STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
JOHN BARBOSA	)	
	)	
VS.	)	W.C.C. 98-01245
	)	
BROWN UNIVERSITY	)	
JOHN BARBOSA	)	
	)	
VS.	)	W.C.C. 96-07976
	)	
BROWN UNIVERSITY	)	

DECISION OF THE APPELLATE DIVISION

HEALY, J. These matters come before the Appellate Division upon the appeals of the petitioner/employee from the adverse decision and decrees of the trial judge.

W.C.C. No. 96-07976 was an Employee's Petition to Review alleging a return of total incapacity as of August 7, 1995 and continuing. At the pretrial conference, the trial judge denied the petition due to a lack of evidence and the employee claimed a trial.

W.C.C. No. 98-01245 was an Employee's Petition to Enforce alleging that pursuant to a Memorandum of Agreement filed with the Department of Labor on August 10, 1983, the employer was obliged to pay the employee the compensation benefits due him during the weeks he was out of work. The employee averred that as of the date of the filing of his petition such compensation benefits had not been paid. The employee sought to have the employer adjudged in contempt and ordered to pay back benefits to him. At the pretrial conference, the trial judge denied the employee's petition and the employee claimed a trial.

These two (2) petitions were consolidated for trial and decision. After a trial on the merits of the case, the trial judge denied and dismissed the employee's petitions finding that the employee had failed to meet his burden of proof in either petition. The employee appeals both cases. After careful review of the record, we affirm the findings and orders of the trial judge.

The facts insofar as pertinent to this matter are as follows. On November 2, 1982, John Barbosa sustained an injury while working for Brown University. On May 3, 1983, the parties entered into a Memorandum of Agreement which described the employee's injuries as "bruised right elbow and right shoulder." On August 10, 1983, the parties executed a separate Memorandum of Agreement which amended the description of the employee's injuries to state "bruised right elbow and

right shoulder, low back strain." The employee continued to receive benefits until they were discontinued by a decree entered by this Court in W.C.C. No. 92-07274.

A review of the file indicates that the document attached to the employer's petition in W.C.C. No. 92-07274, which resulted in the discontinuance of benefits, was the Memorandum of Agreement dated May 3, 1983, the original memorandum. At trial in the present matter, W.C.C. No. 98-01245, the employee contended that the Memorandum of Agreement dated August 10, 1983 had not been addressed in the earlier petition and was, therefore, still in full force and effect. He also argues that the issue before the court for the "first" time in W.C.C. No. 96-07976 was whether the return of total incapacity from his back condition was causally related to the fall on November 2, 1982.

The employee testified in support of his petitions. His testimony revealed that he had worked for the employer for thirteen (13) years prior to his injury as a custodian. His job duties included buffing floors, picking up the garbage, and mopping. He testified that the plastic trash bags used for collecting garbage were of various weights but the buffer for the floor was heavy. The employee injured himself on November 2, 1982 when he slipped and fell while stripping a floor. As a result of the fall, the employee bruised his right elbow and experienced pain in his right shoulder and back. He went to the employer's infirmary. X-rays were taken and he was

sent home. Shortly thereafter, the employee returned to work but was unable to perform his job duties.

The employee testified that he began seeing Dr. Joseph P. Lombardozzi in 1983 or 1984 and he was still treating with him at the time of trial. He was seeing the doctor every six (6) months and testified that since August 7, 1995 his back problem was worse. On the day of his testimony, he stated that his neck was stiff and he had problems with his back. He testified that he could not do his job because the problems with his back prevented him from picking up anything heavy. The employee acknowledged on cross-examination that he had not worked since 1982.

In addition to his own testimony, the employee introduced the deposition testimony of Dr. Joseph P. Lombardozzi, the deposition of Matthew Carey, the Assistant Director of the Department of Labor and Training, and related consent decrees and Memoranda of Agreement. The employer presented the deposition of Dr. A. Louis Mariorenzi and both parties submitted memoranda of law.

After reviewing all the evidence presented, the trial judge concluded that the employee's claim alleging that there was an open memorandum before the court was barred by the doctrine of res judicata. Moreover, the court found that the evidence presented failed to demonstrate a return of incapacity.

Pursuant to R.I.G.L. § 28-35-28(b), the appellate panel is charged with the initial responsibility to review the record to determine whether the decision and decree properly respond to the merits of the controversy. The role of the Appellate Division in reviewing factual matters is, however, sharply circumscribed. Rhode Island General Laws § 28-35-28(b) states, "The findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." The Appellate Division is entitled to conduct a *de novo review* only when a finding is made that the trial judge was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996); Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986).

On appeal, the employee argues that the trial judge erred as matter of law on both fronts. Initially, the employee argues that the trial judge in the present matter mistakenly found that the trial court in the earlier petition, W.C.C. No. 92-07274, addressed the employee's low back condition. The court based this decision upon a determination that the prior decision had relied upon Dr. Mariorenzi's report and that this report included a complete assessment of the employee's low back condition. The employee argues that the consideration of such evidence is not tantamount to actually raising and litigating an issue for the purposes of res judicata. In order to fully understand the issues raised on appeal and to appreciate the basis for the court's conclusions, a discussion of this court's application of the doctrine of res judicata is necessary.

Traditionally, the doctrine would bar the relitigation of any issue which could have been raised in the earlier trial. However, pursuant to DiVona v. Haverhill Shoe Novelty Co., 85 R.I. 122, 127 A.2d 503 (1956), the traditional doctrine of res judicata is modified in workers' compensation proceedings. In DiVona, the court noted that due to the fluid nature of workers' compensation litigation, the doctrine of res judicata has limited application to petitions to review decrees or agreements in workers' compensation cases. Id. at 125, 127 A.2d at 505. The Rhode Island Supreme Court held in DiVona that the doctrine of res judicata would be applied in workers' compensation cases "only with respect to such issues as were actually raised and decided in the prior action." Id. at 126, 127 A.2d at 506. The court stated that the determination of this issue was defined by a question of fact:

> "Was the questioned issue of fact raised and decided in the prior case? If it was, it is barred by the doctrine. If it was not so raised and decided, it may properly be heard in the subsequent proceeding in accordance with the act." Id.

It is unquestioned that the trial judge in the earlier litigation, W.C.C. No. 92-07274, evaluated the employee's injuries to his right elbow, right shoulder and lower back. Following that review, he then determined that those injuries were no longer disabling and discontinued the employee's benefits. In order to make these findings, the trial judge had to rely upon the last unappealed agreement or decree establishing the employer's

obligation to pay. This document also sets forth the nature of the work-related injury and the employee's level of disability at that time. Moreover, in his decision, the trial judge noted his reliance upon the opinions of Dr. A. Louis Mariorenzi, who explicitly commented upon the injuries to the employee's back, neck, and shoulder. Thus, there is ample evidence to support the court's conclusion here that the issue was actually raised and decided in the prior action.

Finally, when this matter was decided adversely to the employee, he filed a timely claim of appeal. At that time, the only argument posited in support of the appeal was that the trial judge abused his discretion in not permitting a continuance for the cross-examination of a witness whose testimony was admitted by affidavit. Brown University v. Barbosa, W.C.C. No. 92-07272 (App. Div. 1995). The employee never challenged the nature and description of the injury, or the memorandum of agreement that was attached to the employer's petition. By failing to appeal the findings regarding his back or the description of the injury in the employer's petition, the employee's rights became fixed. Luzzi v. Imondi, 97 R.I. 462, 467, 198 A.2d 671, 673 (1964), *citing*, Beacon Milling Co. v. Whitford, 92 R.I. 253, 168 A.2d 279 (1961).

In addition, the trial judge made findings regarding the employee's back injury that were clearly supported by the medical evidence. Thus, there is no doubt that this issue was raised and decided in the original

proceeding and the trial judge in the present matter correctly concluded that further consideration of the issue was barred by the doctrine of res judicata. See DiVona, 85 R.I. at 125, 127 A.2d at 505. Therefore, we find no merit in the employee's argument that the August 10, 1983 preliminary agreement was an "open" memorandum of agreement before the court. Thus, we affirm the trial judge's finding that the issue was barred by the doctrine of res judicata.

The second issue raised by the employee on appeal is that the trial judge committed error by not finding that the employee's rheumatoid spondylitis was causally related to his fall on November 2, 1982. The employee argues that the trial judge should have accepted Dr. Lombardozzi's testimony over that of Dr. A. Louis Mariorenzi because ankylosing spondylitis is a rheumatological condition and rheumatology is Dr. Lombardozzi's specialty, whereas Dr. Mariorenzi is an orthopedic surgeon. The employee contends that he was never a candidate for orthopedic surgery. Therefore, he argues that the opinion of Dr. Lombardozzi should be given greater weight than the opinion of Dr. Mariorenzi.

The record is devoid of any evidence on which to base a conclusion that Dr. Mariorenzi's opinions were incompetent or unworthy of belief. In the face of conflicting medical testimony, the law regarding the trial judge's selection of one physician's testimony over that of another is well

established. In Parenteau v. Zimmerman Eng., Inc., 111 R.I. 68, 299 A.2d 168 (1973), the Rhode Island Supreme Court stated that where there are conflicting medical opinions of competent and probative value, it is within the trial court's discretion to accept the opinion of one healthcare provider over that of another. Id. at 78, 299 A.2d at 174.

In the present case, the employee presented the deposition testimony of Dr. Lombardozzi. The doctor diagnosed the employee with ankylosing spondylitis and found him to be permanently disabled. He causally related the employee's current disability to his fall in 1982. The employer presented the deposition testimony of Dr. Mariorenzi. The employee's counsel stipulated to the doctor's qualification as an expert witness. Dr. Mariorenzi testified that the employee was suffering from rheumatoid spondylitis and found the employee to be permanently disabled. However, Dr. Mariorenzi found no relationship between the employee's condition and his injury in 1982. Based upon her evaluation of the evidence, the trial judge found Dr. Mariorenzi's opinion that the employee's condition is not work related to be the more probative and persuasive opinion. She clearly explained her finding by stating:

> "The testimony from Dr. Lombardozzi indicates the employee's condition has been essentially the same since 1984. The literature which the employee submitted through the doctor is hardly supportive of the employee's position. In fact, the literature, if anything, can be interpreted to indicate there is little, if any, evidence to indicate that trauma is the cause of this type of arthritis.

> Dr. Lombardozzi testified that his opinion as to causation is based on the articles submitted." (Tr. decision, p. 12)

Her assessment of the medical testimony in this manner was clearly within her authority. Parenteau, 111 R.I. at 78, 299 A.2d at 174. After careful review of the record, we cannot say that she was clearly erroneous.

For all of the foregoing reasons, the employee's appeals are denied and dismissed and the decision and decrees of the trial court are 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

Arrigan, C.J. and Connor, J. concur.

ENTER:

_____
Arrigan, C.J.

_____
Healy, J.

_____
Connor, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
JOHN BARBOSA	)	
	)	
VS.	)	W.C.C. 96-07976
	)	
BROWN UNIVERSITY	)	

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before 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 December 15, 1998 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Arrigan, C.J.

_____
Healy, J.

_____
Connor, J.

I hereby certify that copies were mailed to Leonard M. Cordeiro, Esq. and Michael T. Wallor, Esq. on

_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

JOHN BARBOSA)
)
VS.) W.C.C. 98-01245
)
BROWN UNIVERSITY)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before 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 December 15, 1998 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Arrigan, C.J.

_____
Healy, J.

_____
Connor, J.

I hereby certify that copies were mailed to Leonard M. Cordeiro, Esq. and Michael T. Wallor, Esq. on _____