STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

SHARON BERGERON	)	
	)	
VS.	)	W.C.C. 02-06994
	)	
R. I. BLOOD CENTER	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the petitioner/employee's appeal from a decision denying her request to amend the description of her work-related injury. After careful review of the record and consideration of the arguments of the parties, we conclude that the trial judge was not clearly erroneous in finding that the employee failed to establish that the description of her injury is incorrect and we, therefore, deny the appeal.

The employee was paid weekly benefits for partial incapacity pursuant to a Memorandum of Agreement dated July 2, 2001. The Memorandum of Agreement described the work-related injury she sustained on April 4, 2001 as a "low back strain." Ms. Bergeron returned to her regular job, but at reduced hours, on May 5, 2001. She left work due to increased back pain on June 17, 2001 before returning again on August 2, 2001 at reduced hours. She again went out of work on October 22, 2001 due to back pain. Pursuant to a pretrial order entered in W.C.C. No. 02-00186, the employee's weekly benefits were discontinued on January 31, 2002 based upon a finding that her incapacity for work had ended. She returned to work on February 1, 2002, but

had to stop working on March 25, 2002 due to a stress fracture in her right foot which was not related to her employment. She has remained out of work since that time.

Ms. Bergeron filed a petition to review alleging that she sustained a return of incapacity beginning May 17, 2002. Thereafter, she filed the petition presently before the appellate panel, to amend the description of her work-related injury. These petitions were consolidated for trial.

Ms. Bergeron, a fifty-seven (57) year old female who was moderately overweight, testified that she injured her back once before in 1992 while lifting a bin of supplies at work, in a manner similar to how she injured herself in 2001. As a result of the 1992 injury, she missed work for about two (2) or three (3) weeks and then returned after the problem resolved itself.

The medical evidence pertinent to this petition consists of the depositions and reports of Dr. William F. Brennan, Jr., Dr. Stephen Saris, and Dr. Peter A. Pizzarello. The employee had initially treated at Occupational Health and Rehabilitation where she was diagnosed with a lumbar strain. Dr. Brennan began treating the employee on May 29, 2001. He initially indicated that she likely suffered from a lumbar strain, but ordered an MRI to further investigate. An MRI of the lumbar spine was done on June 6, 2001. The radiologist noted that the images were of rather poor quality. The only findings noted were some degenerative disc changes with narrowing and annular bulging at L2-3 and L3-4. Dr. Brennan, on June 20, 2001 indicated that the MRI was normal and the employee was likely suffering from an S1 strain. He stated he would follow up with her as needed.

Ms. Bergeron was sent for another MRI on September 24, 2001 by her general practitioner, Dr. Stephen M. Scott. Coincidentally, she saw Dr. Brennan that same day. He continued to maintain that she likely had a lumbar strain, pending his review of the most recent MRI study. The report of this MRI notes a right lateral disc protrusion at L1-2 and degenerative

disc disease and facet joint disease at L2-3, L3-4 and L4-5. The radiologist recommended a repeat scan with a higher strength unit. Apparently, this was done on October 25, 2001 by the same radiologist. In this report, she notes a small focal disc hernia into the right foramen at L1-2 contacting the nerve root, as well as mild disc bulging, facet joint disease, and degenerative narrowing of the foramen at other levels.

Some time after these studies were completed, Dr. Brennan changed his diagnosis to lumbar disc herniation at L1-2 with some chronic strain. Pet. Exh. 5, p. 14. He testified that his diagnosis was causally related to the employee's work injury of April 4, 2001. In March and April 2002, the employee underwent some epidural cortisone injections which did not result in any significant relief. Consequently, Dr. Brennan ordered another MRI of the lumbar spine. The study was done on May 1, 2002 and the following findings were noted:

> "1. Moderate right-sided disc protrusion at L1-2 resulting in severe narrowing of the right neural foramen, not significantly changed from the previous.
>
> "2. Small right-sided posterior disc protrusion at T11-12 but without definite impingement upon the neural elements.
>
> "3. Mild to moderate spondylitic changes at C2-3, C3-4 and C4-5 [sic]. There is early central canal narrowing at L4-5."

Pet. Exh. 5, attached MRI 5/1/02.

Dr. Brennan saw the employee again on July 29, 2002. They decided to try another course of epidural steroid injections. The doctor's note states that the injections will be done at the L4-5 level.

Dr. Saris, a neurosurgeon, evaluated the employee on one (1) occasion on November 9, 2001 on referral from the employee's primary care physician, Dr. Scott. At the time of that examination, the doctor reviewed the MRI films of the October 25, 2001 study. He

acknowledged the question whether there was a herniation at L1-2 and stated that in his opinion there was no herniation shown on the films. He noted that the employee did have diffuse and mild degenerative changes but these were well within normal limits for a woman of the employee's age. His assessment at that time was that the employee had sustained a lumbar strain.

Prior to Dr. Saris' deposition, he was shown the MRI films from the May 1, 2002 study. He testified that he saw no evidence of a disc herniation at L1-2 and strongly disagreed with the radiologist's interpretation. He acknowledged that doctors often disagree even when presented with the same information or set of facts.

Dr. Pizzarello, an orthopedic surgeon, examined the employee on two (2) occasions at the request of the insurer. At the first evaluation on December 19, 2001, the doctor did not state a diagnosis. At that time, he noted only subjective positive findings and recommended that Ms. Bergeron return to work. He did remark that the report of the June 6, 2001 MRI study indicated that it was normal but for some preexisting degenerative changes.

Dr. Pizzarello examined the employee a second time on September 25, 2002. His diagnosis was chronic low back strain with right-sided symptomatology. He acknowledged that her physical examination was not much different than his first examination, but she was complaining of more intense pain which had gradually worsened since December 2001. He attributed her condition to the April 4, 2001 injury.

Prior to his deposition, the doctor had the opportunity to review the reports and films of the four (4) MRI studies. It was his opinion that none of the studies showed a herniated disc at L1-2. He did state that he believed that the films showed a bulge or protrusion which meant that the ligament was still intact. A disc herniation would occur when the disc material broke

through the ligament. He further noted that most of the films were of very poor quality, and only the October 25, 2001 study was of any significantly good quality.

The trial judge reviewed all of the medical evidence and opted to rely upon the opinions of Dr. Pizzarello in finding that the employee sustained a return of incapacity beginning September 25, 2002. He also cited the statements of Dr. Pizzarello in denying the employee's request to amend the description of her work-related injury. The employee filed a claim of appeal in the present matter. There was no appeal filed by either party in the consolidated case regarding the return of incapacity.

In reviewing the decision of the trial judge, we must bear in mind that the findings of fact made by a trial judge must be deemed final on appeal absent a determination that one (1) or more of those findings are clearly erroneous. R.I.G.L. § 28-35-28(b); Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). Only after specifically finding that the trial judge was clearly wrong, may the appellate panel conduct its own *de novo* review of the evidence.

The employee has filed three (3) reasons of appeal in which she argues that the trial judge was clearly erroneous and overlooked or misconceived uncontradicted medical testimony in failing to find that the employee suffered either a herniated disc or protruded lumbar disc as a result of her work-related injury. The employee contends that Dr. Brennan stated that the employee had a herniated lumbar disc; that Dr. Pizzarello found that the employee had a protruded disc; and that Dr. Saris had no opinion as to a current diagnosis. We must disagree with the employee's interpretation of the statements of Dr. Pizzarello and Dr. Saris.

Dr. Brennan certainly remained steadfast in his opinion that the employee sustained a herniated lumbar disc at L1-2. On the other hand, Dr. Pizzarello clearly stated that, after reviewing the films and the reports of the four (4) MRI studies, it was his opinion that none of

them revealed a herniated disc. Res. Exh. A, p. 12. When he was questioned about some of the MRI findings, the doctor indicated that he saw a bulge on the October 25, 2001 study, not a herniation. Id. at 17-18. With regard to the May 1, 2002 MRI, Dr. Pizzarello stated that he saw a protrusion, which in his vocabulary was not the same as a herniation. The doctor was never specifically asked whether he believed that this "protrusion" or "bulge" at L1-2 was caused by the work injury, or was simply part of the various degenerative changes which were noted. We cannot say that Dr. Pizzarello's statements regarding the "protrusion" are quite as definitive as the employee would like to believe. We would note that the doctor never included a bulge or protrusion at L1-2 in his diagnosis of the employee's condition.

Dr. Saris did state at his deposition on March 31, 2003, that he had no opinion as to the employee's current diagnosis or disability. However, his interpretation of the MRI films is relevant to the employee's contention that she sustained a herniated disc at L1-2 on April 4, 2001. He reviewed the October 25, 2001 and May 1, 2002 films and adamantly stated that neither study showed a disc herniation. Dr. Saris was of the opinion that the studies revealed degenerative changes which he would consider normal for someone of the employee's age.

The trial judge relied upon the opinions of Dr. Pizzarello in denying the employee's petition. We have thoroughly reviewed the doctor's deposition and reports and we do not find any statement by the doctor in which he diagnosed a lumbar disc protrusion and causally related that diagnosis to the incident at work. At best, Dr. Pizzarello stated that two (2) of the MRI studies revealed a disc protrusion. However, there were a number of findings made in the MRI reports. The mere fact that the MRI studies revealed some abnormality does not necessarily lead to the conclusion that the abnormality was the result of the work injury. Both Dr. Pizzarello and

Dr. Saris indicated that the MRI studies exposed a variety of degenerative changes which were consistent with the employee's age.

The trial judge exercised his discretion in choosing to rely upon the opinions of Dr. Pizzarello in the face of conflicting competent medical testimony. Parenteau v. Zimmerman Eng'g, Inc., 111 R.I. 68, 299 A.2d 168 (1973). Dr. Pizzarello's statements are also supported by the testimony of Dr. Saris regarding the reading of the MRI films. Based upon our review of the record, the trial judge's finding that the employee failed to prove that the description of her injury should be amended is not clearly erroneous. We, therefore, deny and dismiss the employee's appeal and affirm the decision and decree 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 on

Bertness and Sowa, JJ., concur.

ENTER:

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Olsson, J.

_____
Bertness, J.

_____
Sowa, 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 July 14, 2003 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

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Olsson, J.

_____
Bertness, J.

_____
Sowa, J.

I hereby certify that copies were mailed to Tedford B. Radway, Esq., and Francis T. Connor, Esq., on

_____