2406j

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

HART CORPORATION	)	
	)	
VS.	)	W.C.C. 93-12502
	)	
DENNIS LOMBERTO	)	

DECISION OF THE APPELLATE DIVISION

BERTNESS, J. This matter came on for hearing before the Appellate Division on the respondent/employee's appeal from a decision and decree entered by the Trial Court on April 4, 1994. The matter was heard in the nature of an Employer's Petition to Review alleging that the employee is able to return to light selected work.

Under review is a decree entered in W.C.C. No. 89-2064, which found that the employee had sustained a right wrist injury on March 26, 1982, related to his employment and provided benefits for a closed period of partial disability and for a period of total disability from March 3, 1989, and continuing.

The Trial Court found that the petitioner had proven that the employee was no longer totally disabled and that he remained partially disabled, thereby granting the employer's petition. On appeal, the respondent/employee argues that the employer had not met its burden of proof in failing to show a medical change in condition. The respondent further argues that the Trial Court erred in relying on medical reports of treatment rendered in 1985 and 1990 and

failing to utilize the report relied upon in reaching the determination that the employee was totally disabled as of March 3, 1989.

Normally, when considering an appeal of the trial judge's decree, the Appellate Division conducts, in essence, a de novo review, examining and weighing the evidence, drawing its conclusions, making its own findings of fact, and ultimately deciding whether the evidence preponderates in favor of or against the findings embodied in the decree. E.g. Bottiglieri v. Caldarone, 486 A.2d 1085, 1087 (R.I. 1985); Moretti v. Turin, Inc., 112 R.I. 220, 223, 308 A.2d 500, 502 (1973).

Cognizant of this legal duty imposed upon us, we have carefully reviewed and examined the entire record in this matter, have independently weighed the evidence contained in the record, and for reasons hereinafter set forth, we do find error on the part of the trial judge and we therefore reverse.

In the case of C.D. Burnes Co. v. Guilbault, 559 A.2d 637 (R.I. 1989). The Supreme Court held that comparative medical evidence is required in a situation where the employer alleges a decrease in incapacity for the same reasons set forth in Martinez v. Bar-Tan Manufacturing, 521 A.2d 134 (R.I. 1987) where an employee must show a comparative change in his or her medical condition in order to establish a return of incapacity. C.D. Burnes at 640. This comparative standard was reiterated by the Supreme Court in the case of Costello v. Narragansett Electric Co., 623 A.2d 441 (R.I. 1993). In that case the Court reiterated that comparative evidence is required in situations where an employer alleges a decrease in incapacity. Costello at 444. The Court went on to state that there is only one situation where there is no requirement for comparative evidence: where an employer asserts that an employee's incapacity for work has ended. Id. at 444.

The only evidence presented in the instant petition was the affidavit and deposition of Louis A. Fuchs, M.D.

Dr. Fuchs testified that he examined the employee on September 14, 1993. He also reviewed a 1985 medical report of Dr. Bobb and two (2) reports of Dr. May dated August 1989, and February 1990. He compared the findings of his September 14, 1993, examination with the findings contained in Dr. Bobb's report and found improved motion in only one plane of motion. He opined that the employee's condition had improved.

Attached to Dr Fuchs' affidavit was a report dated January 5, 1994, stating that he had compared his September 1993, examination to Dr. Bobb's February 1985, report and reported that the patient improved in flexion and extension. No other evidence was submitted.

The Trial Court found that Dr. Fuchs' comparison of his findings with the findings of Dr. May from 1990, carried the employer's burden of proof. We disagree.

The document under review is a decree entered in W.C.C. No. 89-2064 on November 27, 1990. The decree found the employee totally incapacitated from March 3, 1989, and continuing. The Trial Court's decision in that petition states that the parties had stipulated that the employee was totally disabled as of the March 3, 1989, date. The Trial Court in that case accepted the parties' stipulation without review of medical reports. In that petition, the reports were reviewed only for purposes of determining the percentage of loss of use and whether scarring had reached an end point. Because the parties themselves picked the March 3, 1989, date for determining total incapacity, there must be some significance to that date which the parties did not share with the Court. For these reasons, in these circumstances, it is our opinion

that the comparison should have made of the employee's condition at the time the parties agreed he was totally disabled on March 3, 1989, with his present condition. This was not done. The only comparisons offered were a comparison of the employee's condition some four (4) years before the parties agreed that he was totally disabled and nearly a year after the parties agreed he was totally disabled. These comparisons are meaningless and do not comport with the burden set forth in C.D. Burnes and Costello.

For the foregoing reasons, the decree of the Trial Court is reversed and a new decree with the following findings shall enter:

1. That the petitioner has failed to prove by a fair preponderance of the credible evidence that the employee is able to return to light selected work.

It is, therefore, ordered:

1. That the petition be denied and dismissed.

2. That the petitioner shall pay to John M. Harnett, Esq., counsel for the employee, an attorney's fee in the amount of one thousand ($1,000.00) dollars for appearance at pretrial, trial and success on appeal.

We have prepared and submit herewith a new decree in accordance with the decision. The parties may appear on November 14, 1994 at 10:00 AM to show cause, if any they have, why said decree shall not be entered.

Rao and Morin, JJ. concur.

Rao, J.

Morin, J.

Bertness, J.

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the appeal of respondent from a decree entered on April 4, 1994.

Upon consideration thereof, the appeal of the respondent is sustained, and in accordance with the Decision of the Appellate Division, the following findings of fact are made.

1. That the petitioner has failed to prove by a fair preponderance of the credible evidence that the employee is able to return to light selected work.

It is, therefore, ordered:

1. That the petition be denied and dismissed.

2. That the petitioner shall pay to John M. Harnett, Esq., counsel for the employee, an attorney's fee in the amount of one thousand ($1,000.00) dollars for appearance at pretrial, trial and success on appeal.

2406j

Entered as the final decree of this Court this 14th day of Nov. 1994.

BY ORDER

Dennis I. Revens, Administrator

ENTERED:

Rao, J.

Morin, J

Bertness, J

I hereby certify that copies were mailed to Earl Metcalf, Esq. and John Harnett, Esq. on

jmf