STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
DIANE LOPES	)	
	)	
VS.	)	W.C.C. 03-06404
	)	
CHERRY HILL MANOR NURSING HOME	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter came to be heard before the Appellate Division on the petitioner/employee's appeal from the amended decision and decree of the trial judge which denied her requests to modify the description of the work injury and grant approval for surgery. After careful review of the record and consideration of the arguments of counsel, we deny the employee's appeal in part and grant it in part. In addition, we remand the matter to the trial judge for a determination of an appropriate counsel fee for services rendered at that level.

The employee sustained an injury on December 28, 2002 while working for the respondent as a housekeeper. A Memorandum of Agreement was issued describing the injury as a low back strain and providing for the payment of weekly benefits for partial incapacity from December 29, 2002 and continuing. The present matter arose from an Employee's Petition to Review alleging that the employer failed to give permission for, or pay for, surgery, specifically an anterior lumbar interbody fusion at L4-5 and L5-S1. The petition also alleged that the description of the injury should be changed from low back strain to an aggravation of pre-existing lumbar disc disease.

The trial judge appointed Dr. Vincent I. MacAndrew, Jr. to conduct an impartial medical examination and comment on the proper description of the employee's injury and the need for surgery. Based upon the doctor's report, the trial judge granted permission for the surgery and amended the description of the injury as requested. Although there is no evidence of any request to do so, the trial judge also ordered that the employer only pay fifty percent (50%) of any medical costs and weekly benefits based upon her finding that the employee's condition was partly attributable to her "personal medical profile." The employee claimed a trial from this order due to the fifty percent (50%) reduction in her benefits.

At the time of her injury, the employee had been working as a housekeeper for the respondent for about six (6) months. She acknowledged that she had experienced back problems previously, to the extent that she had consultations with Dr. James E. McLennan and Dr. Steven L. Blazar and also underwent a physical therapy program. Although she admitted that she was never entirely symptom-free prior to the incident on December 28, 2002, she asserted that she never experienced any problems performing her job as a housekeeper on a regular basis.

The employee's primary care physician was Dr. Robert Ellison. Apparently, she initially began treating with him at Harvard Pilgrim Health Care. When he switched his services to Anchor Medical Associates, the employee continued to see him at his new office. The records of Anchor Medical Associates, which begin in February 2000, were introduced into evidence. In a March 10, 2000 office note, it indicates that the employee has a history of chronic low back pain due to lumbar disc disease. She had an MRI in 1998 and takes up to six (6) Vicodin a day, depending upon her symptoms.

Beginning in October 2000, the employee missed about three (3) months from work due to a flare-up of back pain. She was referred to Dr. McLennan for a consultation, which was done

in January 2001. Dr. McLennan also referred her to Dr. Blazar for evaluation. It appears from the records that the employee tried physical therapy a few times. She also continued taking Vicodin on a regular basis, although she was switched to Percocet in April 2002. On December 13, 2002, shortly before the incident at work, Ms. Lopes was seen at Anchor Medical, in part to discuss her medication use. It was noted that she had chronic low back pain with disc disease and that surgery had been suggested to her by Drs. McLennan and Blazar.

The remainder of the medical evidence consists of the depositions and records of Drs. James E. McLennan, Steven L. Blazar, and Vincent I. MacAndrew, Jr. Dr. McLennan, a neurosurgeon, saw the employee on two (2) occasions, once before the work injury and once afterwards. At the first evaluation on January 9, 2001, the employee reported that she has had "about 2 yrs [sic] of serious back pain, getting slowly worse." Res. Exh. 2, attach. report 1/9/01. He concluded that she had "significant chronic and progressive discogenic pain syndrome," and may be a surgical candidate. The doctor referred her to Dr. Blazar for further evaluation.

Dr. McLennan did not see the employee again until January 23, 2003. He noted that back in 2001, he and Dr. Blazar had difficulty pinpointing the source of her back pain and then she began to improve, so any discussion of surgery was postponed. The doctor did not find any significant changes in her condition on examination or upon review of an MRI done on January 6, 2003. He recommended physical therapy.

Dr. McLennan testified that he was unaware of the substantial amount of narcotic medication the employee was taking for the last several years. After being provided with additional medical history for the period from January 2001 to January 2003, the doctor stated that it seemed that the employee had an ongoing back problem. He specifically pointed out that in 2003, he did not note any additional physical findings on examination and the MRI results

from 2000 and 2003 were very similar. The doctor indicated that he had only the employee's own statement that she had improved to the point that she had been working for five (5) months and then felt worse after the incident on December 28, 2002, to substantiate her claim. He did agree that the amount of narcotic medication taken by the employee was more indicative of a narcotic addiction than a sign that she had continued to experience severe back pain to such a degree that she required that medication.

Dr. Blazar, an orthopedic surgeon, saw the employee on only one (1) occasion, February 27, 2001, on referral from Dr. McLennan. The employee advised Dr. Blazar that she had been experiencing back pain for about two (2) years and tried various treatments. After examining the employee, the doctor arrived at a tentative diagnosis of symptomatic degenerative disc disease at L4-5 and possibly L5-S1. He recommended a discogram to better isolate the source of her pain and determine if surgery was appropriate. The employee did not undergo that test. After the injury at work in December 2002, she did undergo discography on May 8, 2003 on the recommendation of a neurosurgeon she began treating with in March 2003.

Dr. Blazar initially stated that, based upon the sequence of events related by employee's counsel, that the employee suffered an acute injury on December 28, 2002 superimposed upon a pre-existing degenerative condition. However, after being informed of the employee's significant narcotic use and ongoing complaints of back pain, as well as the lack of any change in her physical findings after the injury, he basically retracted that opinion.

Dr. MacAndrew, an orthopedic surgeon, evaluated the employee on March 1, 2004 at the request of the court. The employee informed him that she had a history of back pain, but prior to the incident at work she was improving and had been able to work for six (6) months as a housekeeper. In his report, the doctor initially stated that the traumatic injury at work

exacerbated her pre-existing condition and that she was now a candidate for surgery due to the worsening of her symptoms. The doctor also volunteered that he would attribute fifty percent (50%) of the cause of her condition to the pre-existing degenerative disc disease.

Dr. MacAndrew was not provided with the records of Anchor Medical Associates until the date of his deposition and was unaware of the amount of pain medication the employee had been taking prior to the work injury. After reviewing those records, he testified that the fact that the employee was on a significant dosage of pain medication prior to the injury, made it almost impossible to determine whether the work injury caused any worsening in the level of her pain or function. He further stated that the employee was likely a surgical candidate before the incident at work. He would only go so far as to say that the work injury probably exacerbated the pre-existing condition somewhat, but that condition was significant enough that the employee likely needed surgery before the work incident.

The trial judge concluded that the employee failed to prove that she needs an anterior lumbar interbody fusion at L4-5 and L5-S1 due to the effects of the work injury. She noted that none of the three (3) physicians who testified would state to a reasonable degree of medical certainty that the work injury precipitated the need for surgery or that it was necessary to relieve the employee from the effects of the work injury. The trial judge also found that the medical testimony was not sufficient to establish by a fair preponderance of the evidence that the description of the injury should be changed from a low back strain to an aggravation of pre-existing lumbar disc disease. She again pointed out the equivocal nature of the medical opinions, particularly after the doctors were made aware of the extent of her pain medication use prior to the work injury and her ongoing problems.

A decree was entered on May 23, 2005 which denied the employee's petition. The

decree made no mention of the provision in the pretrial order which had reduced the employee's weekly benefits by fifty percent (50%). Apparently, on the trial judge's own initiative, an amended decision and decree were subsequently issued which added the finding that the employee remained partially disabled and ordered the employer to pay weekly benefits in full retroactive to the entry of the pretrial order.

Pursuant to R.I.G.L. § 28-35-28(b), the Appellate Division must strictly adhere to the trial judge's findings on factual matters absent clear error. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). The Appellate Division is entitled to conduct a *de novo* review only when a finding is made that the trial judge was clearly wrong. Id. (citing R.I.G.L. § 28-35-28(b); Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986)). If the record before the Appellate Division reveals evidence sufficient to support the trial judge's findings, the decision must stand. After a thorough review of the record, we affirm the trial judge's findings, but we must agree with the employee that, under the circumstances, the trial judge should have awarded a counsel fee to the employee's attorney. Therefore, we will remand the matter to the trial judge solely for the determination of an appropriate fee.

In support of her appeal, the employee propounded seven (7) reasons of appeal. The first three (3) reasons are merely general recitations that the trial judge's decision is against the law, the evidence and the weight thereof. Our statute and the pertinent case law require that the appellant state, with specificity, the errors allegedly committed by the trial judge. R.I.G.L. § 28-35-28(a); Falvey v. Women and Infants Hosp., 584 A.2d 417, 420 (R.I. 1991); Bissonnette v. Federal Dairy Co., Inc., 472 A.2d 1223, 1226 (R.I. 1984). Since the first three (3) reasons suffer from a lack of specificity, they are denied and dismissed.

In the fourth reason of appeal, the employee argues that the trial judge overlooked the

testimony of Dr. MacAndrew when she failed to find that the employee suffered an aggravation of a pre-existing condition, instead of a low back strain, as a result of the work-related incident on December 28, 2002. Dr. MacAndrew stated in his report that the employee had a pre-existing condition which was aggravated by the incident at work. However, after reviewing the records from Anchor Medical regarding the extent of her previous back problems and her significant use of pain medication immediately prior to that incident, the doctor became less confident in his opinion and equivocated a great deal in his testimony. *See* Pet. Exh. 8, pp. 30, 37-40, 43-44.

It is well-settled that the petitioner in a workers' compensation matter bears the burden of presenting "credible evidence of probative force" to substantiate the allegations of her petition. Delage v. Imperial Knife Company, Inc., 121 R.I. 146, 148, 396 A.2d 938, 939 (1979). In her decision, the trial judge outlined Dr. MacAndrew's testimony in some detail. We cannot say that she overlooked, misconceived, or misconstrued his testimony. Rather, she simply did not find it to be persuasive, particularly in light of his statements that it was difficult to determine if there was any worsening of the employee's condition after the incident at work. The employee needed a fair preponderance of the evidence to establish she sustained an aggravation and Dr. MacAndrew's testimony was not sufficiently definitive and persuasive to tip the scale in her favor.

The employee also argues that the trial judge erred in failing to find that the requested surgery was necessary because Dr. MacAndrew failed to quantify the percentage of contribution of the work injury to the need for surgery as compared to the pre-existing condition. This reason is without merit. The trial judge neither directly addresses, nor alludes to, percentages or apportionment as grounds for the denial of the petition. The trial judge merely pointed out the contradictions or equivocation in Dr. MacAndrew's testimony and concluded that his testimony

was not persuasive on either issue. The doctor was hard-pressed to state with any reasonable degree of certainty that the incident at work caused a worsening of the employee's pre-existing condition. He acknowledged that the trauma may have aggravated the pre-existing condition, but he then states that because the pre-existing condition apparently was so severe based upon her medication intake, that her overall level was the same. Pet. Exh. 8, pp. 43-44. Dr. MacAndrew also stated that the proposed surgery was warranted before the work injury. We find no indication that the trial judge rejected the doctor's testimony or the employee's allegations because of the lack of testimony as to some percentage of contribution or apportionment.

In the sixth reason of appeal, the employee asserts that the trial judge erred in requiring an opinion as to apportionment from Dr. MacAndrew and thereafter, reducing the employee's benefits by fifty percent (50%). This argument is moot as the trial judge corrected the error made in the pretrial order by eliminating the reduction from the trial decree and further clarified the payments due to the employee when she issued the amended decision and decree.

The final reason of appeal points out that the trial judge erred in failing to award a counsel fee to the employee's attorney after he was successful in reinstating the employee's weekly benefits to the full compensation rate. Although the employee's attempt to obtain permission for surgery and to alter the description of her injury was ultimately unsuccessful, she nevertheless found herself in a more favorable position following trial, as the trial judge reinstated her full indemnity and medical benefits retroactively. Due to the terms of the pretrial order, the employee was forced to claim a trial and fully litigate the entire matter because the trial judge erroneously reduced the employee's benefits on her own initiative at the outset. This error was corrected after the trial and further clarified by the issuance of the amended decision

and decree through the efforts of the employee's attorney. Consequently, we shall remand the matter to the trial judge for a determination as to the award of an appropriate counsel fee and any associated costs.

Based upon the foregoing discussion, the employee's appeal is granted in part, solely regarding the award of a counsel fee and costs for services rendered at the trial level. The findings and orders contained in the amended decision and decree of the trial judge are affirmed. The matter is remanded to the trial judge for the sole purpose of determining the amount of the counsel fee and the appropriate costs.

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

Connor and Ricci, JJ., concur.

ENTER:

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Olsson, J.

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Connor, J.

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Ricci, 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 granted in part, and it is:

ORDERED, ADJUDGED, AND DECREED:

1. That the findings of fact and the orders contained in a decree of this Court entered on June 3, 2005 be, and they hereby are, affirmed.

2. That the matter is remanded to the trial judge for the determination and award of an appropriate counsel fee, as well as appropriate costs, to the employee's counsel for services rendered in the successful effort to restore the employee's weekly benefits to the full weekly compensation rate, as well as restore the full payment of medical expenses.

3. That the employer shall reimburse the employee's counsel the sum of Four Hundred Ninety-nine and 00/100 ($499.00) Dollars for the cost of the trial transcript and the filing of the claim of appeal.

4. That the employer shall pay a counsel fee in the sum of One Thousand Eight Hundred and 00/100 ($1,800.00) Dollars for services rendered before the Appellate

Division.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Connor, J.

_____
Ricci, J.

I hereby certify that copies were mailed to Hagop S. Jawharjian, Esq., and Peter S. Haydon, Esq., on

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