STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

THOMAS PEDCHENKO	)	
	)	
VS.	)	W.C.C. 03-05489
	)	
NARRAGANSETT ELECTRIC COMPANY	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the petitioner/employee's appeal from the decision and decree of the trial judge in which he was awarded weekly benefits for a work-related injury to his neck, but was denied payment for surgery performed on his neck. After careful review of the record and consideration of the arguments of the parties, we grant the employee's appeal and reverse the decision of the trial judge.

The employee had worked for Narragansett Electric for thirty-three (33) years in different positions. Since about 1998, he had been working in a light duty job because he had injured his back at work and had certain restrictions on lifting. The light duty job involved doing clerical work as well as delivering and picking up stock. On July 3, 2002, the employee was involved in a motor vehicle accident while returning from a trip to pick up parts. He was taken by rescue to St. Joseph's Hospital/Fatima Unit with complaints of pain in his left shoulder. He was discharged after a few hours and a supervisor gave him a ride back to the company where he filled out an accident report.

The following day was a holiday and the employee had a vacation day the next day. He returned to work on Monday and the employer sent him to Occupational Health and Rehabilitation for evaluation. He was seen there a number of times and also treated with his personal physician, Dr. Christopher Huntington. He continued to work full-time at the light duty job until January 14, 2003 when he stopped working on the recommendation of Dr. Huntington. He testified that the pain in his neck and left shoulder had progressively gotten worse. The doctor performed surgery on his neck on February 24, 2003. The employee returned to work on July 9, 2003. He stated that he no longer has any problem with his left shoulder and only has some pain at the base of his neck from the incision.

Mr. Pedchenko stated that he never sustained an injury to his neck or left shoulder prior to the accident on July 3, 2002. He had seen Dr. Huntington about a month before the accident because of some soreness in his neck. The doctor gave him a prescription for a muscle relaxant and the complaints improved.

The medical evidence consists of the records of St. Joseph Health Services/Our Lady of Fatima Hospital, Occupational Health and Rehabilitation, and Dr. Paul Keefe, as well as the depositions and records of Drs. Christopher F. Huntington and A. Louis Mariorenzi. The hospital records reflect that the employee complained of neck pain on the left side and left elbow pain. He was treated for a cervical sprain and elbow contusion and released.

Mr. Pedchenko was seen at Occupational Health and Rehabilitation on July 8, 2002 by Dr. Steven G. McCloy. He also diagnosed a cervical strain as a result of the motor vehicle accident on July 3, 2002 and referred the employee for physical therapy. He did allow the employee to continue working in the job he was performing at the time of the accident. Mr. Pedchenko attended physical therapy three (3) times a week for about two (2) weeks. He

stopped going to therapy because he felt that it was not helping his condition. He continued to have some residual pain in his neck on the left side.

Dr. Keefe, the company doctor, saw the employee on August 15, 2002 and agreed with the diagnosis of cervical strain. He did not impose any further restrictions on his activities. The doctor noted that he doubted that the neck problem would require surgery.

Dr. Christopher F. Huntington, an orthopedic surgeon, saw the employee on July 30, 2002 and noted tenderness in the cervical area. He had dynamic lateral flexion-extension x-rays taken that day which revealed retrolisthesis at C2-3 and C3-4, which is a slipping or partial dislocation of the two (2) vertebrae, and other degenerative changes. He testified that this type of x-ray, which is taken with the neck bending backwards and forwards, often reveals additional findings which may be missed with stationary x-rays. The doctor determined that the employee had suffered a traumatic spondylolisthesis of the cervical spine as a result of the motor vehicle accident on July 3, 2002. He indicated that simple degeneration due to aging would not generally cause such a degree of slippage. This fact combined with the report of acute symptoms immediately after the accident and the progression of symptoms since then supported his conclusion that the condition was due to trauma.

Dr. Huntington ordered an MRI which was done on August 16, 2002. The report of that test indicated degenerative changes at C3-4, C4-5 and C5-6 in the form of small disc bulges and osteophytes, but no spinal stenosis or spinal cord compression.

The employee returned on September 19, 2002 complaining of severe left shoulder and neck pain. The doctor noted he was in obvious distress and had decreased sensation in the C4 distribution and other positive findings. Due to the instability of the spine shown on the x-rays

and the increased symptoms, the doctor recommended surgery. He also stated that the employee was disabled from all employment.

On November 5, 2002, the employee saw Dr. Huntington again and his examination failed to show any hard neurological changes, which was an improvement, but his diagnosis and determination as to disability remained unchanged. However, on January 14, 2003, the employee reported that he was having difficulty walking on uneven ground and was tripping and stumbling. The physical exam revealed abnormal reflexes as well as other positive findings which the doctor classified as the most severe he had seen since the injury. Due to the evidence of progressive spinal cord injury, Dr. Huntington recommended that the surgery be done as soon as possible.

On February 24, 2003, Dr. Huntington performed an anterior cervical decompression and fusion from C2 through C4 with plate stabilization. Over the next several months following the surgery, the employee's condition improved in that he had intact neurological functions and normal reflexes. He also regained normal neck strength. On July 9, 2003, the employee returned to full and unrestricted duty.

Dr. A. Louis Mariorenzi, an orthopedic surgeon, saw the employee on November 21, 2002 at the request of the employer. The physical examination was objectively normal. The doctor reviewed the x-rays from Our Lady of Fatima Hospital taken the day of the accident and the MRI films. The doctor noted that due to the arthritic changes in the neck, the employee probably suffered some nerve root irritation which was causing the pain in his left shoulder area. His diagnosis was a cervical strain with some residual minor radiculopathy. Dr. Mariorenzi stated that he found no indication for surgery and recommended anti-inflammatories instead of

muscle relaxants and possibly a trigger point injection. In his opinion the employee was capable of working with the restrictions that had been placed on him prior to the accident.

During the deposition, Dr. Mariorenzi was asked to review Dr. Huntington's impression of the dynamic flexion-extension x-rays contained in his July 30, 2002 report. He testified that based upon his physical examination, he did not feel that those findings were clinically significant and certainly not sufficient to support a decision to operate. He also noted that the retrolisthesis could be due to the significant amount of arthritis in the employee's neck.

The doctor's deposition was taken on December 15, 2003. Dr. Mariorenzi acknowledged that he never saw any medical reports or test results which were generated subsequent to his examination. He testified that as of the date of his examination, it was his opinion that surgery was not necessary to treat the employee's condition.

At the pretrial conference on September 4, 2003, the trial judge granted the petition, finding that the employee sustained a work-related injury to his neck on July 3, 2002 and awarding weekly benefits for partial incapacity from January 14, 2003 to February 22, 2003 and for total incapacity from February 23, 2003 to July 9, 2003. The employer filed a claim for trial.

After considering all of the evidence presented at the trial, the judge stated that he found the opinions of Dr. Mariorenzi to be more persuasive as to the employee's condition. However, he accepted the opinion of Dr. Huntington that the employee was totally disabled on September 19, 2002 and then ended the period of disability based upon Dr. Mariorenzi's examination on November 21, 2002. Unfortunately, in his findings and orders, he states the ending date of disability as December 15, 2002. He concluded that the surgery was not necessary, again in reliance on Dr. Mariorenzi, and declined to award counsel fees and costs to the employee's

attorney because he had achieved no greater success than he had at the pretrial conference. The employee duly filed his claim of appeal to the Appellate Division.

The role of the Appellate Division is very clearly set forth in the Workers' Compensation Act. Section 28-35-28(b) of the Rhode Island General Laws provides that the findings of fact made by a trial judge are final unless the appellate panel determines that they are clearly erroneous. See Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996). The Appellate Division may conduct a *de novo* review of the evidence only after specifically finding that the trial judge was clearly wrong. Id.; Grimes Box Co., Inc. v. Miguel, 509 A.2d 1002 (R.I. 1986).

The employee has filed nine (9) reasons of appeal. The first six (6) reasons all allege error on the part of the trial judge in his evaluation of the employee's testimony and the medical evidence, in particular, the depositions and records of Drs. Mariorenzi and Huntington. We must agree with the employee that the trial judge was clearly wrong in his determination as to the employee's period of disability and, therefore, reverse the decision and decree of the trial judge.

There is a rather obvious conflict between the evidence in the record, the trial judge's statements in his written decision, and the period of disability he included in his findings and orders. In the decision, the trial judge states that he will accept the opinion of Dr. Huntington that the employee is totally disabled as of September 19, 2002 and the opinion of Dr. Mariorenzi that the employee is no longer disabled as of November 21, 2002. However, he then awarded the employee weekly benefits for partial disability from July 3, 2002 to December 15, 2002. There is nothing in the record relating to the date of December 15, 2002. More importantly, the employee testified that he continued working full-time at his regular job and regular wages from July 4, 2002 until January 14, 2003. The petition filed by the employee alleges disability from

January 14, 2003 to July 9, 2003. It is clear that the trial judge overlooked material evidence and his finding as to the period of disability is clearly wrong.

The trial judge also misconstrued the employee's testimony regarding a prior neck problem. On direct and cross examination, Mr. Pedchenko was asked if he had ever had an injury to his neck or left shoulder prior to July 3, 2002. He denied any such injury. When he was confronted with the fact that he had seen Dr. Huntington in June 2002, only one (1) month prior to the work injury, for neck complaints, the employee stated that he told the doctor that his neck was sore, but there was no specific injury reported. Obviously, the word "injury" generally means a trauma to the body part, not merely the insidious onset of soreness or pain. The trial judge raised a question as to the employee's credibility when he indicated in his decision that the employee denied any neck problem prior to July 3, 2002 on direct examination and then was forced to reluctantly admit he had a previous neck complaint on cross-examination. We find that the trial judge's assessment of this testimony and any inference drawn as to the employee's credibility was incorrect.

In his decision, the trial judge appears to have viewed his role in weighing the medical testimony of Drs. Huntington and Mariorenzi as governed by Parenteau v. Zimmerman Eng., Inc., 111 R.I. 69, 299 A.2d 168 (R.I. 1973), which stands for the proposition that a trial judge may exercise his discretion in giving greater weight to the opinions of one (1) medical expert over another when faced with conflicting medical opinions. However, in the present matter, the doctors' opinions are not really conflicting. The trial judge in this matter noted that the two (2) doctors agreed that the employee had a pre-existing arthritic condition in his cervical spine. However, in stating his reliance on the opinions of Dr. Mariorenzi, he does not provide any analysis or explanation for why he chose to rely on this expert while dismissing Dr. Huntington.

> "After reviewing all of the medical evidence offered, I prefer to rely upon the opinions as expressed by Dr. A. Louis Mariorenzi, who, I believe, was much more illuminating and helpful in his explanation as to the condition of the employee." (Tr. Dec. p. 11)

There is no discussion as to how or why Dr. Mariorenzi's testimony was "much more illuminating and helpful." In addition, the trial judge never explained why he rejected the opinion of Dr. Huntington regarding the need for surgery.

Dr. Mariorenzi saw the employee on one (1) occasion on November 21, 2002. His opinions regarding the need for surgery were based entirely on that visit. He did not believe that surgery was necessary; however, this was not much different from Dr. Huntington's contemporaneous opinion. Dr. Huntington had seen the employee in September, and based upon certain positive findings during the examination, he had recommended the surgery. However, he did not express any great urgency in getting the procedure done. When the employee saw Dr. Huntington in November, some of those positive findings were not present and the surgery was not mentioned in his report of that visit. The doctor explained that if the employee had reduced the amount of activity involving his neck, his symptoms could improve at certain times.

In January of 2003, Dr. Huntington found positive objective signs that indicated a progressive spinal cord injury and advised the employee that he should have the surgery as soon as possible. Dr. Mariorenzi was not provided with any of Dr. Huntington's medical reports and never saw the films of the dynamic flexion-extension x-rays, all of which supported Dr. Huntington's opinion to proceed with the surgery. The doctor stated that he would have had to see the x-ray films to confirm what Dr. Huntington found on his review. Dr. Mariorenzi never reviewed the surgical note nor was he aware of the employee's improvement after surgery to the point that he returned to work. It is possible that this additional information would not have changed his opinions, but we do not know this and neither did the trial judge.

It is clear from the record that the employee's condition changed after both of the doctors saw him in November 2002. The present scenario is analogous to the fact pattern in Parkway IGA v. Lyon, 649 A.2d 1024 (R.I. 1994). In that case, the employer was relying on the opinions of two (2) physicians to discontinue the employee's benefits. The physicians had examined the employee at least one (1) year prior to the trial. The employee's treating physician had evaluated the employee just a month before and had stated that his condition had worsened. The Rhode Island Supreme Court stated that the length of elapsed time between the examinations and the hearing did not automatically render those opinions inadmissible or irrelevant to the proceedings. However, they were considered "stale" once evidence demonstrating that the employee's condition had subsequently changed was introduced into the record. Id. at 1025.

In light of the evidence from Dr. Huntington's subsequent examinations that the employee's condition did not remain constant after he visited with Dr. Mariorenzi, we must find that the trial judge was clearly wrong in relying upon the opinions of Dr. Mariorenzi. We find nothing in the trial judge's decision reconciling this evidence of a subsequent change in condition with his reliance upon the opinions of Dr. Mariorenzi, who lacked this information. Consequently, we reverse the decision and decree of the trial judge and, in reliance on the opinions of Dr. Huntington, find that the surgery performed on February 24, 2003 was necessary to cure, rehabilitate or relieve the employee from the effects of the work-related injury he sustained on July 3, 2002. In conjunction with that finding, we also conclude that the employee was totally disabled from January 14, 2003 to July 9, 2003.

In the employee's seventh and eighth reasons of appeal he contends that the trial judge was clearly wrong when he failed to award a counsel fee and costs to his attorney when he succeeded in establishing liability for his injury and a period of disability after the trial. The

employee was successful at the pretrial conference and did not file a claim for trial; only the employer claimed a trial. Pursuant to R.I.G.L. § 28-35-20(e), the trial is *de novo* except that issues which were resolved by agreement at the pretrial conference cannot be reopened at the trial level. In this case, there were no agreements at the pretrial conference so all issues, including liability and disability, were to be litigated.

The trial judge stated in the final order in his decision and decree:

> "5. No additional counsel fee is awarded over and above the counsel fee awarded at the pretrial in this matter in that the petitioner has achieved no greater result at trial than was achieved at the pretrial."

Although the employee achieved no greater benefits, due to the *de novo* nature of the trial, the employee bore the burden of coming forth with evidence to establish that he had sustained a work-related injury, that he underwent surgery which was necessary to treat that injury, and that he was disabled from work for a period of time. As a result of the employer's claim for a trial, the employee was forced to prove the elements of his case. He was successful in that endeavor. Therefore, the trial judge was clearly wrong when he failed to award a counsel fee and the costs of the litigation to the employee and his attorney. Consequently, we grant the employee's appeal in this regard as well. The matter will be remanded for the trial judge to determine the amount of the counsel fee to be awarded for services rendered at the trial level.

The final reason of appeal is really a conditional request to remand the matter to the trial judge. On January 20, 2004, the last day of the trial, the employee's petition was amended to request specific compensation for the scars caused by the surgery Dr. Huntington performed on his neck. The trial judge viewed the scars, but did not make any award for the disfigurement because he found that the surgery was not necessary to cure, rehabilitate, or relieve the employee from the effects of the work-related injury. In light of our decision that the surgery was

necessary, we will remand the matter to the trial judge with instructions to view the scars resulting from the surgery and make an appropriate award for that disfigurement.

For the reasons set forth above, 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 the employee sustained a personal injury, specifically a cervical strain and a traumatic spondylolisthesis at C2-3 and C3-4, on July 3, 2002, arising out of and in the course of his employment with the respondent, connected therewith and referable thereto, of which the respondent had notice.

2. That the employee's average weekly wage is Nine Hundred Fifty-nine and 29/100 ($959.29) Dollars.

3. That the employee has no dependents.

4. That the employee received some weekly benefits pursuant to the pretrial order entered in this matter on September 4, 2003.

5. That the surgery performed by Dr. Christopher F. Huntington on February 24, 2003 was necessary to cure, rehabilitate, or relieve the employee from the effects of the work-related injury he sustained on July 3, 2002.

6. That the employee was totally disabled from January 14, 2003 to July 9, 2003.

7. That the surgery performed by Dr. Christopher F. Huntington on February 24, 2003 has caused some disfigurement.

It is, therefore, ordered:

1. That the employer shall pay to the employee weekly benefits for total incapacity from January 14, 2003 to July 9, 2003.

2. That the employer shall take credit for any payments made to the employee pursuant to the pretrial order entered in this matter on September 4, 2003.

3. That the employer shall pay all reasonable charges for medical services rendered to the employee which were necessary to cure, rehabilitate, or relieve the employee from the effects of the work-related injury he sustained on July 3, 2002, including the appropriate cost for the surgery performed on February 24, 2003 by Dr. Christopher F. Huntington.

4. That the employer shall reimburse Gregory L. Boyer, Esq., attorney for the employee, the sum of Four Hundred Fifty and 00/100 ($450.00) Dollars for the cost of the expert witness fee paid to Dr. Christopher F. Huntington.

5. That the employer shall reimburse Gregory L. Boyer, Esq., attorney for the employee, the sum of Three Hundred Ten and 55/100 ($310.55) Dollars for the cost of the deposition of Dr. Christopher F. Huntington and a copy of the deposition of Dr. A. Louis Mariorenzi.

6. That the employer shall reimburse Gregory L. Boyer, Esq., attorney for the employee, the sum of One Hundred Fifteen and 00/100 ($115.00) Dollars for the cost of obtaining the transcript of the trial proceedings and the filing of the claim of appeal.

7. That the matter is remanded to the trial judge so that he may (a) view the disfigurement caused by the surgery performed on February 24, 2004 and make an appropriate award of specific compensation, and (b) award an appropriate counsel fee to Gregory L. Boyer, Esq., for services rendered to the employee at the trial level.

8. That the employer shall pay a counsel fee in the sum of Two Thousand and 00/100 ($2,000.00) Dollars to Gregory L. Boyer, Esq., attorney for the employee, for the successful prosecution of the employee's appeal.

We have prepared and submit herewith a new decree and order of remand 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 Ricci, JJ. concur.

ENTER:

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Olsson, J.

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Sowa, J.

_____
Ricci, J.

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	)	
VS.	)	W.C.C. 03-05489
	)	
NARRAGANSETT ELECTRIC COMPANY	)	

FINAL DECREE AND ORDER OF REMAND OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the appeal of the petitioner/employee from a decree entered on February 3, 2004.

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

1. That the employee sustained a personal injury, specifically a cervical strain and a traumatic spondylolisthesis at C2-3 and C3-4, on July 3, 2002, arising out of and in the course of his employment with the respondent, connected therewith and referable thereto, of which the respondent had notice.

2. That the employee's average weekly wage is Nine Hundred Fifty-nine and 29/100 ($959.29) Dollars.

3. That the employee has no dependents.

4. That the employee received some weekly benefits pursuant to the pretrial order entered in this matter on September 4, 2003.

5. That the surgery performed by Dr. Christopher F. Huntington on February 24, 2003 was necessary to cure, rehabilitate, or relieve the employee from the effects of the work-related injury he sustained on July 3, 2002.

6. That the employee was totally disabled from January 14, 2003 to July 9, 2003.

7. That the surgery performed by Dr. Christopher F. Huntington on February 24, 2003 has caused some disfigurement.

It is, therefore, ordered:

1. That the employer shall pay to the employee weekly benefits for total incapacity from January 14, 2003 to July 9, 2003.

2. That the employer shall take credit for any payments made to the employee pursuant to the pretrial order entered in this matter on September 4, 2003.

3. That the employer shall pay all reasonable charges for medical services rendered to the employee which were necessary to cure, rehabilitate, or relieve the employee from the effects of the work-related injury he sustained on July 3, 2002, including the appropriate cost for the surgery performed on February 24, 2003 by Dr. Christopher F. Huntington.

4. That the employer shall reimburse Gregory L. Boyer, Esq., attorney for the employee, the sum of Four Hundred Fifty and 00/100 ($450.00) Dollars for the cost of the expert witness fee paid to Dr. Christopher F. Huntington.

5. That the employer shall reimburse Gregory L. Boyer, Esq., attorney for the employee, the sum of Three Hundred Ten and 55/100 ($310.55) Dollars for the cost of the deposition of Dr. Christopher F. Huntington and a copy of the deposition of Dr. A. Louis Mariorenzi.

6. That the employer shall reimburse Gregory L. Boyer, Esq., attorney for the employee, the sum of One Hundred Fifteen and 00/100 ($115.00) Dollars for the cost of obtaining the transcript of the trial proceedings and the filing of the claim of appeal.

7. That the matter is remanded to the trial judge so that he may (a) view the disfigurement caused by the surgery performed on February 24, 2004 and make an appropriate award of specific compensation, and (b) award an appropriate counsel fee to Gregory L. Boyer, Esq., for services rendered to the employee at the trial level.

8. That the employer shall pay a counsel fee in the sum of Two Thousand and 00/100 ($2,000.00) Dollars to Gregory L. Boyer, Esq., attorney for the employee, for the successful prosecution of the employee's appeal.

Entered as the final decree and order of remand of this Court this day of

BY ORDER:

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ENTER:

_____
Olsson, J.

_____
Sowa, J.

_____
Ricci, J.

I hereby certify that copies were mailed to George E. Furtado, Esq., and Gregory L. Boyer, Esq., on

_____