STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

BARBARA BALASSONE	)	
	)	
VS.	)	W.C.C. 00-01921
	)	
ST. JOSEPH'S HOSPITAL	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the cross-appeals of the parties from the decision of the trial judge on the employee's petition to review in which she alleged that she sustained a return of incapacity due to the effects of a work-related injury which occurred on June 6, 1988. The trial judge granted the petition in part, awarding weekly benefits for a closed period of time. After careful review of the record and consideration of the arguments of both parties, we deny the appeals and affirm the decision and decree of the trial judge.

The employee, a registered nurse, sustained a work-related injury described as "head trauma" on June 6, 1988 while working for St. Joseph's Hospital. Pursuant to a Memorandum of Agreement dated August 3, 1988, she began receiving weekly benefits for total incapacity immediately following the injury. As of April 10, 1990, her benefits were reduced to partial incapacity benefits. In 1992, Ms. Balassone underwent surgery on her neck by Dr. Mel Epstein. In a decree entered in W.C.C. No. 92-00464 on July 29, 1992, the description of the injury was amended to include a cervical injury. The employee's weekly benefits were discontinued

pursuant to a decree entered on August 10, 1993 in W.C.C. No. 92-13519 which contained a finding that her incapacity had ended.

After the discontinuance of her weekly benefits, the employee worked at the Providence Medical Health Center on a part-time schedule for one (1) year. She then obtained employment with the Rhode Island Blood Center which involved working in the community on blood drives. Her average schedule was thirty-two (32) hours a week.

The employee testified that following the surgery in 1992 she continued to experience pain in her neck that radiated into her head, left shoulder, scapula and arm. She stated that the pain worsened over time and on September 1, 1998, she stopped working because the pain had become intolerable. She explained that on August 30, 1998, she was the passenger in a vehicle driving on Route 146 in Rhode Island. There was construction on the road and the bumpy ride increased the pain in her shoulder. The employee left work on September 1, 1998 and went to the emergency room at Rhode Island Hospital complaining of severe pain in her neck radiating into her scapula and left arm.

Following this visit, the employee contacted Dr. Epstein, who referred her to Dr. J. Frederick Harrington, Jr., another neurosurgeon. After a period of conservative treatment which did not provide the employee with any significant relief, Dr. Harrington performed a second surgery on the employee's neck on April 6, 1999. According to the employee, this surgery also did little to relieve her pain. She testified that she has not returned to any type of employment and feels that she cannot work because she still has severe pain. In fact, her driver's license was suspended due to physical disability.[1] She also applied and was approved for Social Security Disability Insurance benefits.

[1] The employee's records from the Division of Motor Vehicles were admitted into evidence.

The employee acknowledged that she did not notify St. Joseph's Hospital when she stopped working in 1998 and that all of her medical bills, including those for the surgery by Dr. Harrington, were submitted to a private health insurer. She has also been evaluated by a number of doctors at the Lahey Clinic in Massachusetts for a variety of complaints. The employee indicated that she had experienced regular dizziness, ringing in the ears, heaviness in the arms and legs, fatigue, loss of sensation or burning in the legs, occasional blurred vision, some memory problems, and insomnia, in addition to the pain in her neck.

The significant medical evidence introduced in this matter was the depositions and records of Drs. J. Frederick Harrington, Jr., James E. McLennan, and Henry E. Laurelli.

Dr. Harrington testified that the foraminotomy of the C7 nerve root performed by Dr. Epstein in 1992 created a degree of instability that was exacerbating the pain in the employee's neck. He also stated that because the procedure performed by Dr. Epstein necessitated the 1999 surgery, the latter was reasonable and necessary to relieve symptoms caused by the original 1988 work injury. In his opinion, the 1999 surgery was necessary to address a long-term complication of Dr. Epstein's surgery which was done to treat the effects of the 1988 work injury. He acknowledged that he performed a more extensive surgical procedure than he had originally planned because the employee began to develop lower extremity weakness and urinary frequency which he felt might be caused by spinal cord compression from a degenerative disc at a level above C6-7, where Dr. Epstein had operated.

Dr. Harrington further testified that at the time of his initial evaluation on September 29, 1998, Ms. Balassone was partially disabled. He indicated that she was totally disabled for a three (3) month period after the surgery, which would run approximately from April 6, 1999 to July 7, 1999, and then remained partially disabled thereafter. In the doctor's report dated August

5, 1999, he noted that the employee reported complete relief from arm pain and numbness. On August 26, 1999, Dr. Harrington stated that he felt she could return to work, pending an evaluation by a specialist in multiple sclerosis, which was never performed. He testified that he referred her for evaluation because he was having difficulty explaining the continued complaint of weakness in her legs, despite a normal physical examination. He was also puzzled by her complaints of ongoing neck pain.

Dr. Henry E. Laurelli, a neurosurgeon, evaluated the employee on August 21, 2000 at the request of the court. His diagnosis was chronic pain syndrome, but he had difficulty connecting that condition to the 1988 work injury. The doctor qualified his opinions with the statement that he felt his evaluation was based upon incomplete information because he did not have an opportunity to review the narrative clinical reports of the employee's treating physicians or evaluating physicians. Counsel for the employer attempted to provide the doctor with all of the employee's medical records dating back to 1988 so that he could supplement his original report, however, Dr. Laurelli refused to review the records, which were quite voluminous.

Dr. James E. McLennan, a neurosurgeon, examined the employee on May 3, 2000 at the request of the insurer. After reviewing extensive medical records and conducting a physical examination, the doctor stated that the employee's disability in September 1998 was not related to the 1988 work injury, but was likely due to a progressive neurological illness, such as multiple sclerosis. Regarding the car ride in 1998 that caused increased neck pain, Dr. McLennan testified that the pain was not related to the 1988 injury or the 1992 surgery, but was simply due to degenerative disc disease. In contradiction of Dr. Harrington, he testified to a reasonable degree of medical certainty that the 1999 surgery was not causally related to the original 1992 surgery nor was it necessary to cure, relieve, or rehabilitate the employee from the effects of the

injury she suffered in 1988. He stated that he found no indication of instability of the cervical spine after the 1992 surgery.

The trial judge first noted that the car ride through the construction zone on Route 146 was not a sufficiently significant event to break the potential causal connection to the 1988 work injury. He then rejected the report and opinions of Dr. Laurelli due to the doctor's own statement that he had incomplete information for his evaluation and his refusal to review any further records. After dismissing Dr. Laurelli's report, the trial judge was left to weigh the testimony of Drs. McLennan and Harrington. He was satisfied that the employee had some residual pain from the original work injury and the surgery performed by Dr. Epstein which necessitated the portion of Dr. Harrington's surgery at the C6-7 level. The trial judge accepted the opinion of Dr. Harrington as to the employee's disability for the period from September 29, 1998 to August 27, 1999.

Pursuant to R.I.G.L. § 28-35-28(b), a trial judge's findings on factual matters are final unless the Appellate Division finds them to be clearly erroneous. See Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996). The Appellate Division may only conduct a *de novo* review of the record after a finding is made that the trial judge was clearly wrong. Id.; Grimes Box Co., Inc. v. Miguel, 509 A.2d 1002 (R.I. 1986). With this standard guiding us, we have carefully reviewed the entire record of this proceeding. For the reasons set forth, we find no merit in the cross appeals of the employer and employee, and we, therefore, affirm the trial judge's decision and decree.

The employee has filed two (2) reasons of appeal in which she contends that the trial judge erred in finding that her incapacity ended as of August 27, 1999. First, she argues that Dr. Harrington did not state that it was more probable than not that she could return to work on

August 27, 1999 and, therefore, the trial judge could not rely upon that statement to conclude that her disability had ended. In her second reason of appeal, the employee argues that Dr. Harrington in fact opined that she remained partially disabled as of the last office visit in September 2000.

In his report of June 24, 1999, the doctor indicated that the employee had experienced improvement in her symptoms since the surgery and she could resume her normal activities of daily living and that the only thing holding her back from returning to work was some residual neck pain. On August 26, 1999, Ms. Balassone complained of stiffness in her neck and weakness in her legs to the point that she was using a cane. The doctor was at a loss to explain this complaint. He referred the employee for evaluation by a doctor specializing in multiple sclerosis. In his report he stated "I think she can return to work, but I will wait until Dr. Calabresi makes his evaluation before determining that."

Initially, Dr. Harrington testified to a reasonable degree of medical certainty that the employee remained partially disabled as of September 2000 and that her disability was related to the effects of the 1988 injury. However, despite the employee's continued complaints, her physical examinations were basically within normal limits. She had some hyperflexia in her legs, but the doctor did not consider this to be very significant. Dr. Harrington noted that the employee was not giving her best effort during strength testing and he felt that she was embellishing her symptoms. He stated that the surgery he performed did not cause the weakness in her legs and he actually could not detect any weakness during his examinations. He also found it difficult to believe that her neck pain remained the same before and after the surgery he performed. Dr. Harrington was of the opinion that the employee probably had multiple sclerosis because he really had no other explanation for her ongoing symptoms and complaints.

When testifying as to the relationship between a person's injuries and their ability to work, an expert must speak in terms of probabilities, rather than possibilities. See Lovitt Foods, Inc. v. Veiga, 492 A.2d 1237, 1238 (R.I. 1985); Simon v. Health-Tex, Inc., 490 A.2d 50, 51 (R.I. 1985). The employee argues that the trial judge could not rely on Dr. Harrington's statement in his August 26, 1999 report nor his testimony affirming that statement, because it says "I think she can return to work . . . ." However, the trial judge did not cite only this statement in determining that the employee's incapacity had ended. He looked at the totality of Dr. Harrington's testimony and his reports in arriving at that conclusion.

In his decision, the trial judge notes that Dr. Harrington testified that only a portion of the surgery he performed was necessary to treat the effects of the work-related injury. The doctor acknowledged that some of the employee's problems were caused by disc degeneration at other levels and a kyphosis, or alteration in the normal curvature of the spine. He could not state that the symptoms which developed after he began treating the employee, particularly the leg weakness and urinary problems, were related to the original neck injury and head trauma. The doctor also indicated that he felt that the employee was embellishing her symptoms, was not giving a full effort during physical examinations, appeared to have some psychological issues, and likely had multiple sclerosis. After considering the doctor's reports and testimony in their entirety, the trial judge found that by August 27, 1999, any problems resulting from the effects of the 1988 injury had resolved and any ongoing complaints were not related to the work injury.

An expert is not required to utilize some "magic words" or specifically structured phrase in rendering his opinions. Gallucci v. Humbyrd, 709 A.2d 1059, 1066 (R.I. 1998). The employee has sought to focus on the doctor's use of the phrase "I think" as grounds for disputing the trial judge's alleged reliance on that comment in order find an end of incapacity. However, it

is clear from his decision that the trial judge considered the cumulative effect of the lack of physical findings on examination as well as the doctor's own comments regarding the employee's ongoing complaints in concluding that Ms. Balassone was no longer disabled due to the effects of her work injury. We find no error in that determination.

The employee's second ground for appeal is that the trial judge was in error when he found that her incapacity had ended when Dr. Harrington stated that she remained partially disabled. However, the issue is whether that partial disability is the result of the effects of the work injury or some other condition. Dr. Harrington acknowledged that only a portion of the surgery he performed was directly related to the work injury and that most of the ongoing complaints were not related to that injury either. After cross-examination, it became clear that the doctor was at a loss to explain the cause of the employee's continued problems. Therefore, the probative value of his initial statement that she remained partially disabled was effectively negated.

The employer filed three (3) reasons of appeal. In the first reason, it is argued that Dr. Harrington's opinions are not competent because he did not review all of the employee's medical records from 1988 to 1998. Dr. Harrington testified that he reviewed the records of Dr. Epstein, the last of which was dated in 1992, in conjunction with his treatment of the employee. The employer does not point to any information in any other medical records which would have influenced or altered Dr. Harrington's opinions and he was not questioned regarding the effect of any other records during his deposition. Two (2) binders of medical records were introduced through the deposition of Dr. McLennan. One (1) contains records from 1987 to 1992; the other contains reports of diagnostic testing. Many of the records concern other medical conditions. The mere fact that the employee may not have provided her entire medical history from 1988 to

1998 to Dr. Harrington means nothing in and of itself. We are unaware of any significant event or record that could have had an impact on Dr. Harrington's opinions and rendered them incompetent.

In the second reason of appeal, the employer argues that the trial judge abused his discretion when he rejected the opinions of Dr. Laurelli, the court-appointed impartial medical examiner. Prior to the examination, the court provided the doctor with the reports of multiple diagnostic tests, but no reports of any treating physicians. Dr. Laurelli stated that he "could not determine whether the 2000 surgery [presumably a reference to the 1999 surgery by Dr. Harrington] is related to any of the 1988 events or if in fact it was even indicated . . . ." He further qualified his opinions with the statement that his evaluation was based on incomplete information. The doctor was provided the opportunity to review additional medical records in order to supplement his original report, but refused to do so. As a result, the trial judge concluded that ". . . I find that his opinions in this case are not worth the paper that they are written on."

We must agree with the trial judge's assessment of Dr. Laurelli's report. The doctor did not provide an opinion that had any probative value. He rendered no opinion as to whether the 1999 surgery was necessary to treat the effects of the original injury, the key issue in the case. His statement that he lacked what he considered necessary background information effectively rendered the report useless to the trial judge. There is no mandate that the trial judge must accept the statements of an impartial medical examiner. We find no error on the part of the trial judge in his rejection of Dr. Laurelli's report and testimony.

In the third reason of appeal, the employer alleges that the trial judge was clearly wrong because he overlooked the opinions of Dr. McLennan, who had the opportunity to review the

complete medical records of the employee from 1988 to 1998. First, the trial judge clearly did not "overlook" the opinions of Dr. McLennan. In his bench decision, he discussed Dr. McLennan's report and testimony in detail for six (6) pages of the transcript. As discussed above, nothing was brought out in the old medical records that was sufficiently significant so as to impact the opinions rendered by Dr. Harrington. The trial judge was faced with two (2) competent conflicting expert medical opinions and chose to rely on the statements of Dr. Harrington, which he found more persuasive and probative on the issue of the need for the 1999 surgery. As the finder of fact, the trial judge has the discretion to reject certain medical testimony in favor of another medical opinion. Parenteau v. Zimmerman Eng., Inc., 111 R.I. 68, 299 A.2d 168 (1973). We find no basis for a finding that he was clearly wrong in his assessment of the medical evidence in this matter.

For the reasons set forth above, we deny and dismiss the appeals of both the employer and the employee and affirm the decision and decree of the trial judge. The employer shall pay a counsel fee in the sum of One Thousand Two Hundred and 00/100 ($1,200.00) Dollars to Kevin B. Reall, Esq., attorney for the employee, for services rendered in the successful defense of the employer's appeal.

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

Healy, C.J. and Ricci, J. concur.

ENTER:

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Healy, C.J.

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Olsson, 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 cross appeals of the petitioner/employee and the respondent/employer and upon consideration thereof, the appeals are denied and dismissed, 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 October 1, 2002 be, and they hereby are, affirmed.

2. That the employer shall pay a counsel fee in the sum of One Thousand Two Hundred and 00/100 ($1,200.00) Dollars to Kevin B. Reall, Esq., attorney for the employee, for services rendered in the successful defense of the employer's appeal.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Healy, C.J.

_____
Olsson, J.

_____
Ricci, J.

I hereby certify that copies were mailed to Kevin B. Reall, Esq., and James T. Hornstein, Esq., on

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