

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

RAYMOND BERARDUCCI)

)

VS.)

W.C.C. 05-02139

)

LIFESPAN CORPORATION)

RAYMOND BERARDUCCI)

)

VS.)

W.C.C. 04-07519

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LIFESPAN)

DECISION OF THE APPELLATE DIVISION

OLSSON, J. These two (2) matters were consolidated for trial by the court and remain consolidated on appeal before the Appellate Division. The petitioner/employee has appealed from a decision of the trial judge which denied his request to include a back injury in the description of his work-related injury and also denied his contention that he sustained a return of incapacity from October 13, 2004 to December 8, 2004. After thorough review of the record and consideration of the arguments of the parties, we deny the employee's appeals and affirm the decision and decrees of the trial judge in these matters.

Mr. Berarducci was paid weekly compensation benefits for partial incapacity beginning

February 11, 2004 pursuant to a Memorandum of Agreement dated May 14, 2004. That document indicates that he sustained cervical and thoracic strains on February 10, 2004. He subsequently signed a Suspension Agreement and Receipt on June 3, 2004 in which he agreed that his weekly benefits would stop on June 6, 2004. He returned to his regular job with the employer, but left work again on July 22, 2004.

W.C.C. No. 04-07519 is an employee's petition to review alleging that he sustained a return of incapacity beginning October 13, 2004 due to the effects of his work-related injury. The petition was subsequently amended to allege the period of incapacity was from October 13, 2004 to December 8, 2004. W.C.C. No. 05-02139 is also an employee's petition to review. In this petition, the employee contends that he sustained a back injury on February 10, 2004, in addition to the cervical and thoracic strains.

The employee testified that at the time of his injury he was employed by the respondent as a transporter at Miriam Hospital which involved moving patients around the hospital on stretchers, on beds, and in wheelchairs. At times, he also delivered supplies to different areas of the hospital. He was injured when he caught a patient who was falling. He was seen at the emergency room at Miriam Hospital and then saw his primary care physician, Dr. Richard Bianco. In April 2004, Dr. Bianco referred him to a chiropractor, Dr. Kevin G. Miller.

Mr. Berarducci stated that he saw Dr. A. Louis Mariorenzi at the end of April 2004 at the request of the insurer and the doctor told him to go back to work, so he returned to work in June. He stopped working July 22, 2004 because he "just couldn't take it." (Tr. p. 15) He initially testified that he told a nurse at the front desk that he was leaving because he could not tolerate the pain in his back and neck. He subsequently stated that it was his low back and right leg that

were bothering him. He never notified his supervisor or any other management personnel on that day or thereafter that he was leaving work due to the effects of the work injury.

The employee did not seek any medical treatment for his condition until October 2004 when he saw Dr. Miller again. His explanation for this lapse was that he did not believe he had any coverage to pay for any medical treatment until he spoke with an attorney around October. He asserted that he continued to have problems with his neck, low back and right leg, although he later stated that his neck was alright. (Tr. p. 30) Mr. Berarducci stopped seeing Dr. Miller in December due to concerns about payment of his bill for services.

Despite his physical complaints, the employee helped a friend install a floor at the end of December 2004. He stated that he was in significant pain during this task and afterwards, but he never sought any further treatment. Upon questioning from the trial judge, the employee denied experiencing any problems with his back prior to the injury in February 2004. (Tr. p. 38)

The medical evidence in this matter consisted of the records of Dr. Richard Bianco, the deposition and records of Dr. Kevin G. Miller, and the deposition and reports of Dr. A. Louis Mariorenzi. The records of the primary care physician, Dr. Bianco, indicate that the employee did have back problems prior to the work-related injury. A note from July 27, 2000 indicates that the doctor prescribed two (2) medications for a "low back sprain." (Res. Exh. 3.) A letter from Dr. Harry M. Iannotti to Dr. Bianco dated March 13, 2002 states that the employee has been complaining of back pain radiating to his groin and that he has had back problems in the past. On April 3, 2003, Dr. Bianco prescribed the medication Soma and noted that it was for the employee's low back. In a note dated May 28, 2003, the doctor writes that Mr. Berarducci is having a problem with his low back and that he hurt his back about a year ago. Dr. Bianco stated that the employee had sciatica and was experiencing numbness in his right leg. He had been to

the emergency room and been given a shot for the pain. Apparently, the employee was out of work for some period around April and May of 2003 because the doctor completed a return to work note stating the employee was under his care for sciatica.

In November 2003, there is a notation that Soma was prescribed again. On February 16, 2004, the employee saw Dr. Bianco and described his work injury, relating that he injured his neck, upper back and low back. The doctor prescribed some physical therapy which the employee attended for a period of time. On April 16, 2004, Dr. Bianco referred the employee to Dr. Miller after he stopped attending therapy because it was causing too much pain. From May 13, 2004 to December 16, 2004, Dr. Bianco approved prescriptions for Xanax and Soma on eleven (11) occasions, but there is no indication in his records that Mr. Berarducci complained of increased back pain or right leg problems after July 22, 2004, when he left work.

Dr. Miller, the chiropractor, began treating the employee on April 21, 2004 with a diagnosis of “[c]ervicodorsal and lumbosacral strain injuries with relative multilevel myofascial and vertebral intersegmental dysfunctions, along with the relative right lower extremity radicular pain and paresthesias.” (Pet. Exh. 3, p. 8) After rendering chiropractic treatment to the employee several times a week, Dr. Miller completed a form releasing him to full duty as of June 7, 2004.

According to the doctor’s notes, he saw the employee two (2) times in June after his return to work. The employee then missed two (2) appointments at the end of June, but did see Dr. Miller on July 2, 2004. Another visit was scheduled for July 16, 2004, but the employee failed to appear. The doctor asserted that his course of treatment was halted because the insurer refused to authorize any further treatment, although there is no documentation in the doctor’s file to substantiate this statement.

The employee returned to Dr. Miller's office on October 1, 2004 with complaints of low back pain and right leg problems. The doctor attributed these complaints to the injury in February 2004. He last treated the employee on December 8, 2004 at which time the employee indicated he would stop treatment because he was concerned about running up a bill with the doctor.

Dr. Mariorenzi, an orthopedic surgeon, evaluated the employee on two (2) occasions at the request of the insurer. At the first examination on April 29, 2004, the employee complained of pain in the entire right side of his body from his neck into his leg and pain in the thoracic and lumbar areas. The physical findings were normal and the doctor concluded that the employee was capable of returning to his regular job without restrictions.

Dr. Mariorenzi examined the employee again on February 7, 2005. His complaints included pain in the neck, upper back, and right shoulder, intermittent pain in the lumbar area on the right, and constant pain in the right leg. Again, the physical examination was normal and the doctor stated that the employee was capable of performing the duties of his regular job.

The trial judge, noting various inconsistencies and contradictions in the employee's testimony, as well as some equivocal answers by Dr. Miller, concluded that the employee had not sustained his burden of proof in both matters and he denied both of the petitions. The employee duly filed the present claims of appeal to the Appellate Division.

Pursuant to R.I.G.L. § 28-35-28(b), the scope of our review of the decision of a trial judge is strictly circumscribed. The findings of fact made by a trial judge are final unless the Appellate Division concludes that they are clearly erroneous. The Appellate Division may only conduct a *de novo* review of the evidence after a determination has been made that the trial judge is clearly wrong.

The employee has filed three (3) reasons of appeal. In his first reason, the employee argues that the trial judge was clearly wrong and abused his discretion in concluding that the employee's explanation of the gap in treatment from July 22, 2004 to October 1, 2004 was inconsistent and unrealistic. The trial judge is clearly in the best position to evaluate the testimony of witnesses who appear before him as he is able to observe their demeanor, their body language, and the manner in which they respond to questions. Credibility determinations made by a trial judge are consequently viewed very deferentially by the appellate panel and will not be overturned absent a finding that the trial judge was clearly wrong because he overlooked or misconceived pertinent evidence in arriving at that determination. *See Laganiere v. Bonte Spinning Co.*, 103 R.I. 191, 236 A.2d 256 (1967).

The employee testified that he left work abruptly in July 2004 because he was in such severe pain that he could not tolerate working. However, he did not go to an emergency room or any type of urgent care facility. He did not report his problem or his decision to leave work to a supervisor or any management personnel. He did not attempt to see his primary care physician, Dr. Bianco, although he did call in a number of times from July to October for refills of prescriptions. He also did not attempt to see Dr. Miller, although Dr. Miller's office had called the employee to reschedule the visit he missed on July 16, 2004.

The employee's statement that, despite the severity of his complaints, he did not seek treatment because he thought he did not have insurance coverage of any type for the bill is simply difficult to believe. Apparently, he was paying for prescriptions during this time and he went ahead and saw Dr. Bianco in early 2005 despite an apparent lack of insurance. The employee's failure to seek medical treatment expeditiously for a condition which he claimed was so severe as to cause him to stop working casts doubt upon the validity of his claim that he left

work due to that condition. We believe the trial judge's assessment of the employee's testimony on this subject was clearly supported in the record and we do not find that he committed error or overlooked or misconstrued any evidence in making that assessment and rejecting the employee's testimony.

In his second reason of appeal, Mr. Berarducci contends that the trial judge was clearly wrong in denying his petition based in part on the erroneous conclusion that the employee withheld information from his treating physician. We acknowledge that the trial judge's statement that the employee "apparently withheld" from Dr. Miller the fact that he assisted a friend in laying a floor is incorrect. (Tr. decision, p. 8.) The employee testified that he helped install the floor near the end of December 2004; he last saw Dr. Miller on December 8, 2004. Consequently, the employee never had the opportunity to tell Dr. Miller about this event. However, Mr. Berarducci did inform Dr. Mariorenzi in February 2005 about this activity.

Considering this single reference by the trial judge to the alleged withholding of information in the context of the entire decision, we find that this was harmless error. The trial judge clearly based his decision upon many factors, including other inconsistencies or contradictions in the employee's testimony, as well as the limited probative value of Dr. Miller's testimony. He did not cite this one (1) particular concern regarding the employee's testimony as the determinative factor in ruling against the employee. It was the cumulative effect of many issues which led to the conclusion that the employee had not sustained his burden of proof. In fact, there is an issue of greater concern which we will address in the discussion of the third reason of appeal which the trial judge did not focus on specifically, but certainly supports his decision.

The third reason of appeal states that the trial judge relied upon incompetent medical

evidence in rejecting the employee's allegation that he sustained a back injury on February 10, 2004 and failed to clearly state the basis for denying this allegation. The trial judge denied both of the petitions on the grounds that the employee basically did not produce sufficient evidence to persuade him that he injured his back at the time of the injury and that he later was disabled again due to that injury. The competent evidence clearly supports this conclusion.

The employee contends that the reports of Dr. Mariorenzi cited by the trial judge are not competent evidence on the issue of whether he sustained a back injury because the reports do not contain any diagnosis. Dr. Mariorenzi saw the employee over two (2) months after the injury occurred and found that his examination was normal and there were no residuals of any injury at that time (April 29, 2004). However, on questioning from employee's counsel, the doctor testified that, based upon the history and information he received from the employee and other sources, the employee likely sustained soft tissue injuries to the neck, shoulder, and low back, but he had now recovered from those injuries. (Res. Exh. 2, pp. 11-12) In addition, the trial judge apparently relied upon the opinions offered by Dr. Mariorenzi primarily with regard to the issue of disability, rather than the nature of the original injury.

The employee cites information in an emergency room report from Miriam Hospital, the records of Dr. Bianco, and the report of Dr. Miller dated May 3, 2004 as supportive of his allegation that he sustained a back injury. However, his reliance on these records is misplaced.

The employee went to the emergency room at Miriam Hospital on February 13, 2004, three (3) days after the injury occurred. The history obtained from the employee states that he injured his back lifting patients on Friday, February 6, 2004 and Tuesday, February 10, 2004. Oddly, there is no mention of a falling patient being caught by the employee. A two (2) page form completed by the examining physician contains a diagram indicating the area of pain is the

upper back. There is a notation that the trapezius area was tender and the diagnosis was a trapezius strain. There are no findings, nor any diagnosis, regarding the low back.

The records of Dr. Bianco were admitted through a records deposition. There is no affidavit or testimony from the doctor. There are no opinions expressed in these records as to causation and any statements contained therein cannot be considered as expert medical testimony. In addition, the employee mentions at the first visit on February 16, 2004 that he injured his low back, but there is nothing regarding the low back at the next three (3) visits. It is not until March 19, 2004, that the employee again states he is having low back pain and right leg problems.

The primary concern regarding the medical evidence on the issue of whether the employee sustained a low back injury is that none of the doctors addresses the fact that the employee clearly had previous back problems of a similar nature. The employee specifically denied having any prior back problems, but the records of Dr. Bianco unequivocally establish that he did. He has had back problems since at least 2002, and was receiving prescription medication from Dr. Bianco for those problems. The condition was so bad at one (1) point that he went to the emergency room in May 2003. The complaints included low back pain radiating to the right leg, with tingling and/or numbness in the leg. This is very similar to the complaints he began to make in March 2004.

Dr. Bianco was obviously aware of the prior back problem, but he never testified to offer any opinion as to the effect on the employee's current condition. Dr. Miller was apparently unaware of any prior back problems, as was Dr. Mariorenzi. The records establish that the employee had a significant problem with his back previously which he never revealed to some of the doctors. We find that the opinions of Drs. Miller and Mariorenzi as to causation and the

nature of the injury are, therefore, based upon a faulty foundation. Consequently, there is no competent medical evidence to support the employee's allegation that he sustained a back injury on February 10, 2004.

Based upon the foregoing discussion, the employee's appeal is denied and dismissed and the decision and decrees of the trial judge are affirmed. In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, final decrees, copies of which are enclosed, shall be entered on

Sowa and Connor, JJ. concur.

ENTER:

Olsson, J.

Sowa, J.

Connor, 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 21, 2005 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

John A. Sabatini, Administrator

ENTER:

Olsson, J.

Sowa, J.

Connor, J.

I hereby certify that copies were mailed to Charles J. Vucci, Esq., and Jeffrey M. Liptrot, Esq., on

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