

STATE OF RHODE ISLAND

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT  
APPELLATE DIVISION

HEATHERWOOD RI LLC

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VS.

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W.C.C. No. 2015-03774

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VIVIAN SUGALSKI

)

FINAL DECREE OF THE APPELLATE DIVISION

This matter came to be heard by the Appellate Division upon the claim of appeal of the respondent/employee and upon consideration thereof, the employee's claim of appeal is denied and dismissed, and it is

ORDERED, ADJUDGED, AND DECREED:

That the findings of fact and orders contained in a decree of this Court entered on February 8, 2018 be, and they hereby are, affirmed.

Entered as the final decree of this Court this *21<sup>st</sup>* day of *March, 2022*.

PER ORDER:

/s/ Nicholas DiFilippo  
Administrator

ENTER:

/s/ Olsson, J.

/s/ Conte, J.

/s/ Reall, J.

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DECISION OF THE APPELLATE DIVISION

OLSSON, J. These two (2) matters were consolidated at trial and remain consolidated for the employee's appeals before the Appellate Division. The employee was represented by counsel throughout the course of the trial of these matters; however, she has represented herself throughout the appellate process. In W.C.C. No. 2015-03774, the trial judge granted the employer's petition to review, finding that the employee's incapacity for work had ended. In W.C.C. No. 2016-07160, the trial judge denied and dismissed the employee's petition to review, finding the employee's request for pain management services at the Pain Management Center of Attleboro to be moot. After a thorough review of the record and consideration of the arguments presented by both parties, we find that the factual determinations of the trial judge were not

clearly erroneous and were amply supported by the evidence in the record. We, therefore, deny the employee's appeals and affirm the decision and decrees of the trial judge.

Vivian Sugalski (the employee) sustained a work-related injury on March 24, 2015 when she slipped and fell onto her left side while working for Heatherwood RI LLC (the employer) as a registered nurse. At the time of the injury, the employee was fifty-nine (59) years old and had been working as a registered nurse for forty (40) years at different facilities. Following her injury, a pretrial order was entered in W.C.C. No. 2015-02140, which found the employee sustained a left hip contusion, left elbow injury, and low back strain, and ordered the payment of weekly benefits for partial incapacity from March 25, 2015 and continuing. A Mutual Agreement dated March 25, 2016 modified benefits from partial to total incapacity as of March 23, 2015, and from total to partial incapacity as of June 28, 2015. A second Mutual Agreement issued on November 23, 2016 corrected the dates such that benefits were modified from partial to total incapacity as of March 25, 2015 and from total to partial incapacity as of June 21, 2015.

On July 7, 2015, the employer filed a petition to review, W.C.C. No. 2015-03774, alleging that the employee's incapacity for work had ended based upon an examination by Dr. A. Louis Mariorenzi on June 22, 2015. At the initial pretrial conference, the trial judge appointed Dr. Peter A. Pizzarello, Jr., to conduct an impartial medical examination (IME), which was performed on December 7, 2015. On January 5, 2016, the trial judge entered a pretrial order denying the employer's petition, finding that the employee remained partially disabled and, per the recommendation of Dr. Pizzarello, ordering that the employee attend a work hardening program at the Chief Judge Robert F. Arrigan Rehabilitation Center (Arrigan Center).<sup>1</sup> From that order, the employer duly claimed a trial.

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<sup>1</sup> In 2017, the name of the Dr. John E. Donley Rehabilitation Center was changed to the Chief Judge Robert F. Arrigan Rehabilitation Center. See P.L. 2017, ch. 106, § 4 and P.L. 2017, ch. 266, § 4.

On December 8, 2016, while the trial was pending on the employer's petition, the employee filed a petition to review, W.C.C. No. 2016-07160, requesting authorization for pain management services at the Pain Management Center of Attleboro. At the initial pretrial conference, the trial judge again appointed Dr. Pizzarello to conduct an IME, which was performed on March 13, 2017. After receipt of Dr. Pizzarello's report, the employer filed a petition to review, W.C.C. No. 2017-01767, alleging that the employee's incapacity for work had ended. On April 10, 2017, the trial judge entered a pretrial order in W.C.C. No. 2016-07160, granting the employee's petition and ordering that the employee obtain treatment within forty-five (45) days of the order. In addition, on the same day, the trial judge entered a pretrial order in W.C.C. No. 2017-01767, finding that the employee's incapacity for work had ended and discontinuing the employee's weekly benefits as of April 10, 2017. The employer filed a timely claim for trial in W.C.C. No. 2016-07160 and the employee filed a claim for trial in W.C.C. No. 2017-01767. The two (2) matters were consolidated with W.C.C. No. 2015-03774 for trial.

The employee testified that on the day of the incident, March 24, 2015, she went to Newport Hospital emergency room for treatment and had a disagreement with the hospital personnel regarding medication and their assessment of her condition. An X-ray of her left hip was normal, and the diagnosis was a left hip contusion. The next day, March 25, 2015, the employee went to see Dr. Susan Green at Occupational Medicine of Newport. Dr. Green's diagnosis was left back contusion, left elbow injury, and left hip contusion. The employee was to stay out of work until her follow-up appointment on March 30, 2015. On March 30, 2015, Dr. Green modified her diagnosis to read left ulnar neuropraxia, left hip contusion, and lumbosacral strain. The employee disagreed with Dr. Green's opinion that the employee could return to modified duty on March 30, 2015.

On April 1, 2015, the employee began treating with Dr. William Brennan, an orthopedic surgeon. After reporting that physical therapy was making her feel worse, Dr. Brennan referred the employee to Warwick Pain Center<sup>2</sup> for epidural steroid injections in her low back. At the time of her initial testimony on June 20, 2016, the employee had undergone three (3) injections and was awaiting a fourth. When she returned to continue her testimony on July 21, 2016, the employee stated that she would like to go to a new pain clinic because she believed that a disagreement regarding the medications Warwick Pain Center had prescribed had damaged her relationship with that facility.

The employee denied that she had suffered any falls or sustained any other type of trauma since the date of the work-related injury. However, she did assert that during her participation in the work hardening evaluation at the Arrigan Center, the therapist pushed her beyond the physical limitations imposed by Dr. Brennan. The employee stated that as a result, she sought treatment at the South County Hospital emergency room the next day for complaints of shooting pain from her neck into her head.

At the time of her court testimony, the employee asserted that she continued to experience pain in her lower back, middle lower back, left hip, and under her ribs on the left side. She stated that she also experiences shooting pain down her buttocks from her back on the left side, a tingling sensation in three (3) fingers on her left hand, and pain and tightness in the upper left side of her neck. She attributes all of these complaints to the work-related injury on March 24, 2015. The employee testified that she believes she will never return to work as a nurse because she is in constant pain which severely limits her activities. She also related that she was

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<sup>2</sup> In the records from this facility attached to the first deposition of Dr. Pizzarello dated 5/16/2016 (Er's Ex. 6), one (1) document refers to the facility name as Warwick Pain Center and another refers to it as Warwick Pain Associates, LLC. We have opted to refer to the facility as Warwick Pain Center in our decision.



approved for Social Security Disability Insurance benefits, apparently sometime in late 2015 or early 2016.

The medical evidence in the record is voluminous. We will devote most our attention to the deposition, affidavit, and records of Dr. William Brennan, the deposition and records of Dr. A. Louis Mariorenzi, and the two (2) depositions with attached records of Dr. Peter A. Pizzarello, Jr.

Dr. Brennan, an orthopedic surgeon, commenced treatment of the employee on April 1, 2015. The employee informed the doctor that she fell at work on March 24, 2015, landing on her left arm, left lower back, and left leg area. The employee complained of tingling in her left arm from her elbow into the fourth and fifth fingers but related that most of her pain was in the left lower lumbar area, left buttock, left posterior lateral thigh, and left upper calf. The employee informed Dr. Brennan that she had been injured in a motor vehicle accident in 2009 and had an MRI in July of 2010 for low back complaints; however, she asserted that she had never experienced anything like her current symptoms in the past. Dr. Brennan noted that X-rays of the left hip were unremarkable, and X-rays of the lumbar spine revealed some spondylosis, degenerative changes, and no acute abnormalities.

After conducting his initial physical examination, Dr. Brennan diagnosed the employee with lumbar pain with radicular features and left upper ulnar neuropathy. He causally related both conditions to her work injury. Dr. Brennan recommended physical therapy, an exercise program, and anti-inflammatory medication. He testified that, due to these injuries, the employee was not able to work.

Dr. Brennan continued to treat the employee on a regular basis. After an office visit on May 28, 2015, Dr. Brennan referred the employee for an MRI of the lumbar spine which was

done on June 16, 2015. The radiologist's report of the MRI, dated June 16, 2015, states the employee is osteopenic and the test revealed "partial sacralization of L5 on the left with a moderate degenerative pseudarthrosis with the native sacrum," "congenital shortening of the pedicles," mild facet arthritis at L4-L5 bilaterally, a mild disc bulge at L3-L4, a moderate disc bulge at L4-L5, and very mild L2-L3 and mild L3-L4 degenerative spinal stenosis. Ee's Ex. 1, Dr. William Brennan Dep., Toll Gate Radiology report dated June 16, 2015 (attached).

On June 17, 2015, the employee complained of bilateral hip pain, worse on the left, left lower lumbar pain, and pain in the neck extending down the left arm. The physical examination on June 17, 2015 revealed lumbar tenderness, mild spasm, pain through the range of motion, and tenderness in the hip area bilaterally with full range of motion. Dr. Brennan kept the employee out of work and discussed the option of an epidural steroid injection. He agreed to hold off on therapy as the employee stated it was aggravating her condition. Dr. Brennan also referred the employee to Dr. Maria Guglielmo, a neurosurgeon, for evaluation of her left arm complaints.

On August 19, 2015, the employee reported some relief after undergoing the first epidural steroid injection and stopping physical therapy. She still complained of pain in the lower lumbar area, with some extension into the thigh. Dr. Brennan's physical examination revealed tenderness in the lumbar region, mild spasm, some pain with forward flexion, hyperextension, and rotation, but no pain with hip, knee, or ankle motion. The evaluation with Dr. Guglielmo took place on August 28, 2015. Dr. Guglielmo's impression was that the employee suffered from "mild cervical radiculopathy or a mild brachial plexus injury." Er's Ex. 6, Dr. Peter A. Pizzarello, Jr. Dep. dated 5/16/2016, Dr. Maria Guglielmo Neurosurgical Consultation report dated August 28, 2015, page 2 (attached). She recommended a cervical MRI and suggested a possible EMG.

As of October 28, 2015, Dr. Brennan believed that the employee's condition remained unchanged, despite having had two (2) injections. His assessment was that the employee had some mild stenosis. Dr. Brennan opined that the employee was capable of a light duty position, with no lifting over ten (10) pounds, and no repetitive bending or twisting.

The employee's complaints and physical examinations on December 10, 2015 and January 21, 2016 remained the same and Dr. Brennan's diagnoses were lower back pain, lumbago, and lumbar spondylosis without radicular features. Ee's Ex. 1, Dr. Brennan Dep., report dated January 21, 2016 (attached). On February 26, 2016, following the alleged incident that occurred at the Arrigan Center, the employee had new cervical complaints in addition to an increase in her low back pain. Dr. Brennan continued her previous light duty work restrictions.

Dr. Brennan testified that on June 8, 2016, the employee reported feeling a little better after another injection, but that she did some walking and aggravated her back pain. Dr. Brennan stated that, as of August 4, 2016, there were no changes in the employee's physical examination, but that she complained of worsening lower back pain and worsening radicular pain on the right side. At this office visit, the employee was using a cane to ambulate. Dr. Brennan requested another MRI of the lumbar spine.

In his report of December 21, 2016, Dr. Brennan indicated that the employee told him that in addition to her back pain, she had increased symptoms in the leg, mainly buttock and upper thigh, and that she had numbness in her toes. Ee's Ex. 5, Affidavit of Dr. William Brennan, report dated December 21, 2016 (attached). She complained that her pain level was an eight (8) out of ten (10) in intensity, was worse with walking or increased activity, and she had some pain at rest. *Id.* After reviewing the employee's second MRI performed on December 15, 2016, Dr. Brennan stated that the MRI "shows very significant stenosis at the 4-5, 5-1, and 3-4

levels with facet joint arthritis and fluid in the facet joints at 5-1.” *Id.* However, the radiologist’s impression was that the December 15, 2016 MRI revealed facet arthrosis and ligamentum flavum hypertrophy from L2-3 through L4-5 causing mild canal stenosis at L3-4 and L4-5 and mild left neural foraminal stenosis at L4-5. Er’s Ex. 10, Dr. Peter A. Pizzarello, Jr. Dep. dated 10/23/2017, Dr. Pizzarello IME dated March 13, 2017, page 6 (attached).

On February 1, 2017, Dr. Brennan reported that the employee had continuing lower back pain, and aching and numbness in her right leg, which was worse with walking or increased activity. Ee’s Ex. 5, Affidavit of Dr. Brennan, report dated February 1, 2017 (attached). She was walking with an antalgic gait and using a cane for ambulation. *Id.* He referred her for additional pain management. On June 1, 2017, Dr. Brennan found that the employee was “very minimally changed” overall. Ee’s Ex. 5, Affidavit of Dr. Brennan, report dated June 1, 2017 (attached). His diagnosis was lumbar spinal stenosis and occasional neurogenic claudication. *Id.* Dr. Brennan stated that the employee was limited due to her pain and not capable of returning to her former occupation. *Id.* On August 31, 2017, Dr. Brennan recommended that the employee continue with pain management.

On cross-examination, Dr. Brennan agreed that, while he had been told of the employee’s back pain and prior MRI following an earlier motor vehicle accident, he was not informed of an incident on March 3, 2015 or a fall at home when the employee had reportedly sustained additional prior back injuries. He admitted that the opinions he expressed could be affected if these reports were accurate. He also conceded that these prior injuries were a possible explanation for the employee’s back complaints.

Dr. Brennan acknowledged that the employee’s initial examination on April 1, 2015 was completely normal from an objective standpoint and that the findings of the MRI of June 16,

2015 did not reveal any acute pathology or injury. He acknowledged that the mild stenosis and disc bulging shown on the test were normal and common observations for a person of the employee's age. After he reviewed an MRI from July 7, 2010, Dr. Brennan noted that the disc bulge at L4-5 was mild on that test but moderate on the 2015 MRI; however, the degree of stenosis was about the same.

Dr. Brennan was also questioned regarding the employee's complaints at the office visit on August 4, 2016, when the employee complained that her back was worse and that she had symptoms of radicular pain into her *right* leg. Previously, the employee had only reported pain in the *left* side of her back radiating into her *left* leg. In his report of that office visit on August 4, 2016, Dr. Brennan stated that he did not have any explanation for that symptom. During cross-examination, he conceded that the shift in the radicular complaints was possibly due to preexisting arthritic changes in the lumbar spine.

Dr. A. Louis Mariorenzi, an orthopedic surgeon, examined the employee on June 22, 2015 at the request of the employer. The employee related that she injured her left hip, back, and elbow when she fell at work on March 24, 2015. At the examination, she complained of pain in the lower back, buttocks, and trochanteric area on the left side. She also stated she had a constant throbbing sensation in her left hip. The employee had no complaints regarding her left elbow.

Dr. Mariorenzi's physical examination revealed no objective findings to support the employee's claim of incapacity. Instead, Dr. Mariorenzi noted that the employee had "subjective complaints involving every part of her body with any kind of motion." Er's Ex. 5, Dr. A. Louis Mariorenzi Dep. 8:12-13. Dr. Mariorenzi explained that the lack of objective physical findings was inconsistent with the employee's complaints of pain during almost every aspect of the

physical examination and led him to conclude that the employee displayed significant symptom magnification. Dr. Mariorenzi reviewed the report of the lumbar MRI performed on August 15, 2015. He testified that the MRI revealed some degenerative arthritis changes in the low back but did not show evidence of any acute trauma, acute pathology, or any other finding that might correlate with the employee's pain complaints.

Dr. Mariorenzi further testified that, considering the condition of the employee's low back, left hip, and left elbow, which he found to be normal, the employee was capable of returning to her regular job as a registered nurse and it would not be injurious to her health to return to that employment.

Dr. Peter A. Pizzarello, Jr., an orthopedic surgeon, conducted IMEs of the employee on both December 7, 2015 and March 13, 2017 at the request of the trial judge. Dr. Pizzarello was also deposed on two (2) occasions, May 16, 2016 and again on October 23, 2017. In preparation for his initial examination of the employee on December 7, 2015, Dr. Pizzarello reviewed the extensive medical records forwarded to him by the trial court and on the day of the examination, he obtained a history from the employee. On December 7, 2015, the employee complained of persistent bilateral hip pain and stated that although she had previously experienced right hip pain, she never had left hip pain before the fall at work. In addition, the employee complained of moderate to severe low back pain radiating down both thighs to her knees and left-sided rib pain.

Dr. Pizzarello's examination of the cervical spine on December 7, 2015 revealed only some tenderness over the trapezius musculature, worse on the left side. Er's Ex. 6, Dr. Pizzarello Dep. dated 5/16/2016, Dr. Pizzarello IME dated December 7, 2015, page 3 (attached). He stated that his examination of the left elbow was subjectively and objectively normal. With regard to the employee's hips, the only finding was tenderness over the greater trochanters bilaterally.

Er's Ex. 6, Dr. Pizzarello Dep. dated 5/16/2016, Dr. Pizzarello IME dated December 7, 2015, page 4 (attached). Examination of the lumbar spine revealed no spasm, limited range of motion due to pain, and negative straight leg raising bilaterally with no radicular pain. Dr. Pizzarello testified that the employee demonstrated several nonanatomic and inconsistent findings on examination, including hypersensitivity to light touch over her low back, complaints of low back pain when force was applied to her shoulders, and complaints of low back pain with gentle trunk rotation. He explained that these findings indicate an exaggeration of symptoms and complaints. Dr. Pizzarello also noted that despite the employee's complaints that she was experiencing severe low back pain radiating down her legs, the physical examination did not confirm the presence of any radicular pain. In addition, the MRI on June 15, 2015 revealed only degenerative changes and nothing to support the employee's complaints of radicular pain.

Dr. Pizzarello concluded that the employee was not disabled with regard to her left elbow and left hip. He found that, although the physical findings regarding the employee's low back were completely subjective and somewhat inconsistent, the employee was partially disabled with restrictions of no lifting more than twenty (20) pounds, and no repetitive bending, lifting, and stooping. Dr. Pizzarello stated that, as the employee's first epidural steroid injection was somewhat effective, and even though the second epidural steroid injection was less successful, he thought a third and final epidural steroid injection would be reasonable, though he was not optimistic that it would be helpful. He also recommended that the employee attend the Arrigan Center for work hardening and anticipated she would be able to return to her regular job upon completion of the program.

At the appointment on March 13, 2017, the employee told Dr. Pizzarello that she continued to have moderate to severe pain across her low back and lumbar spine which was

slightly worse on the right side. She also complained of numbness and tingling in four (4) toes of her right foot, and she was walking with a cane. The employee reported that she no longer suffered from pain in her left upper extremity and neck.

The physical examination on March 13, 2017 revealed no evidence of ongoing muscle spasm or lumbar strain. The employee continued to demonstrate the nonanatomic findings noted in Dr. Pizzarello's first examination. Dr. Pizzarello reviewed the interim medical records that had been forwarded to him by the trial court, including a December 15, 2016 MRI of the employee's lumbar spine, which he stated revealed only mild age-related degenerative changes. The radiologist's report of the December 15, 2016 MRI states that it revealed "mild central stenosis at L3-L4 and L4-L5 and mild LEFT neural foraminal stenosis at L4-L5." Er's Ex. 10, Dr. Pizzarello Dep. dated 10/23/2017, Dr. Pizzarello IME dated March 13, 2017, page 6 (attached). Dr. Pizzarello noted that he saw no reason for the employee's use of a cane as her gait appeared normal. Dr. Pizzarello concluded that the employee was not disabled, that she could return to her previous employment as a nurse, and that she did not require any further injections, medications, or other treatment. Dr. Pizzarello testified that, regardless of the precise demands of her nursing job, there was no objective proof upon which to base an opinion that there was any incapacity from the work injury. He did comment that, due to the employee's subjective complaints of severe pain, a referral to the Arrigan Center Comprehensive Pain Management Program, particularly the psychiatric component, may be beneficial.

Additional medical records were marked as exhibits in the depositions of the various doctors or introduced into evidence as full exhibits during the trial. We will briefly summarize the relevant information gleaned from these records.



The report of the Newport Fire Department rescue on March 24, 2015 states that the employee complained of left hip and left elbow pain after falling at work. At the Newport Hospital Emergency Department (Newport Hospital), the employee's chief complaint was left hip pain. The Newport Hospital records reflect that there were no outward signs of trauma, the left hip range of motion was normal with some soreness, and an X-ray of the left hip was unremarkable. The diagnosis was a left hip contusion. The employee was given a prescription for Naprosyn and provided a work release form. The Newport Hospital report indicates that she began to yell at the hospital staff when not given narcotic medication.

The following day, the employee was seen by Dr. Susan Green at Occupational Medicine of Newport, Inc. The diagnosis was a left back contusion, left elbow, and left hip contusion. The employee was given a note to stay out of work until March 30, 2015, when she was to return for a follow-up appointment. On March 26, 2015, she presented to South County Hospital Medical and Wellness Center with a primary complaint of pain in her left arm and hand with numbness in several fingers. The employee insisted on obtaining an X-ray of her left arm which revealed no acute bony abnormality. The employee was instructed to follow-up with Dr. Green on her previously scheduled appointment. When she followed up with Dr. Green on March 30, 2015, the employee was reexamined, and she became upset when Dr. Green released her to modified work duties.

Extensive records documenting the employee's treatment at the South County Hospital both before and after the work injury were admitted as an exhibit. Of note, the employee was seen on March 28, 2008, following a motor vehicle accident in which the airbag deployed, complaining of an abrasion to her left cheek and redness to her chin, neck, and chest. She was seen again on May 2, 2010, following a motor vehicle accident on April 21, 2010, for complaints

of a headache and ringing in her ear. She was examined on July 10, 2008, October 10, 2010, and again on October 17, 2013, for various falls where she sustained injuries, but not to her low back. The employee presented to the emergency room at South County Hospital on March 3, 2015, after she fell a week and a half ago and then was lifting and moving furniture the day before. She complained of right rib pain and was diagnosed with a rib contusion and a thoracic strain.

The employee went to South County Hospital again on April 6, 2015, stating that she experienced tingling in her left arm while blow drying her hair which then resolved. On February 5, 2016, the employee was seen at South County Hospital emergency room for complaints of severe neck pain which she attributed to her participation in a work hardening evaluation performed by the Arrigan Center. The trial judge had ordered the employee to attend a work hardening program at the Arrigan Center based upon the recommendation of Dr. Pizzarello in his December 7, 2015 IME. She was diagnosed with a neck strain and administered intravenous Toradol and Robaxin.

The records from Warwick Pain Center reveal that on August 10, 2015, at the initial consultation, the employee complained of low back pain radiating to both hips and down her left leg. Of note, the physician performing the physician examination wrote that he was unable to test the employee's right Achilles reflex because she was wearing a soft walking boot. The employee's first lumbar epidural steroid injection was administered on that date, August 10, 2015.

Records from the Pain Management Center of Attleboro include two (2) letters from Dr. Susan Pollan to Dr. Brennan regarding her interactions with the employee who was seeking additional epidural steroid injections in her back. In the letter dated August 18, 2017, Dr. Pollan stated that she noted pain behaviors during the employee's physical examination, and she

requested the employee's medical records before developing a treatment plan. After reviewing the employee's medical records, the facility offered the employee a series of sacroiliac joint injections; however, the employee insisted that they be done with anesthesia, which the facility refused. In the second letter to Dr. Brennan dated September 21, 2017, Dr. Pollan described her in-person discussion with the employee on this subject and indicated that the employee had told her that the records from the Warwick Pain Center were full of lies and that she had reported that facility to the Rhode Island Department of Health. When Dr. Pollan informed the employee that she had only mild spinal stenosis, the employee insisted that Dr. Brennan told her it was severe. Dr. Pollan commented that she did not believe she had the employee's trust and advised her to treat with a different doctor with whom she might have a more beneficial therapeutic relationship.

The records of Dr. Anne Cushing Brescia, the employee's primary care physician, were introduced into evidence; however, Dr. Cushing Brescia did not specifically treat the employee for the work-related injury. These reports document treatment provided from 2003 until shortly after the employee's work injury. In late 2009 and through the fall of 2010, the employee was treated for complaints of back and neck pain, including physical therapy. On January 7, 2011, the employee complaints of right hip pain. On January 11, 2012, she reported back and shoulder pain after falling at home. Dr. Cushing Brescia indicated that the employee became incapacitated in December of 2014 and was referred to a psychotherapist for depression. A record from February 12, 2015 states that the employee fell while climbing onto a counter and hit her right buttock. A record of a telephone message on March 5, 2015 states that the employee called to report that she was seen at South County Hospital emergency department on March 4, 2015 because she thought she hurt her back helping to move a mattress.

The affidavit and records of Danielle DeSantis, LMFT, PsyD., show that she began to treat the employee on January 2, 2015 for increased anxiety and depression due to stress at her place of employment. The employee attended therapy sessions with Dr. DeSantis about every ten (10) to fourteen (14) days through January, February, and March of 2015, to address stress due to personal issues and her work environment. The employee was out of work due to anxiety and stress and collected Temporary Disability Insurance (TDI) benefits for a period from early January to mid-February of 2015. On April 3, 2015, and for many visits thereafter, the employee advised Dr. DeSantis that the work injury, together with her personal issues, contributed to her anxiety and depression.

Records subpoenaed from the Rhode Island Temporary Disability Insurance Division of the Department of Labor and Training were admitted as an exhibit. The employee was out of work for several periods in 2010 and earlier. Records from January of 2010 indicate the employee suffered from a back strain and severe muscle aches in her lower back related to a motor vehicle accident in July of 2009. The records also demonstrate that she received benefits in early 2015 due to anxiety and stress.

The parties rested in all three (3) matters on December 8, 2017. On January 18, 2018, the trial judge went on the record and *sua sponte* re-opened the matters. The trial judge then vacated the pretrial order entered on April 10, 2017 in W.C.C. No. 2017-01767 and instructed the parties to submit a stipulation withdrawing that petition. The trial judge then entered an interlocutory order in W.C.C. No. 2015-03774 *nunc pro tunc* to April 10, 2017, finding that based upon the March 13, 2017 IME of Dr. Pizzarello, the employee's incapacity had ended, and the employee's weekly benefits were discontinued as of April 10, 2017. The trial judge then deemed the remaining two (2) matters closed and ready for decision.

Two (2) weeks later, on February 1, 2018, the trial judge issued a lengthy written decision in which she reviewed all of the evidence in the record, both testimonial and documentary, in great detail. Regarding the employee's petition requesting approval for treatment at the Pain Management Center of Attleboro, W.C.C. No. 2016-07160, the trial judge found that the petition was moot. The trial judge based this on the fact that the petition was granted at the pretrial conference and the employee attended the Pain Management Center of Attleboro and was offered treatment; however, after her meeting with Dr. Pollan, the employee chose not to pursue further treatment at the Pain Management Center of Attleboro.

Regarding the employer's petition to review, W.C.C. No. 2015-03774, the trial judge concluded that the employee was capable of performing her regular job as a registered nurse without restriction. In support of this conclusion, the trial judge cited her prerogative under *Parenteau v. Zimmerman Engineering, Inc.*, 111 R.I. 68, 299 A.2d 168 (1973), to accept the medical opinion of one (1) expert over the opinion of a different physician when presented with conflicting opinions. The trial judge explained that she found the testimony and opinions of Drs. Pizzarello and Mariorenzi to be more persuasive than the opinions expressed by Dr. Brennan. She pointed out that neither Dr. Pizzarello nor Dr. Mariorenzi found anything objective during their physical examinations to substantiate the employee's complaints, and in fact, the examinations revealed several inconsistent findings which were indicative of symptom magnification and exaggeration. In addition, none of the diagnostic studies demonstrated any acute trauma or pathology or revealed any findings that would substantiate the employee's complaints. The trial judge discounted the opinions of Dr. Brennan because they were based solely upon the employee's subjective complaints. Consequently, based upon the opinions of Drs. Pizzarello and Mariorenzi, the trial judge granted the employer's petition and affirmed the

findings of the interlocutory order entered on January 18, 2018, which discontinued the employee's weekly benefits as of April 10, 2017. The employee filed claims of appeal in both matters.

Rhode Island General Laws § 28-35-38(b) sets forth the deferential standard to be applied by the Appellate Division in reviewing a trial judge's decision: "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." R.I. Gen. Laws § 28-35-28(b). Thus, the Appellate Division "exceeds its scope of review when it undertakes a *de novo* review of conflicting medical testimony without first finding that the trial commissioner was clearly wrong." *Diocese of Providence v. Vaz*, 679 A.2d 879, 881 (R.I. 1996) (quoting *Grimes Box Co. v. Miguel*, 509 A.2d 1002, 1004 (R.I. 1986)). Before undertaking a *de novo* review of the record, the appellate panel must reach the conclusion that the trial judge "misconceived or overlooked material evidence." *Id.* (quoting *Grimes Box Co. v. Miguel*, 509 A.2d 1002, 1004 (R.I. 1986)). After thoroughly reviewing the record with this standard as our guide, we find that the employee's appeals are without merit and we, therefore, affirm the trial judge's decision and decrees.

In support of her appeal the employee, who was self-represented at the appellate level, has submitted an eleven (11) page document with about eighty (80) additional pages of various documents attached, commencing with a multi-page introductory statement expressing her dissatisfaction with her attorney, her medical providers, the workers' compensation system, and the trial judge. She then listed twenty (20) numbered paragraphs explaining why she believes she was not treated fairly. We will consider these numbered paragraphs to be her Reasons of Appeal.

Paragraphs two (2), three (3) and eleven (11) describe her complaints about the conduct of her attorney during various stages of his engagement in this matter. Likewise, paragraphs six (6) and seven (7) address problems that the employee faced when receiving treatment at certain medical facilities. Paragraph sixteen (16) is a summary of the difficulties that the employee claims to have experienced while working for the employer. We are not in a position to address these allegations, as they have no bearing upon whether the trial judge committed reversible error. If the employee believes that there was misconduct by her counsel or by these providers, there are other forums available to investigate those allegations.

In paragraph one (1) of the document, the employee alleges that a statement by the trial judge that the employee did not want a spinal injection at the Pain Management Center of Attleboro was “untrue.” Ee’s Reasons of Appeal at 4. At no point in her written decision did the trial judge state that the employee did not desire an additional spinal injection. Also, the employee has inserted new facts and statements that are not in evidence in this paragraph and her other reasons of appeal. The Appellate Division is bound to consider only the evidence presented at trial and that record cannot be expanded or amended. *See Perfetto v. Fanning & Doorley Constr. Co.*, 114 R.I. 624, 629, 337 A.2d 791, 794 (1975) (citing *Larose v. Warwick Brass Foundry, Inc.*, 97 R.I. 459, 198 A.2d 668 (1964); *United States Rubber Co. v. Dymek*, 87 R.I. 310, 140 A.2d 507 (1958)); *Guiliana Perez v. UTGR, Inc.*, W.C.C. No. 2014-02425 (App. Div. December 18, 2019). Additional information presented by the employee in her writings and oral argument to the appellate panel cannot be factored into our decision. *See Perfetto*, 114 R.I. at 629, 337 A.2d at 794 (citing *Larose v. Warwick Brass Foundry, Inc.*, 97 R.I. 459, 198 A.2d 668 (1964); *United States Rubber Co. v. Dymek*, 87 R.I. 310, 140 A.2d 507 (1958)); *Guiliana Perez*, W.C.C. No. 2014-02425 at 17.

Paragraphs four (4) and sixteen (16) contain complaints about the actions of the employee's attorney and the opinions expressed by Dr. Pizzarello following his appointment as the court's examiner on two (2) occasions. As stated previously, the employee's dissatisfaction with her attorney is not a valid basis for an appeal in this tribunal. Concerns regarding the examinations and opinions of Dr. Pizzarello were the proper subject matter for cross-examination of Dr. Pizzarello during his two (2) depositions. There was no error by the trial judge in electing to accept Dr. Pizzarello's opinions, which were competent and probative.

Paragraph five (5) expresses offense at a passing comment made by the trial judge regarding the employee's use of a cane, which was documented in the medical records. In this paragraph, the employee has again presented information that is not in evidence. As stated earlier, we are bound by the record below. Furthermore, the comment regarding the use of the cane was clearly not a deciding factor in the trial judge's decision.

In paragraph eight (8), the employee alleges that the trial judge "tries to attempt to go around the truth" by mentioning a medical condition suffered by the employee in 2008. Ee's Reasons of Appeal at 8. This condition was merely referenced by the trial judge when reviewing the evidence contained in the records received in response to a subpoena issued to obtain TDI records. Likewise, in paragraphs nine (9), ten (10), and seventeen (17), the employee again provided new information, not in the record below, to explain medical information which is in evidence and was referenced in the trial judge's decision. In paragraphs twelve (12) and fourteen (14), the employee expressed that she was upset that the trial judge included certain other personal information in her attempt to give a complete description of the evidence under review. The trial judge did not commit error by incorporating any of these facts in her summary of the evidence presented.



In paragraphs thirteen (13) and fifteen (15), the employee again presented facts not in evidence regarding other alleged work injuries as well as certain treatment by a podiatrist. As stated earlier, we are unable to consider information that has not been presented to the trial court. This information has no bearing upon whether the decision of the trial judge should be reversed.

In her final numbered paragraphs, paragraphs eighteen (18), nineteen (19), and twenty (20), the employee argued that the trial judge attempted to make the employee “look bad” when recounting the employee’s testimony and that the trial judge was not impartial when reviewing the evidence as the judge elected to find in favor of the employer based upon “a 30 minute evaluation.” Ee’s Reasons of Appeal at 11. The employee apparently contends that the opinions of her treating physician, Dr. Brennan, should be afforded greater weight than the opinions of Dr. Pizzarello. This argument has been rejected by the Rhode Island Supreme Court as contrary to the rationale behind Rhode Island General Laws § 28-35-24, which allows the trial judge to appoint an impartial medical examiner when the court is presented with conflicting medical opinions. *See Grimes Box Co. v. Miguel*, 509 A.2d 1002, 1004 (R.I. 1986).

The trial judge has the obligation and authority to weigh the expert medical testimony and determine which opinion is more persuasive. *See Parenteau*, 111 R.I. at 78, 299 A.2d at 174. Here, she performed that function and adequately expressed the reasons for her decision. It is abundantly clear that the employee is not happy that the trial judge did not make findings in her favor. That is not a valid basis for a reversal of the prior decision and decree. Nothing presented by the employee demonstrates that the trial judge overlooked or misconceived any material evidence or that she committed any clear error. For these reasons, the appeals of the employee must be denied and dismissed.

After reviewing the record in these matters, we feel compelled to address two (2) issues. First, with regard to the employee's petition requesting approval for treatment at the Pain Management Center of Attleboro, W.C.C. No. 2016-07160, we agree with the trial judge's conclusion that the petition is moot. This petition was granted at the pretrial conference and the employee attended the facility. Unfortunately, a disagreement arose over the treatment and the employee elected not to pursue further treatment at the Pain Management Center of Attleboro. At the time of trial, there was no longer any justiciable controversy for the trial judge to decide. Based upon the specific allegation of the petition, there was no further relief to be granted. Therefore, we affirm the trial judge's decision and decree regarding this petition.

Second, we do not condone the trial judge's actions on January 18, 2018 in *sua sponte* re-opening these matters, summarily vacating the pretrial order entered in the companion case (W.C.C. No. 2017-01767), instructing the attorneys to withdraw the petition in that matter, and executing an interlocutory order identical to the vacated pretrial order, to be entered *nunc pro tunc* to April 10, 2017 in the companion case, W.C.C. No. 2015-03774. Although not reviewable by this panel, we find this process to be highly irregular.

Although not prohibited by the Workers' Compensation Act, the entry of an interlocutory order should be reserved for those "rare instances" in which a trial judge finds that such an order is "necessary and justified" by the particular circumstances of the case. *Zecchino v. State*, 520 A.2d 139, 140 (R.I. 1987). In the case before this appellate panel, the trial judge characterized these actions as "housekeeping," which is certainly not sufficient justification for taking this unusual action. Trial Tr. 103:8. The pretrial order entered in W.C.C. No. 2017-01767 discontinued the employee's weekly benefits as of April 10, 2017 and that matter was consolidated with the two (2) petitions currently before the panel. The trial on all of these

matters had been concluded. The trial judge simply needed to issue a decision addressing all three (3) petitions. We find nothing in the record that would justify the trial judge's actions on January 18, 2018.

We address this issue only to reinforce to the trial judges that the use of an interlocutory order should be a rare occurrence, and certainly the actions of the trial judge on January 18, 2018, in vacating the pretrial order and ordering the withdrawal of the underlying petition after the conclusion of the trial, should never occur. We would note that our concern is with the process and procedure employed in this situation and does not affect the validity of the actual trial decision and decrees which we have 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 **March 21, 2022.**

Conte, J., and Reall, J., concur.

ENTER:

/s/ Olsson, J.

/s/ Conte, J.

/s/ Reall, J.