STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

DEBRA PESTANA	)	
	)	
VS.	)	W.C.C. 06-04199
	)	
U.P.S.	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter was heard before the Appellate Division on the petitioner/employee's appeal from the decision and decree of the trial court which denied her original petition for workers' compensation benefits. After conducting a careful review of the record in this matter and considering the arguments of both parties, we affirm the decision of the trial judge and deny and dismiss the employee's appeal.

The employee's original petition was denied at the pretrial conference, and a timely claim for trial was made. At trial, the employee testified, as did Dr. John Mukand and a fellow U.P.S. employee, Damon Sabalewski. The employer presented the testimony of Gina Wright, the employee's supervisor at U.P.S. Additionally, several exhibits were entered into evidence, including several medical reports, records from the Department of Labor and Training, and the deposition of the court-appointed impartial medical examiner, Dr. Norman Gordon.

Debra Pestana testified that she worked for U.P.S. from August 17, 1998 until May 25, 2006 as a customer counter assistant clerk. She worked five (5) days a week from 4:00 p.m. to 9:00 p.m. She assisted customers at the time station where they typed their addresses and labels,

and she helped customers pack boxes for shipment. Ms. Pestana would then process packages brought in by customers for shipping. This process involved lifting packages from the counter onto the scale, which is waist high, and then pushing the package onto a belt or moving it to a back room if it was large. Additionally, she would retrieve packages for customers that were undeliverable because they were too large or that remained undelivered after several delivery attempts. These packages were stored on shelves in a back room.

The employee testified that packages ranged in weight from one (1) to one hundred forty-nine (149) pounds, and the volume of packages varied from day to day. She was expected to be able to lift packages weighing up to seventy (70) pounds on her own and use either a hand truck or another person to assist her with anything exceeding that weight. She noted that there seemed to be an increase in the volume of packages and the size of the packages since the time that she began her job. This account of her job duties was largely corroborated both by the employee's colleague, Mr. Sabalewski, and her supervisor, Ms. Wright, although differing somewhat in the estimates of frequency of lifting, the volume of packages, and the number of heavy packages. Ms. Wright testified that the employee was a good worker, and barring one minor incident, had no issues in the workplace.

The employee began working a second job at Sub South USA in February 2006 answering phones, typing, picking up mail, and dropping off bank deposits for approximately twenty (20) to thirty (30) hours per week. She stated that this position required "[n]othing strenuous at all," and she continued that employment after she stopped working at U.P.S. in May 2006 until July or August of 2006. Tr. 16.

Ms. Pestana testified that she was working on April 12, 2006 at the U.P.S. counter when she went to pick up some boxes, and she felt pulling in her shoulders, neck, and back area, which

caused her pain. She called her manager to inform him that she wanted to go to the emergency room due to the severe pain, but she stated that she would return later to scan documents. She left work on that day and sought treatment at Stat Care. The physician treated her for a cyst under her breast and also noted muscle spasm in her neck and back, suggesting that she seek follow up treatment from her primary care physician.

She saw her primary care physician, Dr. Frank Baffoni, about a week later. He advised her that she had a muscle strain and prescribed medication. Her symptoms worsened and she contacted Dr. Baffoni again. He sent her for an MRI of her cervical and thoracic spine which was done on June 3, 2006. Ms. Pestana's last day of work at U.P.S. was May 25, 2006.

Dr. Baffoni referred the employee to Dr. Lisa K. Harrington, who evaluated Ms. Pestana on June 16, 2006 and referred her to Dr. Joseph V. Centofanti, a neurologist, for evaluation and testing. The history in Dr. Centofanti's report of his June 26, 2006 examination states that about four (4) weeks earlier, the employee awoke with a stiff neck and bilateral shoulder pain. Thereafter, the employee treated with Dr. Jon A. Mukand in July and November of 2006. In addition, Ms. Pestana was evaluated by Dr. Matthew J. Smith, a physiatrist, on October 6, 2006. Dr. Smith's report states that there was "[n]o inciting event" which caused the employee's symptoms to develop six (6) months earlier. Resp. Exh. D, p. 1. The employee informed the doctor that "it may have been cumulative from her work at UPS doing continuous lifting up to 75 pounds." Id.

Ms. Pestana testified on December 12, 2006 that she continued to experience pain in her neck, back and both shoulders, frequent headaches, pain and tingling in her arms, dizziness, and difficulty hearing. She has not returned to any form of employment.

Dr. Mukand, a specialist in physical medicine and rehabilitation, testified at trial regarding his examinations of Ms. Pestana on July 18, 2006 and November 29, 2006. In his July report, the doctor recorded a history that the employee developed neck and shoulder pain on May 25, 2006. He also noted that she had been working for U.P.S. for the last nine (9) years, lifting boxes weighing from five (5) to one hundred (100) pounds above shoulder level for four (4) hours a day. Subsequently, in his November report, the doctor amended the history to reflect that the employee's symptoms developed on April 12, 2006, but the employee did not go out of work until May. He also amended the job description to indicate that Ms. Pestana worked for U.P.S. for seven (7) years, in five (5) to six (6) hour shifts, lifting about three hundred (300) boxes a day, which weighed between forty-five (45) and one hundred fifty (150) pounds each. Dr. Mukand noted that the job required repetitive lifting, bending, and pushing, similar to an assembly line.

When Dr. Mukand examined the employee in July 2006, he noted that she had pain in her neck and shoulders, specifically the trapezius muscles. He recommended therapy. When he examined the employee in November 2006, he noted that her symptoms had progressed, so he ordered an MRI. Based upon the radiologist's report from the MRI, Dr. Mukand diagnosed the employee with several herniated cervical discs resulting in compression of the spinal cord and nerve root damage. He opined to a reasonable degree of medical certainty that the employee's condition was causally related to her work activities, and that she was disabled from her work at U.P.S. as a result of her condition. He noted that the frequent heavy lifting done by the employee was very stressful to her cervical spine. He did not mention a specific incident as the triggering event for her symptoms.

The trial judge ordered an impartial medical examination with Dr. Norman M. Gordon, a neurologist, whose testimony was taken by deposition in this matter. Dr. Gordon took a history from the employee that one day in April 2006, she woke in the morning with pain in her neck, which worsened with movement and was diagnosed in the emergency room as a muscle spasm. The doctor noted that she treated with her primary care physician who prescribed physical therapy, which was helpful for a time; however, the symptoms persisted. He was provided with physical therapy reports, the report of the MRI of June 3, 2006, and the records of Drs. Mukand, Barone, Baffoni, Centofanti, and Harrington.

Dr. Gordon conducted a complete physical examination of the employee on October 16, 2006. His diagnosis was neck pain, cervical spondylosis, cervicogenic migraine type headache and left-sided vestibular neuropathy. The doctor indicated that she was partially disabled and should avoid lifting objects weighing in excess of ten (10) pounds, which would prevent her from performing her job at U.P.S. He testified that he was unable to find a causal connection to her work activities in the absence of any history of a specific injury or incident that precipitated her symptoms.

The doctor was asked a hypothetical question incorporating the testimony regarding the employee's job duties provided by the employee, Mr. Sabalewski, and Ms. Wright and utilizing a range of zero (0) to two hundred (200) as the number of packages handled by Ms. Pestana on a daily basis. Dr. Gordon maintained his opinion that there was no causal relationship between the employee's diagnosis and her work activities. He did acknowledge that if he were to assume that on a daily basis the employee was lifting about three hundred (300) boxes weighing from 45 to 150 pounds and was required to lift some of these six (6) feet in the air to place on shelves above her head, she could develop a muscle strain or overuse syndrome. However, Dr. Gordon

testified that the degree of arthritis of the neck present on the employee's MRI at the age of 35 was not caused by the repetitive strain of lifting and carrying boxes, but more likely due to some sort of traumatic injury.

The trial judge found that, although it is undisputed that Ms. Pestana has had considerable medical issues that have disabled her from her strenuous, demanding employment with U.P.S., there is no competent medical evidence to support a causal relationship between the employee's disability and her employment. In arriving at this opinion, the trial judge relied on the expert medical opinion of Dr. Gordon, that absent a specific traumatic incident, a causal connection to work could not be established. Therefore, the employee's original petition for workers' compensation benefits was denied, and the employee filed the instant appeal.

The standard employed when reviewing the decision of a trial judge is quite deferential. "The findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." R.I.G.L. § 28-35-28(b); *see* Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996). Furthermore, the appellate division is precluded from conducting a *de novo* review of the evidence without initially determining that a factual finding made by the trial judge is clearly wrong. Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986). After reviewing the evidence and the record in this matter, we conclude that the trial judge was not clearly erroneous in his findings and conclusions. Therefore, we affirm the decision of the trial judge and deny and dismiss the employee's appeal.

In her reasons of appeal, the employee first argues that the trial judge's decision was against the law, the evidence, and the weight thereof. These initial reasons of appeal lack the specificity required by R.I.G.L. § 28-35-28 and are therefore dismissed without further consideration. *See* Impulse Packaging, Inc. v. Sicajan, 869 A.2d 593, 598-99 (R.I. 2005) (citing

Falvey v. Women and Infants Hospital, 584 A.2d 417 (R.I. 1991); Bissonnette v. Federal Dairy Co., 472 A.2d 1223 (R.I. 1984)).

Next, the employee contends that her receipt of Temporary Disability Insurance (TDI) benefits is not an appropriate basis for an adverse decision. After a careful review of the trial judge's decision, it is clear that he gave no moment to the employee's receipt of TDI benefits in reaching his decision. The only mention of TDI in the trial judge's decision is when he noted that,

> [i]n addition, the employer presented the records of temporary disability which included the report of Dr. Centofanti where he was specifically asked if [the disability] was a work-related problem. He indicated it was not.

Tr. 144-45. This comment was made in the context of noting the introduction of the records of Drs. Centofanti, Harrington, and Smith and that none of these physicians recorded a history of a work-related incident or indicated that the employee's condition was work-related. The TDI records which were introduced into evidence included forms completed by Drs. Baffoni and Harrington which indicated that the employee's condition was not work-related.

Ultimately, the trial judge relied on the opinion expressed by Dr. Gordon in denying the employee's petition. The trial judge simply referred to the TDI records as further support for the conclusion that the evidence did not establish a causal relationship between Ms. Pestana's condition and her work activities. He clearly did not base his decision on the fact that the employee received TDI benefits.

The employee also argues that Dr. Gordon actually acknowledged that the employee's condition was work-related. However, as the trial judge explained, the hypothetical question that elicited the doctor's response suggesting a possible causal relationship between the employee's

muscle strain overuse syndrome and her work misstated the employee's job duties as described in the testimony of Ms. Pestana, Ms. Wright, and Mr. Sabalewski.

During the deposition of Dr. Gordon, counsel for the employee engaged the doctor in the following exchange:

> Q: * * * Is that also your opinion as to causal connection of her activities for nine years lifting and bending about 200 packages a day sometimes as high as six feet high sometimes as low as the bottom shelf?
>
> A: * * * Now am I to assume that she's lifting 150 pounds on her own six feet up and down?
>
> Q: We contend, yes, at times. She's tried to get help, but sometimes they are too busy to get help.
>
> A: If I am to assume that Miss Pestana has been required to lift objects that weigh up to 1150 (sic) pounds six feet in the air to put on a shelf I would not at all be surprised that if she would have developed myofascial pain syndrome or muscle strain overuse syndrome. But to develop arthritis of the neck at the age of 35 I would assume that someone would have to really have some sort of an injury and not just the repetitive strain of lifting and carrying.

Resp. Exh. G, p. 34-5. Based upon this exchange, the employee argues that Dr. Gordon actually concedes that the employee's injury is work-related.

The employee bears the burden of proving her case by a fair preponderance of the credible and probative evidence. *See* Blecha v. Wells Fargo Guard-Co. Serv., 610 A.2d 98, 102 (R.I. 1992). No evidence before the court suggests that the employee was required to lift the heaviest packages received at the counter by U.P.S. overhead to heights of six (6) feet. Therefore, Dr. Gordon's response to an inaccurate hypothetical question cannot satisfy the employee's burden of proof regarding the causal connection between her disability and her employment. Moreover, when examining Dr. Gordon's response in its entirety, it is clear that Dr. Gordon continued to maintain his assessment that some specific incident beyond just "the

repetitive strain of lifting and carrying" was necessary to cause the employee's condition, in particular the significant degenerative arthritic changes present in someone of her age. The trial judge specifically addressed this issue in his decision and noted the discrepancy in the job description given to Dr. Gordon in the hypothetical presented by counsel for the employee. We find no error on the part of the trial judge in his assessment of Dr. Gordon's testimony, and the employee's appeal on this ground must fail.

Finally, the employee contends that repetitive lifting and bending at work can cause muscular damage to a worker without a particular incident. Essentially, the employee seems to suggest that the trial judge should have relied on the opinion of Dr. Mukand who found that the repetitive activities of employee's job caused her condition rather than the opinion of the court-appointed impartial medical examiner, Dr. Gordon. Dr. Mukand's opinion was based upon his understanding of the employee's job duties which included frequent heavy lifting without assistance of about 300 boxes a day weighing between 45 and 150 pounds, moving them to various places, and sometimes placing them on overhead shelves. *See* Pet. Exh. 1, p. 1-2; Tr. pp. 54, 60-61, 79. As noted by the trial judge, this job description was not consistent with the description provided by Ms. Pestana, Ms. Wright and Mr. Sabalewski. Consequently, the foundation of Dr. Mukand's opinion is faulty, and his opinion as to causation is therefore not probative.

Assuming, *arguendo*, that Dr. Mukand's opinion is probative and competent; we would still conclude that there is no clear error in the trial judge's decision. It is well-settled that a trial judge may exercise discretion in choosing to rely upon one medical opinion over another. Parenteau v. Zimmerman, 111 R.I. 68, 78, 299 A.2d 168, 174 (R.I. 1973). That is precisely what the trial judge did in the instant case, and we find no reason to disturb that determination. Both

Dr. Mukand and Dr. Gordon provided expert medical opinions to a reasonable degree of medical certainty based on reviews of relevant medical documents and examinations of the employee. Faced with differing opinions, the trial judge did not err in relying on the well-founded opinion of Dr. Gordon over that of Dr. Mukand. Accordingly, the employee's appeal on these grounds cannot succeed.

Based upon the foregoing, the employee's appeal is denied and dismissed, and the opinion of the trial judge is affirmed. 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 Hardman, JJ. concur.

ENTER:

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Olsson, J.

_____
Connor, J.

_____
Hardman, 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 October 2, 2007 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

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Olsson, J.

_____
Connor, J.

_____
Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Thomas W. Pearlman, Esq., and Tracey McPeak Morel, Esq., on

_____