Mariorenzi.

The employee began treating with Dr. Palumbo, an orthopedic surgeon, on June 4, 1997. After examining Mr. Ponder, he diagnosed a right L5-S1 radiculopathy which was likely due to a recurrent or new disc herniation. The doctor attributed the employee's condition to the activities at work on May 6, 1997. He indicated that the employee was restricted to working four (4) hours a day with no prolonged car riding and no heavy lifting. Dr. Palumbo stated that the limitation on the number of hours worked per day would have been in effect for about eight (8) weeks at the most. He further clarified that after the eight (8) week period he would have allowed Mr. Ponder to drive for up to one (1) hour at a time and he could make several trips per day of one (1) hour duration with up to thirty (30) minutes of rest in between.

The employee has been treated conservatively since that time with physical therapy initially, medication, and at least one (1) course of epidural corticosteroid injections. He also had a chronic pain management consultation. Dr. Palumbo first proposed surgery in 1999 and even obtained approval from the insurer, which was subsequently withdrawn. The doctor testified that Mr. Ponder was not an "optimal candidate" for surgery because of several factors, including but not limited to, the chronicity of his symptoms, the lack of any diagnostic testing demonstrating a well-defined lesion compressing the nerve, and his chronic narcotic use. All of these factors weighed against achieving a good result or improvement in his symptoms from the surgery. Dr. Palumbo acknowledged that it was more likely than not that the employee would not improve after surgery, but if the employee elected to have the surgery, he would perform it.

Beginning in September 1997 and continuing for almost one (1) year, the employee underwent a program of physical therapy and chiropractic manipulation by Dr. L'Europa as a result of a referral by Dr. Palumbo. His diagnosis of the employee's condition was right sciatica and a lumbar disc syndrome with mid-back strain which he attributed to the employee's activities

at work on May 6, 1997. The doctor indicated that during the entire time of his treatment, the employee was unable to perform his regular job duties, but he could work up to four (4) hours a day with no excessive sitting or standing and no prolonged driving. Dr. L'Europa explained that excessive sitting and standing meant doing that activity more than thirty (30) to sixty (60) minutes continuously. He also indicated the employee should not drive more than twenty (20) minutes at a time more than two (2) to three (3) times a day.

Dr. Mariorenzi, an orthopedic surgeon, evaluated the employee on January 30, 1998 at the request of the insurer. He diagnosed a lumbosacral strain with radiculopathy caused by the activities at work in May 1997. The doctor recommended further conservative treatment, including aquatic therapy and a weight reduction program. He further stated that the employee should be capable of returning to his regular job eight (8) hours a day, but that he should drive no more than one (1) hour at a time without a break and no more than two (2) to three (3) hours in a day with a break every hour.

The trial judge found that the employee had sustained a work-related injury to his low back on May 6, 1997 which resulted in a period of partial incapacity from May 7, 1997 through January 29, 1998. He also granted the request for permission for surgery, despite acknowledging that the employee was not an optimal candidate.

Our review of a decision rendered at the trial level is limited by statute and case law. Pursuant to R.I.G.L. § 28-35-28(b), a trial judge's findings on factual matters are final unless found to be clearly erroneous. See Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996). The Appellate Division is entitled to conduct a *de novo* review only when a finding is made that the trial judge was clearly wrong. Id.; Grimes Box Co., Inc. v. Miguel, 509 A.2d 1002 (R.I. 1986).

The employer has filed a claim of appeal in both matters and raises a single issue in each. In W.C.C. No. 97-06134, the employer is not contesting the finding that the employee sustained a work-related injury. The two (2) reasons of appeal simply argue that there was no competent medical evidence to support the finding that the employee was partially disabled from May 7, 1997 to January 29, 1998. We will first discuss the employer's appeal from the trial judge's decision to grant the employee's original petition and award partial incapacity benefits from May 7, 1997 to January 29, 1998.

The trial judge recognized that a primary issue in the case was whether the restrictions placed upon the employee's activities by the three (3) physicians would prevent him from performing his regular job duties as a loan originator and, if so, for what period of time. The employee's job was primarily sedentary, but he had the ability to sit and stand as needed. The amount of driving required was disputed to some degree, but the employee's testimony indicates that he made one (1) to four (4) stops per day at real estate offices within a limited geographical area in Cranston and Coventry.

The first indication by a physician that the employee was restricted in his job duties came from Dr. Palumbo on June 4, 1997. The doctor testified that as of his first visit on that date, he would limit the employee to four (4) hours of work per day for up to eight (8) weeks. The other restrictions noted by the doctor at that time would not have prevented the employee from performing his regular job duties, including driving to real estate offices. Dr. Palumbo indicated that after eight (8) weeks, he would have allowed the employee to work full-time. The driving limitations noted by Dr. Mariorenzi in January 1998 would not have prevented Mr. Ponder from performing his usual duties. Dr. L'Europa was more stringent in terms of limiting the driving

time to twenty (20) minutes at a time, but that would have encompassed the employee's normal route.

In addressing the issue whether the doctors' restrictions prevented the employee from performing his regular duties, the trial judge specifically stated:

> "Again, after thorough review of the record, it would seem that the employee's regular physical activities in his office and on the road would be within the restrictions placed upon him by the doctors." (Tr. Dec. p. 7)

However, after discussion of other issues in the case, the trial judge then makes a finding that the employee was partially disabled from May 7, 1997 through January 29, 1998. We are unable to find any explanation for this apparent inconsistency. The only possible reasoning we can discern is that the trial judge, after a lengthy discussion about the calculation of the employee's average weekly wage and reviewing records to determine when he began earning less wages, concluded that the employee had experienced a reduction in earnings during this period. This was a confusing issue in the case because the employee was paid on a commission basis depending upon the number of his loans that closed in a given month. However, any fluctuation in his earnings is irrelevant unless it is established that it was directly related to the effects of his injury, such as an inability to work full-time due to the injury.

Despite the fact that the employee stopped working entirely for a period of four (4) months and may have limited his own work activities, none of the physicians stated that he was unable to work at all at any time and the restrictions that would have prevented him from doing all of his normal job activities only applied for an eight (8) week period beginning June 4, 1997. Even the employee acknowledged that he continued working for a while before he stopped entirely, and eventually he resumed basically all of his former activities around January 1998.

After thoroughly reviewing the evidence in this matter, we are unable to find any legally competent evidence to support the trial judge's finding that the employee was partially disabled from May 7, 1997 through January 29, 1998. Consequently, we must conclude that the trial judge was clearly wrong and grant the employer's appeal in this regard. However, based upon our *de novo* review of the evidence, in particular the opinions of Dr. Palumbo, we find that the employee was partially disabled for a period of eight (8) weeks beginning June 4, 1997 and ending July 30, 1997.

In the second matter, W.C.C. No. 99-03199, the employer has filed one (1) reason of appeal arguing that there was no competent evidence that the surgery was necessary and likely to cure, rehabilitate, or relieve the employee from the effects of his work-related injury. Dr. Palumbo testified that based upon a number of factors, it was his opinion that the employee was not an optimal candidate for surgery and it was more likely than not that he would not experience any improvement in his condition. However, the doctor indicated that if the surgery was successful, the employee would be able to increase his activities. Presumably, he would also be less dependent upon pain medication. The doctor stated that if the employee consented to undergo the surgery, he would perform the operation. None of the other physicians commented on the proposed surgery.

Rhode Island General Laws § 28-33-5 states as follows:

> "The employer shall, subject to the choice of the employee as provided in § 28-33-8, promptly provide for an injured employee such reasonable medical, surgical, dental, optical, or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus for such period as is necessary, in order to cure, rehabilitate or relieve the employee from the effects of his injury; . . . ."

The employee's burden in this case is to prove that the proposed surgery would cure, rehabilitate or relieve him from the effects of the work-related injury he sustained in May 1997. However, this standard must be considered in conjunction with the provisions of R.I.G.L. § 28-33-41(2):

> "Rehabilitation means the prompt provision of appropriate services necessary to restore an occupationally injured or diseased employee to his or her optimum physical, mental, vocational, and economic usefulness. This may require medical, vocational, and/or reemployment services to restore occupationally disabled employee as nearly as possible to his or her pre-injury status."

Medical services are defined in this section as including surgery which is needed to restore an injured worker "to a state of health as near as possible to that which existed prior to the occupational injury or disease." R.I.G.L. § 28-33-41(2)(i)(A).

Mr. Ponder has experienced unrelenting pain since his injury, but he was pain-free for many years prior to May 1997. Prior to his injury, he participated in athletic activities and was able to sit in a car for lengthy periods of time. He has willingly tried and been compliant with, all treatment options proposed by his physicians, but nothing has provided permanent relief. Dr. Palumbo has advised him that he can basically live with his current situation, utilizing pain medication and limiting his activities, or attempt a more invasive approach such as the proposed surgery or implantation of pain control devices, such as a spinal cord stimulator.

Dr. Palumbo's prognosis as to the potential outcome of the surgery is not very optimistic, however, there is no evidence to indicate that there is only a minimal or no chance of improvement in the employee's condition. If this surgery had no chance of alleviating any of the employee's symptoms, presumably Dr. Palumbo would not be willing to operate. The fact that the likelihood for recovery or significant improvement is less than fifty percent (50%) does not automatically require a finding that the employer cannot be held responsible for payment of the cost of the surgery.

It is clear from reading Dr. Palumbo's testimony as a whole that the doctor believes that the surgery could provide some relief to the employee and improve his level of functioning. There is no evidence to contradict his testimony. As stated in R.I.G.L. § 28-33-41(2), the employer shall provide medical services to the employee necessary to restore the injured worker to his optimum physical health or his pre-injury state of health. With this standard in mind, how can we deny this employee access to a medical procedure that has at least some potential to relieve him of some of the effects of his injury, and relegate him to a life of daily pain? Considering the language of §§ 28-33-5 and 28-33-41(2), we find that the trial judge was not clearly wrong in finding that the surgery was appropriate and granting permission to proceed with the operation.

For the reasons set forth above, we grant the employer's appeal and reverse in part the trial judge's decision in W.C.C. No. 97-06134. In accordance with our decision, a new decree shall enter containing the following findings and orders:

1. That on May 6, 1997, the employee sustained an injury arising out of and in the course of his employment, connected therewith and referable thereto, of which the employer had notice.

2. That the employee sustained an injury to his low back.

3. That it has not been shown that the employee has sustained an injury to the right leg, it being found that the right leg complaints are of a radicular nature emanating from the low back injury.

4. That the employee's average weekly wage at the time of his injury was Four Hundred Eighty-one and 22/100 ($481.22) Dollars, and his average monthly wages at the time of the work injury were Two Thousand Eighty-five and 29/100 ($2,085.29) Dollars.

5. That the employee has received some benefits under the terms of a pretrial order entered in this matter.

6. That the employee was partially disabled from June 4, 1997 to July 30, 1997, at which time he was physically capable of returning to his regular job duties.

It is, therefore, ordered:

1. That the employer shall pay to the employee weekly benefits for partial incapacity from June 4, 1997 through July 30, 1997.

2. That the employer shall pay all reasonable medical, hospital and surgical bills in accordance with the provisions of the Workers' Compensation Act.

3. That the employer is given credit for any payment made to the employee pursuant to the Pretrial Order and the trial decree entered in this matter.

4. That it shall be the duty of the employee to furnish to the employer and/or insurer evidence of the amount of wages earned from any employer other than the respondent in order that the amount of compensation which may be awarded to the employee may be properly computed.

5. That the employer shall pay to Dr. Mark Palumbo an expert witness fee in the amount of Nine Hundred ($900.00) Dollars.

6. That the employer shall pay an expert witness fee to Dr. Robert A. L'Europa in the amount of Three Hundred ($300.00) Dollars.

7. That the employer shall pay to Seth Perlmutter, Esq., counsel for the employee, the cost of taking the depositions of Drs. Palumbo and L'Europa upon proof that said costs have been paid, as well as the cost of obtaining a copy of the deposition of Dr. A. Louis Mariorenzi, upon proof that said cost has been paid.

8. That the employer shall reimburse Seth Perlmutter, Esq., counsel for the employee, the cost of the three (3) witness subpoenas marked Petitioner's Exhibits 6, 7 and 8.

9. That the employer shall pay a counsel fee to Seth Perlmutter, Esq., attorney for the employee, in the amount of Three Thousand ($3,000.00) Dollars, together with Twenty ($20.00) Dollars for the cost of filing the within petition. The award of this fee and costs include those awards made in the earlier pretrial order and trial decree and the employer shall take credit for such payments made under that order and decree.

We have prepared, and submit herewith, a new decree in accordance with our decision. The parties may appear on 10:00 a.m. to show cause, if any they have, why said decree shall not be entered.

In the companion case, W.C.C. No. 99-03199, we deny and dismiss the employer's appeal and affirm the findings and orders of the trial judge. 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 in that matter on

Healy, C.J. and Connor, J. concur.

ENTER:

_____
Healy, C.J.

_____
Olsson, J.

_____
Connor, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

CURTIS PONDER)
)
VS.) W.C.C. 99-03199
)
GMAC MORTGAGE CORP.)

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 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 November 21, 2002 be, and they hereby are affirmed.

2. That the employer shall pay a counsel fee in the sum of One Thousand and 00/100 ($1,000.00) Dollars to Seth A. Perlmutter, Esq., attorney for the employee, for services rendered in the successful defense of the employer's appeal in this matter and in the partially successful defense of the employer's appeal in the companion case, W.C.C. No. 97-06134.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Healy, C.J.

_____
Olsson, J.

_____
Connor, J.

I hereby certify that copies were mailed to Michael T. Wallor., Esq., and Seth A. Perlmutter, Esq., on

_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

CURTIS PONDER	)	
	)	
VS.	)	W.C.C. 97-06134
	)	
GMAC MORTGAGE CORP.	)	

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the appeal of the respondent/employer from a decree entered on November 21, 2002.

Upon consideration thereof, the appeal of the employer is granted in part and in accordance with the decision of the Appellate Division, the following findings of fact are made:

1. That on May 6, 1997, the employee sustained an injury arising out of and in the course of his employment, connected therewith and referable thereto, of which the employer had notice.

2. That the employee sustained an injury to his low back.

3. That it has not been shown that the employee has sustained an injury to the right leg, it being found that the right leg complaints are of a radicular nature emanating from the low back injury.

4. That the employee's average weekly wage at the time of his injury was Four Hundred Eighty-one and 22/100 ($481.22) Dollars, and his average monthly wages at the time of the work injury were Two Thousand Eighty-five and 29/100 ($2,085.29) Dollars.

5. That the employee has received some benefits under the terms of a pretrial order entered in this matter.

6. That the employee was partially disabled from June 4, 1997 to July 30, 1997, at which time he was physically capable of returning to his regular job duties.

It is, therefore, ordered:

1. That the employer shall pay to the employee weekly benefits for partial incapacity from June 4, 1997 through July 30, 1997.

2. That the employer shall pay all reasonable medical, hospital and surgical bills in accordance with the provisions of the Workers' Compensation Act.

3. That the employer is given credit for any payments made to the employee pursuant to the Pretrial Order and the trial decree entered previously in this matter.

4. That it shall be the duty of the employee to furnish to the employer and/or insurer evidence of the amount of wages earned from any employer other than the respondent in order that the amount of compensation which may be awarded to the employee may be properly computed.

5. That the employer shall pay to Dr. Mark Palumbo an expert witness fee in the amount of Nine Hundred ($900.00) Dollars.

6. That the employer shall pay an expert witness fee to Dr. Robert A. L'Europa in the amount of Three Hundred ($300.00) Dollars.

7. That the employer shall pay to Seth Perlmutter, Esq., counsel for the employee, the cost of taking the depositions of Drs. Palumbo and L'Europa upon proof that said costs have been paid, as well as the cost of obtaining a copy of the deposition of Dr. A. Louis Mariorenzi, upon proof that said cost has been paid.

8. That the employer shall reimburse Seth Perlmutter, Esq., counsel for the employee, the cost of the three (3) witness subpoenas marked Petitioner's Exhibits 6, 7 and 8.

9. That the employer shall pay a counsel fee to Seth Perlmutter, Esq., attorney for the employee, in the amount of Three Thousand ($3,000.00) Dollars, together with Twenty ($20.00) Dollars for the cost of filing the within petition. The award of this fee and costs include those awards made in the earlier pretrial order and trial decree and the employer shall take credit for such payments made under that order and decree.

Entered as the final decree of this court this day of

BY ORDER:

_____

ENTER:

_____
Healy, C.J.

_____
Olsson, J.

_____
Connor, J.

I hereby certify that copies were mailed to Michael T. Wallor, Esq., and Seth A. Perlmutter, Esq., on

_____