

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

FRANCELIA TURCIOS)

)

VS.)

W.C.C. 2009-05190

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MEMORIAL HOSPITAL)

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's appeal from the decision and decree of the trial judge denying the employee's original petition for workers' compensation benefits. The trial judge found that the employee failed to prove by a preponderance of the credible evidence that she sustained a work-related injury on or about August 5, 2009, arising out of and in the course of her employment. After conducting a careful review of the record in this matter and considering the arguments of both parties, we deny the employee's appeal.

The employee alleged in her original petition that she developed back spasms at L2-3 and sustained blunt trauma to the left trochanteric area on August 5, 2009 when she hit her back on a microscope at work. She requested total or partial incapacity benefits beginning August 5, 2009 and continuing. The trial judge denied the petition at the pretrial conference, and the employee filed a timely claim for trial.

Ms. Turcios testified that she was employed by Memorial Hospital as a surgical technician for approximately a year and a half before she sustained the alleged injury on August

5, 2009. She was responsible for preparing operating rooms for surgical procedures, which involved assembling the proper instruments and equipment needed for the particular surgery, as well as stocking the operating rooms with supplies for the next day. She would also assist in transferring patients onto the operating table. Her normal work hours were 7:00 a.m. to 3:30 p.m.

On August 5, 2009 at approximately 8:05 a.m., the employee went into a back room to retrieve a wheeled table which held the sterile instruments needed for an upcoming surgery. As she backed through the door of the back room pulling the table and entered the outside room, she tripped on the base of a large standing microscope, twisted, and struck her right mid-back on the arm of the microscope. The microscope was a large apparatus on wheels with locking handles and brakes, and the arm was spring-loaded, making it very easy to move with the touch of a finger. A co-worker, Lucille Healy, witnessed the incident. The employee asserted that she did not see the microscope when she walked through the room to the back room. Ms. Turcios indicated that she felt a sharp pain the minute she struck the microscope, but that she continued working until her shift was over. At some point during the work day, she reported the incident to Diane Bannister, the operating room assistant, and completed an incident report. Later in the day, she also reported the incident to her supervisor, William Dias.

After her shift ended, the employee went to the employee health clinic at the hospital complaining of mid-back pain. Later that evening, she went to Urgent Medical Care in Cumberland because she was still having a lot of pain in her mid-back and was very uncomfortable. She has not returned to work since the incident. Within a few days of the incident, she consulted an attorney who referred her to Dr. David J. DiSanto, a neurosurgeon, for evaluation and treatment. Dr. DiSanto referred Ms. Turcios to the Donley Center for physical

therapy treatment. She testified that she felt she could not return to work because she continues to have pain and does not think she can lift more than fifteen (15) pounds.

On cross-examination, the employee acknowledged that she was given a verbal warning from Memorial Hospital in January 2009, and received a written warning in July 2009, approximately one (1) week before the alleged injury. The written warning stated that she would be supervised for the next two (2) weeks, and if her performance did not improve, she may be terminated. *See* Er's Ex. C.

The employer presented the testimony of William Dias, the employee's supervisor, and Lucille Healy, the surgical technician who was present at the time of the incident. Mr. Dias is the assistant clinical manager and educator for the operating room department. He testified that he learned of the incident at about 2:00 or 3:00 in the afternoon. He identified a form entitled "Report of Counseling" dated July 29, 2009 directed to Ms. Turcios. Mr. Dias explained that the employee's work performance was inconsistent; she would have days and weeks without incident, but then there would be periods with issues on a daily basis. He noted that physicians were requesting that she not be put in their operating room, which made scheduling nearly impossible. As a result, the written warning was issued to the employee, which she signed on July 29, 2009. On the bottom of the form, the employee wrote that she disagreed with the warning, and felt she did the best she could do on a daily basis. The warning stated that her performance would be monitored over the next two weeks and any further reports of inadequate job performance may result in termination.

Lucille Healy, a surgical technician who had come to relieve the employee so that she could take her morning break, was present as Ms. Turcios was pulling the table of instruments through the doorway from the back room. She indicated that the microscope is quite large and

hard to miss and was positioned right outside the door to the back room. Ms. Healy stated that she offered to move the microscope, but Ms. Turcios indicated it was not necessary. Ms. Turcios then backed straight out the door, rather than at an angle, and hit the arm of the microscope, which moved away as she hit it because it was not in a locked position. Ms. Healy asked her if she was okay and the employee responded that she was fine. The employee did not fall to the ground and did not make any noise to indicate that she was hurt. Ms. Healy testified that about three (3) or four (4) hours later, the employee asked her to look at her back because it was hurting. Ms. Healy testified that she did not observe any mark, redness or bruising on the employee's back.

On the day of the incident, Ms. Turcios completed an Employee Incident Report which was introduced into evidence. In that document, she described the incident as follows:

As I was coming backwards from the room in the back of Room 6, there was the old microscope behind the door. I didn't see it, and I hurt my middle ~~left~~ right back.

Ee's Ex. 1.

Records of Urgent Medical Care were introduced in the deposition of Dr. DiSanto. The history recorded in the records indicate that the employee struck her right mid-back on a microscope and was experiencing sharp, shooting pain in the right posterior mid-back. The employee requested that x-rays be taken. The only positive findings on examination were paravertebral tenderness at the T11-T12 level, as well as some moderate spasm in that area. An x-ray of the thoracic spine was read as normal. The diagnosis was "muscle strain/spasm." The employee was advised to return to the Memorial Hospital employee health clinic for further treatment and work restrictions.

The employee presented the deposition and records of Dr. DiSanto, who evaluated the employee for the first time on August 11, 2009. The history recorded in his initial report states that Ms. Turcios sustained an injury “moving surgical instruments sterilized where she was lifting and twisting and hit her back against a microscope on 8/5/09 . . . She states that she has increased pain, especially worse in the morning, increased on activity in the upper lumbar region and involving the left hip which she struck against the microscope.” Ee’s Ex. 5, 8/11/09 report at 1. His examination revealed tenderness and swelling in the right L2-3 region of her back and tenderness at the left greater trochanteric area of the left hip. The doctor’s diagnosis was “back spasms at L2-3 and also blunt trauma to the left trochanteric area of her hip.” Id. at 7. Dr. DiSanto concluded that this condition was caused by the incident at work when the employee twisted and hit the microscope. He referred the employee to the Donley Center for physical therapy.

The employee returned to Dr. DiSanto for follow-up evaluation on September 8, 2009 complaining of left hip, groin and back pain. The physical examination was similar to the initial evaluation, although the doctor modified his diagnosis to back spasms with sacroiliitis. Ms. Turcios was not seen again by Dr. DiSanto until December 3, 2009. In the interim, she was evaluated at the Donley Center and participated in a physical therapy and work hardening program. On November 10, 2009, on recommendation of the Donley Center, Dr. DiSanto signed a form agreeing to release the employee to return to full duty work as a surgical technician.

When the doctor re-examined Ms. Turcios on December 3, 2009, she complained of continued pain in her left hip, thigh and back and he noted spasm at the L4-5 region. He concluded that she was disabled for work and referred her for an MRI of the lumbar spine. The

MRI study revealed “[a]ctive bilateral facet arthropathy at L4-5 and small synovial cysts arising from the right L4-5 facet.” Ee’s Ex. 5, MRI report 12/23/09.

During his deposition, Dr. DiSanto was questioned a number of times on cross-examination regarding his understanding of the mechanism of injury. He acknowledged that in his initial report, he wrote that the employee struck her left hip and her back on the microscope, whereas the records from the employee health clinic and Urgent Care indicate that the employee hit only her right mid-back. Ee’s Ex. 5 at 26, 29. The doctor attempted to downplay this conflict in the histories.

You know, she – I could imagine probably what she – she twists – it says here she – something – she was walking backwards, twisting and falling. That’s probably what got her problem going, not the blunt trauma against the microscope.

Id. at 29.

Dr. DiSanto elaborated on this statement after further questioning, stating “I think she twisted carrying 50 pounds of heavy instruments and fell back and hurting her back. That’s what I think happened.” Id. at 33. He subsequently reiterated this theory on the cause of the employee’s condition.

Well, again, I don’t think the blunt trauma didn’t cause all these findings on the MRI. They may be rendered medically symptomatic and came to the surface. I think it was – she said she twisted, lifted and twisted, and then she hit her back. I think that’s what did it, the lifting and twisting. It usually does at the L4-5 level.

Id. at 35-36. The doctor testified that it was his understanding that Ms. Turcios was carrying the surgical instruments in her arms at the time of the incident. He acknowledged that if the history of how the injury occurred was inaccurate, then his opinion on causation may be inaccurate.

After reviewing all of the testimony and medical evidence, the trial judge denied and dismissed the employee's petition. In support of his decision, the trial judge stated that he rejected the employee's testimony because of the conflict between her testimony and the records regarding how she was injured. He also rejected Dr. DiSanto's opinions because they were based on an inaccurate history as to how the injury occurred. Consequently, the employee failed to prove the allegations of her petition. The employee then filed a timely claim of appeal.

The Appellate Division will not disturb a factual finding made by the trial judge unless the appellate panel finds that it is clearly erroneous. *See* R.I.G.L. § 28-35-28(b); Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996). Furthermore, the Appellate Division will only conduct a *de novo* review of the evidence when a finding made by the trial judge is first determined to be clearly wrong. Grimes Box Co. v. Miguel, 509 A.2d 1002, 1004 (R.I. 1986).

The employee has filed five (5) reasons of appeal, the first of which is simply a general statement that the decision and decree are against the law, the evidence and the weight of the evidence. Obviously, this statement does not comply with the statutory requirement that the appellant state specifically "in what manner or where in the record the trial [judge] allegedly erred." Falvey v. Women and Infants Hospital, 584 A.2d 417, 419 (R.I. 1991); *see* R.I.G.L. § 28-35-28(a). Consequently, we will address only the remaining four (4) reasons of appeal.

In the second reason of appeal, the employee alleges that the trial judge erred when he rejected the opinions of Dr. DiSanto because they were based upon an inaccurate history. The employee contends that the doctor did have an accurate history of her injury and that his opinions were based upon that accurate history. After reviewing Dr. DiSanto's testimony, we must disagree with the employee's assertion.

It is clear from his deposition that Dr. DiSanto was under the impression that the employee lifted and carried surgical instruments weighing fifty (50) pounds when she was injured. This is certainly different than the employee's testimony that she was pulling a wheeled table containing surgical instruments when she backed into the standing microscope. Although Dr. DiSanto also recorded information that the employee hit her back on the microscope, he downplayed that trauma as a primary cause of her condition and resulting disability, instead focusing on the lifting and twisting as the root of her problems. We find this to be a significant distinction which provides grounds for rejection of the doctor's opinions as to causation.

The employee bears the burden of providing the court with competent, probative evidence that her alleged injury is one "arising out of and in the course of his or her employment, connected and referable to the employment." R.I.G.L. § 28-33-1. Generally, expert medical testimony is required in order to establish the causal connection between the work activity and the alleged injury and disability. Hicks v. Vennerbeck & Clase Co., 525 A.2d 37, 42 (R.I. 1987). Prior to rendering an opinion, an expert witness must be provided with the facts necessary to form an adequate foundation for his opinion. Alterio v. Biltmore Construction Corp., 119 R.I. 307, 312-313, 377 A.2d 237, 240 (1977). "In the workers' compensation context, if a medical expert's opinion is based upon facts which are not established by the evidence or on a misconception of the pertinent facts, the probative force of the opinion is destroyed." Perdomo v. Benjamin Box Co., W.C.C. No. 2007-01241(App. Div. 10/3/07); *see* Leviton Mfg. Co. v. Lillibridge, 120 R.I. 283, 288-289, 387 A.2d 1034, 1037 (1978).

Dr. DiSanto's opinion that the employee's injury and disability were caused by the incident at work was based upon an inaccurate history as to what actually occurred at work. The doctor testified that his understanding of the injury was that "...she said she twisted, lifted and

twisted, and then she hit her back. I think that's what did it, the lifting and twisting." Ee's Ex. 5 at 36. He testified at several points in his deposition that the mechanism of the employee's injury involved twisting while lifting or carrying fifty (50) pounds of instruments. The employee never stated in her testimony or in any of the histories recorded in the incident report she filed at work or the reports of the employee health clinic or Urgent Care that she was lifting or carrying anything at the time of the alleged injury. There is no evidence in the record before us that the employee did what Dr. DiSanto believes she did, and which he says caused her injury and disability. The foundation for his opinion, therefore, is contrary to the established facts. As a result, his opinion as to causation is not competent and the trial judge was correct to reject it.

Dr. DiSanto was the only expert medical witness to offer an opinion regarding causation. The only other medical evidence submitted were the records from the employee health clinic and Urgent Care. There are also records from the Dr. John E. Donley Rehabilitation Center. None of these records provide the necessary expert opinion as to whether the incident described by Ms. Turcios caused the alleged injury and disability. Without proof of causal relationship, the employee cannot succeed in proving the allegations contained in her petition.

In her second reason of appeal, the employee argues that the trial judge erred by basing his finding that the employee was not credible on a purported conflict within the medical reports and between the medical reports and the employee's testimony. It is well-settled that the trial judge who observes a witness testify is in the best position to make a determination of that witness's credibility and his finding on that issue will be given great weight on review.

Laganiere v. Bonte Spinning Co., 103 R.I. 191, 195, 236 A.2d 256, 258 (1967). During his review of the evidence, the trial judge emphasized certain portions of the testimony of Ms. Healy, the potential for termination due to recent disciplinary action, the lack of consistent

physical findings by the Donley Center to substantiate the employee's complaints, and some inconsistencies in the histories in the records of the employee health clinic and the other medical providers. These factors in combination led the trial judge to question the employee's credibility. Under the circumstances, we cannot say that he was clearly wrong to do so.

Even if we were to conclude that the trial judge's credibility determination was in error and we assumed that Ms. Turcios's testimony is entirely credible, her petition would still fail. As noted previously, she cannot sustain her burden of proof without an expert medical opinion establishing the element of causation.

The employee next alleges that the trial judge overlooked the uncontradicted medical evidence of three (3) different physicians who conducted physical examinations of the employee shortly after the alleged incident at work and found her to be experiencing mid-back spasm and tenderness. Even if the court were to accept that there was evidence upon physical examination of a physical problem, the employee still has not met her burden of proof. She has not offered any competent medical testimony stating that the physical problem was caused by the work-related activity described by the employee. As noted by the Rhode Island Supreme Court in Delage v. Imperial Knife Co., Inc., 121 R.I. 146, 396 A.2d 938 (1979):

Injury and causation are separate entities. It does not follow that because he was injured, a nexus must exist between the injury and his employment.

Id. at 149, 396 A.2d at 940. The employee must still provide evidence that the on-the-job activity she described caused the condition which has been diagnosed.

In the final reason of appeal, the employee contends that the trial judge erred in rejecting Dr. DiSanto's opinions because, in addition to the history provided by the employee, the doctor had relied on the results of the December 23, 2009 MRI in concluding that the employee was

partially disabled due to her work-related back injury. The employee cites Garcia v. C.I. Hayes, Inc., 606 A.2d 1322 (R.I. 1992), for the proposition that the trial judge cannot disregard a physician's testimony simply because he questions the employee's credibility where the physician relies on records of prior medical treatment, medical test results and his own physical examinations as well as information provided by the employee in formulating his opinions. *See id.* at 1325.

This argument disregards the fact that Dr. DiSanto based his opinion on causation on an incorrect perception of the mechanism of injury. He believed the employee lifted and carried fifty (50) pounds of surgical instruments in her arms when she was allegedly injured, and that is simply not true according to the employee's own testimony. We cannot assume that twisting while lifting and carrying fifty (50) pounds results in the same type of injury as tripping, twisting and hitting one's back on the arm of a standing microscope. The fact that the MRI may show some abnormality indicating an injury does not cure the problem with the foundation of the doctor's opinion regarding the cause of the alleged injury.

Based upon the foregoing discussion, we deny and dismiss the employee's claim of appeal and affirm the decision and decree of the trial judge. 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

Ricci and Ferrieri, J.J., concur.

ENTER:

Olsson, J.

Ricci, J.

Ferrieri, J.

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the claim of 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 February 1, 2010 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

John A. Sabatini, Administrator

ENTER:

Olsson, J.

Ricci, J.

Ferrieri, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Stephen J. Dennis, Esq., Robert S. Thurston, Esq., Esther King, Esq., and William Gardner, Esq., on
