STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
LUANN THOMPSON ROSSI	)	
	)	
	)	
VS.	)	W.C.C. 2001-00477
	)	
	)	
RIVERVIEW NURSING HOME	)	

DECISION OF THE APPELLATE DIVISION

HEALY, J. This matter came on to be heard before the Appellate Division upon appeal of the employee/petitioner from a decision and decree of the trial judge entered April 19, 2002.

This is an Employee's Petition to Review alleging a return of incapacity on April 8, 1999 as a result of a work injury she had sustained on November 26, 1990. At the pretrial conference on February 12, 2001, the trial judge denied the employee's petition and the employee claimed a trial.

At the conclusion of the trial, the trial judge, relying upon the opinions of Dr. A. Louis Mariorenzi, found that the employee failed to prove that she sustained a return of incapacity for work as a result of the muscle

strain to the low back she sustained on November 26, 1990; and, accordingly denied and dismissed the employee's petition. The employee, thereafter, filed the instant appeal.

The employee suffered a low back muscle strain while working as a nurse's aide for Riverview Nursing Home on November 26, 1990. She received benefits for total incapacity, pursuant to a pretrial order dated October 3, 1991, for a closed period from November 27, 1990 to March 29, 1991. The employee testified that after the injury she never returned to work at Riverview. She worked at a jewelry company for one (1) month in December of 1991; and, in 1992 she worked at Kenney Manufacturing for three (3) months. She did not work again until September, 1999. She testified that in 1991 she treated with Dr. Geret A. Dubois and was also seen by Dr. Stanley Stutz. She then treated with Dr. David DiSanto until some time in 1995.

She testified that in February 1999 she bent down to pick up her daughter who had fallen in the snow. When she went to stand, up her back gave out. She did not seek medical attention immediately because "maybe once or twice a year my back gives out." (Tr. p.15). About one (1) month after this lifting incident she went to Dr. Lucia Larson because of pain in her right leg. Dr. Larson recommended an MRI and referred her to Dr. Mark Palumbo. Dr. Palumbo performed surgery on her back in May 1999. In September 1999, three (3) months after her surgery, she began working

at Pezza Farm, where she worked part time until December 2000. She has not seen a doctor for her back since December, 1999. She testified that her back still bothers her but, "I can function." She does not feel she could return to work at Riverview Nursing Home because there is too much lifting.

The medical evidence in this matter consists of affidavits and reports of Drs. Stanley J. Stutz and Lucia Larson; and depositions of Drs. A. Louis Mariorenzi, Lucia Larson, Stanley J. Stutz and Mark Palumbo.

Dr. Stutz testified that he examined the petitioner on two (2) occasions, December 14, 1990 and October 2, 1991. His report dated December 14, 1990 indicated that the employee presented with right-sided low back pain that traveled up to her neck and sometimes into her right leg. His impression was low back syndrome. He stated that her physical examination is objectively normal and he would not place any specific restrictions on her based on his examination. Dr. Stutz examined her again on October 2, 1991. She presented with right-sided low back pain at times radiating into her right leg. Her examination was somewhat inconsistent. His impression was low back syndrome and he placed no restrictions on her. There was an addendum to Dr. Stutz's October 2, 1991 report, which discussed an MRI performed on March 5, 1991 showing degenerative disc disease with disc bulge at L4-5, no disc herniation or spinal stenosis. This report did not change Dr. Stutz's impression of low back syndrome.

Dr. Larson treated the petitioner approximately seven (7) times from August 1997 until October 2001. Dr. Larson saw her for hyperthyroidism, symptoms of dizziness, possible depression and back pain. The first time the employee complained of back pain was March 1999. Dr. Larson testified that the precipitating event for these complaints was when the employee bent over quickly to pick up her daughter who had fallen in the snow. Dr. Larson testified that she ordered an MRI on March 18, 1999. She further testified that the MRI indicated that the employee had a herniated disc at L4-5 which was impinging on the L-5 nerve root on the right. Thereafter, she advised the employee to seek an orthopedic consult.

Dr. Mark Palumbo, an orthopedic surgeon, examined the employee for the first time on April 14, 1999 for complaints of right leg pain of two (2) months duration. The history given to Dr. Palumbo by the employee at that time was of recent trauma while lifting her infant child. After reviewing an MRI, Dr. Palumbo's diagnostic impression was right L5 radiculopathy secondary to disc herniation at the L4-5 level. Dr. Palumbo saw the employee on two (2) more occasions prior to corrective surgery which was performed on May 10, 1999. He next saw the employee on May 26, 1999. Dr. Palumbo testified she had complete resolution of her right lower extremity pain; and that she was already up and about doing physical activities at home, including child care. He last saw the employee on

December 8, 1999. At that time, she presented with complaints of intermittent back pain occurring several days a week.

Dr. A. Louis Mariorenzi, an orthopedic surgeon, performed a medical record review in March, 2000, and subsequently on April 17, 2000 conducted a physical examination of the employee. Dr. Mariorenzi stated that based upon his examination and review of the employee's medical records from 1989 to 1999, the disc herniation sustained by the employee was a new injury, precipitated by the episode while lifting her young child and that there was no relationship between the injury in 1999 and the occupational injury of 1990. It was also his opinion that the employee made a full and complete recovery from her 1990 occupational injury and was capable of returning to her usual employment as a nurse's aide. He finally testified that a return to her usual employment as a nurse's aide would not be injurious to her health. As noted earlier, the trial judge relied upon the opinions of Dr. Mariorenzi to deny the employee's petition for benefits.

The role of the Appellate Division in reviewing contested factual matters is sharply circumscribed. Rhode Island General Laws § 28-35-28 (b) states that "[t]he findings of the trial judge on factual matters are 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). Thus, if the record before the Appellate Division reveals competent evidence to support the findings of the trial judge, the decision must be allowed to stand. Guided by these dictates and our careful review of the record, we find no merit in the petitioner/employee's appeal and affirm the decision and decree of the trial court.

In support of her appeal, the petitioner/employee filed four (4) reasons of appeal. The first three (3) reasons of appeal lack the specificity required by R.I.G.L. §28-35-28 and are mere recitations of the law. As such, they are denied and dismissed. Bissonnette v. Federal Dairy Co., 472 A.2d 1223 (R.I. 1984); Falvey v. Women & Infants Hosp., 584 A.2d 417 (R.I. 1991).

The petitioner's fourth reason of appeal is twofold. Initially, she argues that the trial judge was clearly erroneous to find that the employee had not sustained a recurrence of disability because he based his decision on Dr. Mariorenzi's opinions. She argues that the doctor's opinions were incompetent because they were based upon an incomplete history. She avers that Dr. Mariorenzi gives no indication he was aware of the back problems the employee continued to experience after her work-related back injury. The employee argues that this gap in the history undermines the

foundation of his opinion that the 1999 incident was a new injury and not a recurrence.

All the medical evidence presented at trial was in written form. As a result, we shall apply the standard as set fourth in Verte v. Mearthane Products Corp., 583 A.2d 524 (R.I. 1990) and independently weigh and view all of the medical evidence.

The employee's reliance upon Moreno v. Nulco Mfg. Co. Corp.; 591 A.2d 788 (R.I. 1991) and Ilidio Ferreira v. Carol Cable Co. W.C.C. 92-08761 (App. Div. 1997) (rejection of medical evidence based on untrue, inaccurate or incomplete medical history) is misplaced. In the present case, the employee did provide Dr. Mariorenzi a history of her back injury which occurred on November 26, 1990. However, the doctor did not base his opinions solely on the history provided by her. In forming his opinion, Dr. Mariorenzi also relied upon prior diagnostic tests including a CAT scan, MRI, and EMG's as well as records from St. Joseph Hospital, Rhode Island Hospital, Drs. Dubois, Stutz, Golini, DeSanto and Sayeed. Finally, Dr. Mariorenzi performed his own examination of the employee on April 17, 2000. It is apparent that Dr. Mariorenzi's testimony relied upon numerous diagnostic tests as well as physical examinations preformed by himself and other doctors in making his diagnosis. In particular, he had the histories given to these numerous health care providers available to him. Even if the history provided by the employee herself was inaccurate, untrue or

incomplete, Dr. Mariorenzi's diagnosis was certainly not completely reliant upon it. As a result we find that Dr. Mariorenzi's testimony is competent and reject the employee's assertion to the contrary. See (Garcia v. C.I. Hayes, Inc., 606 A.2d 1322, 1325 (R.I. 1992).

Finally, the appellant argues that the trial judge overlooked or misconceived the petitioner's uncontradicted testimony regarding her persistent occasional back problem subsequent to her 1990 work-related injury. We find no merit in this argument. In the instant case, the trial judge quite correctly based his decision on the medical evidence presented and stated, "I have had a chance to thoroughly review the entire record here and the only medical evidence regarding the cause of the employee's back condition in 1999 comes from the testimony of Dr. Mariorenzi." (Tr. Dec. p.2).

There is nothing in the record or decision which indicates or suggests that the petitioner's testimony was incredible. However, "The rule that a fact finder may weigh the probative value of an employee's subjective assessment of incapacity, though established, has no bearing on the question of whether (the employee's) testimony is legally sufficient and competent to prove (her) claim. Absent corroborating medical testimony, an employee's uncontradicted testimony is competent to prove an incapacity only when a physical injury with symptoms observable to the ordinary person appears reasonably soon after a work-related accident.

Faria v. Carol Cable Co., 527 A.2d 641 (R.I. 1987). To prove a recurrence of incapacity the employee must establish a relationship or nexus between her previous incapacity and the alleged recurrence. For the incapacity to recur, it must arise out of or, otherwise, bear some relation to a previous incapacity, though the incapacities need not be identical. LaFazia v. D. Moretti Sheet Metal Co.; 692 A.2d 1206, 1210 (R.I. 1997). It is axiomatic that medical evidence is the only competent proof of the necessary causal connection because this issue is a highly technical determination. Accordingly, the employee's testimony standing alone without the corroboration of competent medical evidence is insufficient as a matter of law to prove incapacity causally related to her 1990 injury. Charles Deroche v. King's Auto Parts Inc.; W.C.C. No. 95-01171 (App. Div. 1996)

Thus, the instant case must turn on the medical evidence. The petitioner came under the care of Dr. Palumbo in April 14, 1999, with a chief complaint of right leg pain of two (2) months duration. The only antecedent trauma mentioned in the doctor's record was the lifting of the employee's child two (2) months earlier. An MRI scan performed in March 1999 indicated L4-5 disc herniation compressing the L-5 nerve root. Surgery was performed on May 10, 1999 by Dr. Palumbo. There was no mention by the employee to Dr. Palumbo of her 1990 back injury. A review of Dr. Palumbo's records made no mention of such prior injury. When asked if there was any correlation between the 1990 work injury and the

herniated disc in 1999, Dr. Palumbo's response was extremely equivocal. He testified, "it's a difficult correlation to make today given the lack of documentation.... if I assume that there was a direct injury to the L4-5 disc in 1990 that led or accelerated the process of degenerative disc disease, there is a potential for correlation between this injury and what we saw in 1999." (Pet. Exh. #2 pp. 22-24). After reviewing Dr. Palumbo's entire testimony, we find that his opinion as stated is mere conjecture. Expert testimony, if it is to have any evidentiary value, must state with some degree of positiveness that a given state of affair is the result of given cause. Sweet v. Hemingway Transport, Inc.; 333 A.2d 411, 415 (R.I. 1975). Additionally, there is no testimony from any medical provider that the petitioner has any incapacity as a result of the 1999 incident.

Conversely, Dr. Mariorenzi testified unequivocally as to the basis for his opinion and expressed those opinions to a reasonable degree of medical certainty. His opinions were based upon statements of the employee as well as his examination and the review of numerous diagnostic tests from 1990 to 1999. We find that Dr. Mariorenzi's opinions provide a sufficiently probative evidentiary basis for the trial judge's decision.

It is clear that the employee failed to present competent evidence to establish a recurrence of incapacity. For the foregoing reasons, the decision and decree of the trial court are hereby affirmed and the petitioner's reasons of appeal denied and dismissed.

In accordance with Sec. 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, copy of which is enclosed, shall be entered on

Morin and Bertness, JJ. concur.

ENTER:

_____
Healy, J.

_____
Morin, J.

_____
Bertness, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

LUANN THOMPSON ROSSI)
)
VS.) W.C.C. 2001-00477
)
RIVERVIEW NURSING HOME)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the employee/petitioner 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 April 19, 2002 be, and they hereby are affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Healy, J.

_____
Morin, J.

_____
Bertness, J.

I hereby certify that copies were mailed to Stephen Dennis, Esq. and Howard Feldman, Esq. on

_____