STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

GTECH CORPORATION	)	
	)	
VS.	)	W.C.C. 04-03831
	)	
MICHELLE A. PIZZITOLA	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the respondent/employee's appeal from an adverse decision of the trial judge which discontinued the employee's weekly benefits based upon a finding that her incapacity for work due to an injury sustained on March 1, 2001 has ended. Pursuant to a previous court decree, it was found that the employee remained partially disabled and her condition had reached maximum medical improvement. The employee now argues that the employer failed to prove that her condition had substantially improved since that finding as required by R.I.G.L. § 28-29-2(8) and, therefore, the trial judge erred in granting the employer's petition to discontinue her benefits. We agree and reverse the trial judge's decision.

The employee initially began receiving weekly workers' compensation benefits pursuant to a Memorandum of Agreement dated February 1, 2002. The memorandum indicates that the employee developed right elbow tendonitis on March 1, 2001 and began receiving weekly benefits for partial incapacity as of August 9, 2001. In a pretrial order entered on July 3, 2002 in W.C.C. No. 02-02026, it was found that the employee remained partially disabled based upon

the opinion of the impartial medical examiner, Dr. Steven Graff. On February 27, 2003 in W.C.C. No. 03-00913, the court, at the employer's request, found that the employee's condition had reached maximum medical improvement and her benefits were continued at the rate for partial incapacity.

The employee did not testify and the only medical evidence is the deposition, affidavit, and reports of Dr. Arnold-Peter C. Weiss, an orthopedic surgeon specializing in hand surgery. Dr. Weiss examined the employee on two (2) occasions at the request of the employer. Apparently, the employee's job involved a significant amount of computer work. In March 2001, she began to experience pain in her right forearm. The physical examination revealed only mild tenderness along the forearm muscle area. The doctor's diagnosis was mild right forearm tendonitis which he could not relate to her work activities with a reasonable degree of medical certainty. He further concluded that Ms. Pizzitola's condition had reached maximum medical improvement in that further treatment would not cause any significant improvement. Dr. Weiss stated that the employee was capable of returning to her regular job duties.

Dr. Weiss re-examined the employee on May 4, 2004. He noted that Ms. Pizzitola had moved to Connecticut and taken a job in a doctor's office which involved "quite a bit of data entry and phone work." The employee told him that she still had some aching in her right forearm which was unchanged from the last examination. The doctor again detected some mild tenderness along the forearm musculature, but the remainder of the examination was unremarkable. He reiterated that her condition was at maximum medical improvement and that she had a three percent (3%) impairment rating. In a subsequent letter dated May 13, 2004, Dr. Weiss stated that the employee could return to her regular work activities without any restrictions.

The trial judge, citing Costello v. Narragansett Elec. Co., 623 A.2d 441 (R.I. 1993), found that the employer did not need to prove that there had been a substantial improvement in the employee's condition through the introduction of comparative medical evidence in order to discontinue her benefits on the ground that her incapacity has ended. Consequently, she accepted the opinions of Dr. Weiss that the employee could perform the duties of her regular job and discontinued the employee's weekly benefits. The employee then filed her claim of appeal.

We are mindful of our appellate standard of review which accords great deference to the findings made by the trial judge. Rhode Island General Laws § 28-35-28(b) states that the findings of fact made by a trial judge are final unless the appellate panel determines that they are clearly erroneous. Only after specifically making such a finding may the appellate panel undertake a *de novo* review of the record and weigh the evidence. Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996); Blecha v. Wells Fargo Guard-Co. Serv., 610 A.2d 98 (R.I. 1992). In this case, we find that the trial judge failed to apply the standard of proof set forth in R.I.G.L. § 28-29-2(8) and, therefore, her conclusion that the employer established that the employee's incapacity for work has ended is clearly erroneous.

The employee has filed six (6) reasons of appeal. The argument put forth in five (5) of the reasons is basically that the trial judge failed to utilize the standard of substantial improvement set forth in R.I.G.L. § 28-29-2(8) for review of a finding of maximum medical improvement. The remaining reason of appeal contends that the medical reports and opinions of Dr. Weiss were incompetent as they contained no comparative evidence to support a conclusion that the employee's condition had substantially improved from February 2003 to May 2004.

Rhode Island General Laws § 28-29-2(8) explains the status of "maximum medical improvement" as follows:

> " 'Maximum medical improvement' means a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to materially improve the condition. Neither the need for future medical maintenance nor the possibility of improvement or deterioration resulting from the passage of time and not from the ordinary course of the disabling condition, nor the continuation of a pre-existing condition precludes a finding of maximum medical improvement. A finding of maximum medical improvement by the workers' compensation court may be reviewed only where it is established that an employee's condition has substantially deteriorated or improved." (Emphasis added.)

Employers often seek such a finding of maximum medical improvement (hereinafter, "MMI") because it is a prerequisite to obtaining a reduction in the employee's weekly benefits to seventy percent (70%) of the weekly compensation rate under R.I.G.L. § 28-33-18(b). However, pursuit of such a finding is not without risk. As stated in the statutory definition, a finding of MMI means that the employee's condition has essentially reached an end point where, based upon sound medical opinion, no further improvement in function or appearance is expected. If the employee is partially disabled and unable to perform her regular job duties at the time a finding of MMI is made, the employer obviously has a greater burden of proof to overcome the finding that the employee's condition had previously been determined to be at an end point in terms of improvement. The standard for even attempting to overcome the MMI finding is set forth in the statute; the employer must prove that the employee's condition has substantially improved.

In the present case, the court determined on February 27, 2003, at the employer's request, that the employee's condition had reached MMI and she remained partially incapacitated. The finding of partial incapacity means that she was unable to perform the duties of her regular job at GTech due to the effects of her work-related injury and the finding of MMI means that her recovery from the injury is at an end point and her condition is not expected to improve. The

logical conclusion derived from these findings is that the residual effects of the work injury will prevent the employee from ever being physically capable of performing the duties of her previous employment.

In order for the employer to successfully establish that the employee's incapacity has ended and she is capable of returning to her regular job, the employer must prove that her condition has "substantially improved" since the finding of MMI. The employer argues that they are not trying to "remove" or review the finding of MMI; however, this ignores the employee's status under the workers' compensation system – she was found to be unable to perform her regular job (i.e., partially incapacitated) and at MMI. The employer's petition requests review of the employee's status because the employer contends that the employee's incapacity has ended and she is now physically capable of performing her previous employment. To simply ignore the MMI provision in the statute in this case would render that language meaningless.

One might argue that evidence that the employee can perform a job that she could not previously perform presents a *prima facie* case proving that her condition has substantially improved. However, such a conclusion would violate the general principle that a medical expert cannot testify as to a conclusion without providing an adequate foundation for his opinion. Costello v. Narragansett Elec. Co., 623 A.2d 441 (R.I. 1993). We believe that, in order to preserve the integrity of the underlying decree or agreement, as well as give meaning to the language of R.I.G.L. § 28-29-2(8), the employer must present specific medical testimony comparing the employee's condition at the time of the finding of MMI and her present condition. Only then can the trial judge adequately assess the medical expert's opinion to determine if the employee's condition has substantially improved, such that her incapacity has now ended.

The trial judge cited Costello v. Narragansett Elec. Co., 623 A.2d 441 (R.I. 1993), for the proposition that comparative evidence is not necessary when the employer is asserting that the employee's incapacity has ended. However, that case did not involve the MMI statute, which had just been enacted in 1992. In light of the specific standard of proof set forth in the statute for review of a finding of MMI, we find that the general principle noted in Costello is inapplicable in this situation.

In addition, the employer cites two (2) Appellate Division decisions in support of its contention that a finding of MMI does not preclude a subsequent finding that the employee's incapacity has ended. See Memorial Hospital of Rhode Island v. Oliveira, W.C.C. No. 94-03253 (App. Div. July 15, 1994); Mathews, Inc. v. Inderlin, W.C.C. No. 93-02445 (App. Div. July 20, 1993). The decisions in those cases focused on the sufficiency of medical evidence and did not directly address the issue presented to this panel. In addition, we would note that we agree that a finding of MMI does not preclude a subsequent conclusion that the employee's incapacity for work has ended. We simply disagree with the position of the employer and the trial judge that comparative evidence establishing a substantial improvement in the employee's condition is not necessary to prove that the employee's incapacity has ended after a finding of MMI.

Based upon the foregoing discussion, we agree with the employee that the trial judge erred when she failed to consider the standard of proof set forth in R.I.G.L. § 28-29-2(8) to review a finding of MMI. Therefore, we have conducted a *de novo* review of the evidence and conclude that the employer has failed to satisfy the burden of proof in this matter.

The only medical evidence in the record is the deposition, affidavit and reports of Dr. Weiss. Dr. Weiss had examined the employee on February 28, 2002 and had concluded at that time that no further medical treatment was required and the employee was capable of returning

to her normal work activities. On July 3, 2002, the court determined that the employee remained partially disabled, i.e., unable to return to her regular employment. The trial judge in that matter cited the results of an impartial medical examination conducted by Dr. Steven Graff as the basis for that finding, thereby implicitly rejecting the opinion of Dr. Weiss from his February 28, 2002 examination.

On February 27, 2003, a pretrial order was entered with the findings that the employee remained partially disabled and that her condition had reached MMI. On May 4, 2004, Dr. Weiss again examined the employee at the request of the employer. He repeated his conclusion that the employee was capable of returning to her regular job duties. Under cross-examination, he did note that the employee had some pain with resisted wrist extension in February 2002, but she did not have any pain with that movement in May 2004. However, there is no comparison to the employee's condition and physical findings at the time of the finding of MMI in February 2003. Dr. Weiss simply maintained the same opinion he had in February 2002, which was previously rejected by the court. Consequently, there is no evidence to establish that the employee's condition has "substantially improved" since that time.

Based upon the foregoing, we grant the employee's appeal and reverse the decision and decree of the trial judge. In accordance with our decision, a new decree shall enter containing the following findings and orders:

1. That pursuant to a pretrial order entered in W.C.C. No. 03-00913 on February 27, 2003, it was found that the employee's condition had reached maximum medical improvement and she remained partially disabled due to a work-related injury she sustained on March 1, 2001.

2. That the employer has failed to prove by a fair preponderance of the credible and competent evidence that the employee's condition has substantially improved since February 27, 2003 such that her incapacity has ended.

It is, therefore, ordered:

1. That the employer shall reinstate the payment of weekly benefits for partial incapacity to the employee retroactive to July 13, 2004, the date of the pretrial order entered in this matter which discontinued her weekly benefits, and shall continue such payment until further order of the court or agreement of the parties.

2. That the employee shall promptly report to the employer or insurer the amount of any wages earned in the employment of any employer other than the petitioner so that the proper amount of weekly benefits may be calculated.

3. That the employer shall reimburse Charles J. Vucci, Esq., the sum of Eighty-four and 50/100 ($84.50) Dollars for the cost of obtaining a copy of the transcript of the deposition of Dr. Arnold-Peter C. Weiss.

4. That the employer shall reimburse Charles J. Vucci, Esq., the sum of Forty-eight and 00/100 ($48.00) Dollars for the cost of the transcript of the trial and the sum of Twenty-five and 00/100 ($25.00) Dollars for the cost of filing the appeal.

5. That the employer shall pay a counsel fee to Charles J. Vucci, Esq., in the sum of Three Thousand Five Hundred and 00/100 ($3,500.00) Dollars for services rendered to the employee at the pretrial conference, trial, and appellate levels.

In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, we have prepared and submit herewith a new decree in accordance with our decision. The

parties may appear on at 10:00 a.m. to show cause, if any they have, why said decree shall not be entered.

Sowa and Connor, JJ. concur.

ENTER:

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Olsson, J.

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Sowa, J.

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Connor, 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 the respondent/employee from a decree entered on November 1, 2004.

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

1. That pursuant to a pretrial order entered in W.C.C. No. 03-00913 on February 27, 2003, it was found that the employee's condition had reached maximum medical improvement and she remained partially disabled due to a work-related injury she sustained on March 1, 2001.

2. That the employer has failed to prove by a fair preponderance of the credible and competent evidence that the employee's condition has substantially improved since February 27, 2003 such that her incapacity has ended.

It is, therefore, ordered:

1. That the employer shall reinstate the payment of weekly benefits for partial incapacity to the employee retroactive to July 13, 2004, the date of the pretrial order entered in this matter which discontinued her weekly benefits, and shall continue such payment until further order of the court or agreement of the parties.

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5. That the employer shall pay a counsel fee to Charles J. Vucci, Esq., in the sum of Three Thousand Five Hundred and 00/100 ($3,500.00) Dollars for services rendered to the employee at the pretrial conference, trial, and appellate levels.

Entered as the final decree of this Court this day of

BY ORDER:

_____

John A. Sabatini, Administrator

ENTER:

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Olsson, J.

_____
Sowa, J.

_____
Connor, J.

I hereby certify that copies were mailed to Charles J. Vucci, Esq., and Christopher A. Fiore, Esq., on

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