

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

OAKLAND GROVE HEALTH CARE CENTER)

)

VS.

)

W.C.C. 00-07399

)

MARLEN RIBON)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the Respondent/Employee and upon consideration thereof, the appeal is denied and dismissed, and it is

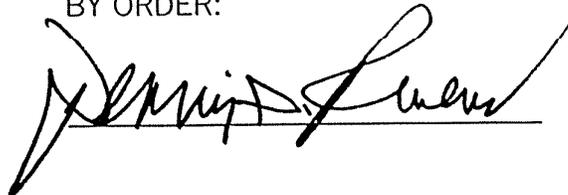
ORDERED, ADJUDGED, AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on November 2, 2001 be, and they hereby are affirmed.

Entered as the final decree of this Court this 4th day of September 2002.,

216 - 9 2002
RECEIVED

BY ORDER:



Dennis J. Revens Administrator

ENTER:

Arrigan

Arrigan, C.J.

Olsson

Olsson, J.

Connor

Connor, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq., and Michael T. Wallor, Esq., on *August 26, 2002*

Sherry L. D'Amico

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

MARLEN RIBON)

VS.)

W.C.C. 01-03693)

OAKLAND GROVE HEALTH CARE CENTER)

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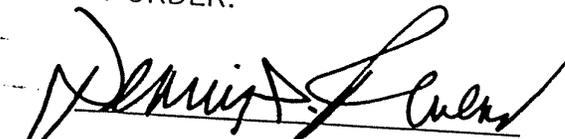
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SEP - 4 2002
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BY ORDER:



Dennis I. Revens Administrator

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

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OAKLAND GROVE HEALTH CARE CENTER)

DECISION OF THE APPELLATE DIVISION

OLSSON, J. These two (2) matters were heard before the Appellate Division upon appeals of the employee from a decision and decrees of the trial judge entered November 2, 2001.

W.C.C. No. 00-07399 is an Employer's Petition to Review alleging the employee's incapacity for work has ended. At the pretrial conference on January 17, 2001, the trial judge granted the petition and discontinued the employee's weekly benefits. The employee claimed a trial.

W.C.C. No. 01-03693 is an Employee's Petition to Review seeking pre-approval of physical therapy and the reimbursement of certain prescription expenses. At the pretrial conference on October 22, 2001, the trial judge denied the petition. The employee claimed a trial.

The two (2) petitions were consolidated for trial. At the conclusion of the trial, the trial judge, relying upon the opinions of Dr. A. Louis Mariorenzi, the employer's expert, found that the employee's incapacity had ended and granted the employer's petition. He also granted the employee's petition in part, ordering that the employee attend a work hardening program at the Donley Center and that the employer reimburse a portion of the prescription receipts which had been submitted. The employee has made a timely claim of appeal with regard to both matters.

The employee suffered a sprained back while working as a certified nurse assistant (CNA) for Oakland Grove Health Center on October 1, 1999. She began receiving benefits for total incapacity pursuant to a Memorandum of Agreement dated December 28, 1999. Her weekly benefits were modified from total incapacity to partial incapacity pursuant to a pretrial order entered on August 29, 2000. The employee testified that she has treated with Dr. Sydney Migliori since November 16, 1999. She asserted that she is unable to return to her former employment because she cannot do any lifting without experiencing pain in her back.

The medical evidence in this matter consists of the depositions and records of Drs. A. Louis Marioenzi and Sydney Migliori. Dr. Marioenzi, an orthopedic surgeon, examined the employee on two (2) occasions, February 1, 2000 and November 14, 2000, at the request of the employer. After his last examination, the doctor opined that the employee had made a full and complete recovery from the lumbosacral strain she sustained on October 1, 1999 and was capable of returning to her work as a CNA without restrictions. He further indicated that a return to that employment would not be injurious to her health.

Dr. Migliori, an orthopedic surgeon, examined the employee for the first time on November 16, 1999 for complaints of low back pain on the right, particularly through the sacroiliac region radiating into her right buttock. (Resp. Exh. A, p. 4) She found no focal neurological deficits, but did note leg raise pulling with no radicular symptoms. The x-rays taken previously were essentially negative. Her diagnosis was a lumbar strain and sacroiliac strain.

The doctor saw the employee about once a month thereafter. The symptoms and diagnosis have remained the same since November of 1999. She last saw the employee on July 23, 2001 and noted that there had been gradual improvement in the severity and frequency of symptoms, but the employee continued to experience pain. Dr. Migliori opined that as of July 23, 2001 the employee was still partially disabled and should not lift more than twenty (20) pounds. (Id. at 9).

On cross-examination, Dr. Migliori acknowledged there was no evidence of a neurological problem or degenerative joint changes that would account for the employee's continued subjective complaints. (Id. at 12). Both a CT scan and MRI were essentially normal. Dr. Migliori noted that the employee's condition had reached maximum medical improvement as of June 11, 2001 and that she was basically treating her for her subjective complaints of pain which seemed focused in the right SI joint.

The role of the Appellate Division in reviewing factual matters is sharply circumscribed. Rhode Island General Laws §28-35-28 (b) states that, "[t]he findings of the trial judge on factual matters are final unless an appellate panel finds them to be clearly erroneous." The Appellate Division is entitled to conduct a *de novo* review only when a finding is made that the trial judge was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996); Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986). Thus, if the record before the Appellate Division reveals competent evidence to support the findings of the trial judge, the decision must be allowed to stand. After careful review of the record, we find no merit in the employee's appeals and affirm the decision and decrees of the trial court.

The employee claimed an appeal in both of the above matters, but her reasons of appeal only address the trial court's decision in W.C.C. No. 00-07399, the Employer's Petition to Review. Furthermore, the employee states in her memorandum in support of the reasons of appeal that she is not appealing the

trial court's decision in W.C.C. No. 01-03693. Consequently, the employee's appeal regarding this petition is denied and the decree appealed from is affirmed.

In support of her appeal in W.C.C. No. 00-07399, the employee filed seven (7) reasons of appeal. The first three (3) reasons of appeal lack the specificity required by Rhode Island General Laws § 28-35-28 and are mere general recitations of the law. As such, they are denied and dismissed. Bissonnette v. Federal Dairy Co., 472 A.2d 1223 (R.I. 1984); Falvey v. Women & Infants Hospital, 584 A.2d 417 (R.I.1991).

In her fourth and fifth reasons of appeal, the employee essentially argues that the trial judge erred in relying upon the opinions of Dr. Mariorenzi because he was never qualified as an expert witness and therefore, his testimony was not competent. It is well-settled that the qualification of expert witnesses is a matter addressed to the sound discretion of the trial justice. Absent clear error or an abuse of that discretion, the trial judge's determination will not be disturbed on appeal. Debar v. Women & Infants Hosp., 762 A.2d. 1182, 1185 (R.I. 2000).

Dr. Mariorenzi testified that he is licensed to practice medicine in the State of Rhode Island and that his specialty is orthopedic surgery. At no time during the doctor's deposition did the employee object to Dr. Mariorenzi testifying as to his opinion regarding diagnosis, causation and disability. The doctor's reports were marked as exhibits without objection. When the deposition was moved to be admitted as a full exhibit during the trial, the employee did not object and, in fact, agreed to waive all objections raised in the deposition. Counsel for the

employee never raised any question as to the qualifications of Dr. Mariorenzi as an expert witness during the deposition or during the trial itself.

"No principle of appellate review is better settled in this state than the doctrine that this court will not consider an issue raised on appeal that has not been raised in reasonably clear and distinct form before the trial justice." Town of Smithfield v. Fanning, 602 A.2d. 939, 942 (R.I. 1992). Additionally, Rule 103(a) (1) of the Rhode Island Rules of Evidence provides that reversible error in the admission of evidence will not be found absent a timely objection or motion to strike appearing on the record. As noted above, there was no objection raised at any time with regard to the admission of the testimony of Dr. Mariorenzi despite ample opportunity to do so. The employee is therefore precluded from raising the issue of Dr. Mariorenzi's qualifications for the first time on appeal. Russell v. Kalian, 414 A.2d 462, 465 (R.I. 1980); State v. Long, 488 A.2d 427, 432 (R.I. 1985).

The employee's sixth reason of appeal fails for the same reasons. She contends that the trial judge failed to properly consider the testimony of Dr. Migliori with respect to the employee's continuing partial disability. The trial judge discussed the findings and testimony of Drs. Migliori and Mariorenzi and concluded as follows:

"In looking at all of the material in the file, particularly the complete absence of findings for an extended period of time, and the indication from Dr. Migliori that there was improvement in the employee's condition from the time she first evaluated her, specifically the absence of muscle spasm, I think that in this situation the court

prefers to rely upon the opinions of Dr. A. Louis Mariorenzi that the employee is capable of returning to her work without any restrictions." (Tr. p. 22)

The employee argues that although the trial court noted that there was a dispute in the medical opinions as to the degree of disability, there was actually no dispute because the opinion of Dr. Mariorenzi was unqualified and incompetent and, therefore, entitled to no weight. This argument was addressed above and we find no merit in this additional argument.

Aside from the issue of Dr. Mariorenzi's qualifications to render expert opinions, the employee argues in the alternative that Dr. Mariorenzi's testimony was incompetent because it was based on conjecture and speculation and was couched in terms of possibilities rather than probabilities. The employee has singled out one (1) response of the doctor to support this contention. After reviewing the entire testimony of the doctor, we find that his opinions were stated with the requisite certainty to render them probative and competent as to the issue before the court.

Dr. Mariorenzi examined the employee on two (2) occasions. As a result of the first examination on February 1, 2000, the doctor stated that the employee was capable of returning to work without restrictions. However, he did recommend a transitional return to work (four (4) hours a day the first week, increasing by two (2) hours a day the next week and again the following week) because this would allow her to recondition herself to work since she had been out of work for some time. After his second examination on November 14, 2000,

Dr. Mariorenzi stated, without qualification, that the employee could return to her former employment without restrictions and her return to that type of work would not be injurious to her health. He testified to this opinion to a reasonable degree of medical certainty.

During cross-examination, the doctor was asked to explain why he recommended a transitional return to work in February, but not in November. He indicated that over the period of nine (9) months, she had shown some improvement and, based upon the employee's own statements, had been performing activities of daily living such as cooking, driving and cleaning. Dr. Mariorenzi further stated that "[s]he at least got back to relatively normal activities so I think it would have been safe for her to go back to work full duty." (emphasis added) (Pet. Exh. 5, p. 9). If this was the only testimony proffered by Dr. Mariorenzi regarding the employee's ability to work, we might agree with the employee's argument; however, this was not the case.

The fact that the doctor used the word "think" in one (1) response does not automatically render his opinions inadmissible. The Rhode Island Supreme Court has set forth the standard for expert testimony:

"...Expert testimony, if it is to have any evidentiary value, must state with some degree of positiveness that a given state of affairs is the result of a given cause. Absolute certainty, of course, is not required." Sweet v. Hemingway Transport, Inc., 114 R.I. 348, 355, 333 A.2d 411, 415 (1975).

In determining whether the standard has been met, the court must look at the testimony of Dr. Mariorenzi in its entirety and not isolate one (1) response or statement. Montuori v. Narragansett Elec. Co., 418 A.2d 5, 11 (1980).

As noted above, Dr. Mariorenzi testified unequivocally on direct examination as to the basis for his opinions and expressed those opinions to a reasonable degree of medical certainty. Furthermore, on cross-examination, the doctor explained why he was no longer recommending the transitional return to work. His explanation was based upon statements of the employee as to her current activity level, his examination and his review of the diagnostic test results. After reviewing Dr. Mariorenzi's entire testimony, we find that his opinions clearly rise above the level of mere conjecture or speculation and provided a sufficiently probative evidentiary basis for the trial judge's decision as to the employee's ability to work.

The trial judge in this matter was simply confronted with a classic case of conflicting expert medical opinions. He preferred to rely upon the opinion of Dr. Mariorenzi and provided a clear explanation as to his reasoning in doing so. Such preference and evaluation is within his province when presented with conflicting medical evidence. Parenteau v. Zimmerman Eng'g, Inc., 111 R.I. 68, 299 A.2d 168 (1973).

The employee's final reason of appeal alleges that the trial judge applied the wrong burden of proof when he determined that the employee was no longer disabled from work. We find no merit in this argument. It is well-settled that the

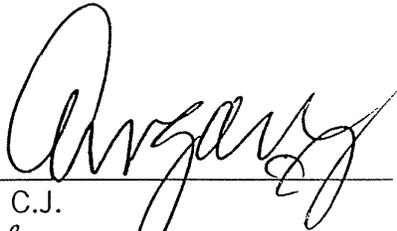
party asserting the affirmative in a worker's compensation petition bears the burden of establishing by competent legal evidence the essential elements entitling him to the relief sought. Soprano Constr. Co., Inc. v. Maia, 431 A.2d 1223, 1225 (R.I. 1981). As a result of our conclusion that Dr. Mariorenzi was qualified as an expert witness and that his opinions were competent and probative, the record contains ample evidence to support the employer's allegation and satisfy the burden of proof. We find no error on the part of the trial judge in relying upon the evidence presented by the employer and finding that the employee is capable of returning to work without any restrictions.

For the foregoing reasons, the decision and decrees of the trial court are hereby affirmed and the employee's reasons of appeal are denied and dismissed.

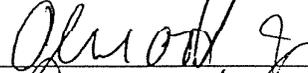
In accordance with Sec. 2.20 of the Rules of Practice of the Workers' Compensation Court, final decrees, copies of which are enclosed, shall be entered on September 4, 2002 at 10:00 a.m.

Arrigan, C.J. and Connor, J. concur.

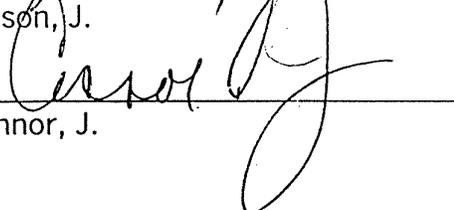
ENTER:



Arrigan, C.J.



Olsson, J.



Connor, J.