

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

ALEX RODRIGUEZ)

)

VS.)

W.C.C. 01-02925

)

A.R.C.H. POLYMERS)

DECISION OF THE APPELLATE DIVISION

CONNOR, J. This matter is before the Appellate Division upon the appeal of the petitioner/employee from the decision and decree of the trial judge entered on August 26, 2003.

This is an employee's original petition alleging total or partial disability from March 23, 2001 and continuing. At the pretrial conference, the trial judge granted the employee's petition for benefits for a March 22, 2001 injury described as a cervical and mid/upper dorsal spinal sprain/strain/aggravation of a preexisting condition. She awarded the employee partial incapacity benefits from March 23, 2001 and continuing. The employer claimed a trial. At the conclusion of the proceeding, the trial judge rendered a decision and entered a decree containing the following finding and order:

"1. That the petitioner/employee has failed to prove by a fair preponderance of the credible evidence that he sustained a work-related injury on March 22, 2001, arising out of and in the course of his employment with the respondent, connected therewith

and referable thereto, of which injury the respondent had notice.

“It is, therefore, ordered:

“1. That the petition be denied and dismissed.”

The employee then claimed this appeal.

The employee testified that he was working for the employer on March 22, 2001. He was working on an assembly line filling glass containers. After he had filled approximately twenty (20) containers, he started to pack them. As he lifted the packed items from the assembly line, he felt a strain in his lower back. He stated that everything went loose on him, and he stopped working and informed his supervisor. The package that he was lifting weighed approximately twenty-two (22) pounds. The employee left work with his supervisor’s permission and went to see Dr. Wallace E. Gonsalves. He was able to get an appointment with him that day. After seeing the doctor, he presented his employer with a note, and he did not return to work. He had been employed with this employer since 1993.

The employee acknowledged that he had been treating with Dr. Gonsalves since 1998 for back problems. He stated that he injured his back in 1998, and again in 1999. He stated that he had last treated with Dr. Gonsalves prior to the March 22, 2001 incident about two (2) to three (3) weeks earlier. Following this incident, he was referred to Dr. William J. Golini and Dr. Stephen J. Kamionek. He was also referred to the Dr. John E. Donley Rehabilitation Center.

On cross-examination, the employee testified that he treated with Dr. Gonsalves in August 1998 for problems with his back and shoulder. He also

treated with him in April 1999 for neck pain and low back pain. He continued to treat with Dr. Gonsalves in 1999 for neck and low back pain, and at this time he was working light duty. He also treated with Dr. Gonsalves throughout the year 2000 for his neck, low back and shoulder. In December 2000, he treated with him for some symptoms of carpal tunnel syndrome.

The employee stated that he saw Dr. Gonsalves on February 28, 2001 for numbness in his hands, a pinch on his neck, and back pain. The employee saw Dr. Gonsalves again on March 6, 2001, and he complained of back and neck pain and numbness in his hands and elbows.

The employee acknowledged that he treated with Dr. John T. Sotis for problems with his back from October 15, 1999 through March 2, 2001. He also acknowledged seeing Dr. Golini in September 1999 because of low back pain. He stated that when he saw Dr. Golini on September 13, 1999, he told him that he had a “many year history” of low back and neck pain. The employee acknowledged that in 1999 he had an MRI and an EMG due to his neck complaints, as well as an MRI and an EMG regarding his low back. He had another MRI of his neck in December 2000.

The employee was also treated by a rheumatologist in October 1999 for neck and back pain and numbness in his arms.

The trial judge reviewed medical records from Dr. William J. Golini, Dr. John T. Sotis, Dr. Yousaf Ali, and Dr. Stephen J. Kamionek. These records reveal that the employee had treatment as far back as September 13, 1999, for

complaints of low back and cervical pain. Dr. Golini treated the employee for neck and back symptoms, which he did not causally relate to any work activities or any specific instances at work. He also treated him for carpal tunnel syndrome. The employee treated with Sotis Chiropractic from October 1999 through March 2001 for neck and back pain. There is no indication in these medical records that his symptoms were work related. The employee also treated with a rheumatologist, Dr. Yousaf Ali, who diagnosed the employee with bilateral thoracic outlet syndrome. No cause and effect between a work incident and this diagnosis is noted in the doctor's reports. The employee also treated with Dr. Stephen Kamionek in 2001, and Dr. Kamionek diagnosed the employee with cervical radiculitis and cubital and carpal tunnel syndrome. Dr. Kamionek did not comment in his reports with regard to any cause and effect between these diagnoses and any work incidents.

The trial judge reviewed records from the Dr. John E. Donley Rehabilitation Center from May 2001, wherein the employee was enrolled in a physical therapy program as well as a work hardening program.

Dr. Wallace E. Gonsalves testified by way of deposition. The transcript of that deposition was introduced into evidence by the employee. Dr. Gonsalves is board certified in family practice. Dr. Gonsalves testified that he saw the employee on March 22, 2001, at which time the employee gave him a history of being injured while lifting boxes that weighed approximately twenty-two (22) pounds. He complained of pain in his upper back, across his shoulders into his

arms, more so on the right than the left. The doctor examined the employee and found spasm and tenderness present throughout the cervical, mid/upper dorsal spinal area. The doctor also noted tenderness bilaterally over the trapezius muscles, as well as tenderness bilaterally over the shoulder girdles. He also noted a decreased range of motion with flexion, extension, side bending and rotation of the cervical spine. The doctor offered a diagnosis to a reasonable degree of medical certainty of a soft tissue strain/sprain of the cervical, mid/upper dorsal spinal area, as well as bilateral soft tissue shoulder girdle strain, cervical radiculopathy with paresthesia of the right hand and wrist. The doctor causally related these conditions to the incident described to him by the employee, whereby he was lifting boxes and sustained an injury. The doctor felt he was disabled from his usual job.

The doctor testified that he had seen the employee for similar problems as recently as March 6, 2001. At that time, the employee complained of back and neck pain. The doctor noted that the employee's history of back and neck pain goes back several years and there was no specific incident precipitating these complaints. The doctor stated that he referred the employee to Dr. William Golini for EMG tests, which revealed bilateral cervical radiculopathy. The doctor testified that he last saw the employee on June 13, 2002, at which time he continued to complain of back, neck and shoulder pain. The doctor found marked spasm and tenderness present throughout C5 through D3. The doctor stated that throughout his treatment of the employee these symptoms have

remained constant and have increased in their nature and intensity. The doctor felt that the employee could not perform any type of work that involved any lifting or bending.

On cross-examination, Dr. Gonsalves testified that he began treating the employee on May 21, 1996 for neck pain. The doctor stated that as a result of the March 22, 2001 injury, he diagnosed the employee with a strain to his upper dorsal and thoracic area, as well as bilateral shoulder strains. He did not diagnose the employee with a low back injury as a result of this incident. He also diagnosed the employee with a cervical radiculopathy and numbness into his hands as a result of this incident.

The doctor reviewed the history of his treatment of the employee. He stated that on August 25, 1998, he treated the employee for stiffness in his shoulders and pain in his low back as a result of moving furniture in his cellar. The doctor diagnosed him with shoulder pain, spasm, tenderness and back pain.

The doctor stated that he examined the employee on April 22, 1998, whereby he took a history that on the previous date the employee had been doing pushups at home and began to experience problems with his neck and upper back. The doctor examined him and found spasm and tenderness present in his neck and upper back. The doctor diagnosed him with a strain of the cervical area.

The doctor saw the employee on March 17, 1999, whereby he complained of back, neck and left shoulder pain. The doctor diagnosed him with neck, upper

back and low back problems. The doctor could not recall if the employee suffered from a strain or a muscle spasm at that time.

The doctor saw him again on August 24, 1999, whereby the employee complained of pain and tightness in the left side of his neck and pain in his mid to low back. At that time, the employee was treated with manipulative therapy and referred to Dr. Golini for neurological consultation. The doctor could not recall if he was diagnosed at that time with a neck strain or a continued chronic neck problem. The doctor stated that the employee had neck, upper dorsal and low back problems continually. The doctor testified that the employee's neck and upper dorsal problems are chronic.

Dr. Gonsalves referred the employee to Dr. Golini, who saw him on September 13, 1999 and forwarded Dr. Gonsalves his report regarding his treatment of the employee. Dr. Golini's note indicates that the employee's condition had worsened in the past year, and the cervical and lumbar pain is associated with radicular symptoms involving both arms and both legs. The employee complained to the doctor of numbness in both hands. The doctor acknowledged that it is the same type of numbness that the employee complained of after the incident at work on March 22, 2001. The diagnostic studies performed by Dr. Golini revealed a very mild right-sided C7 radiculopathy of questionable significance. The doctor acknowledged that after March 22, 2001, this is the same problem that the employee continued to experience.

Dr. Gonsalves stated that in September 1999 he referred the employee for an MRI of the neck which revealed a small left paracentral disc bulge and osteophyte at C4-5. The doctor agreed that the employee was suffering from neck pain and complaining that his neck was making cracking noises. The doctor agreed that arthritis could be one of the causes for these symptoms. He reviewed x-rays that indicated that the employee had arthritis. The doctor continued to treat the employee for these symptoms throughout 1999. These symptoms included symptoms of cervical radiculitis that were possibly the result of a bulging disc and some cervical arthritis. The doctor agreed that in 1999 the employee suffered from the same type of radiculopathy that he diagnosed him with in March 2001.

In October 1999, Dr. Gonsalves referred the employee to Dr. Lombardozzi, a rheumatologist, who diagnosed the employee with fibromyalgia. Dr. Gonsalves began to prescribe medication to the employee consistent with this diagnosis. The doctor stated that the employee's problems were chronic in nature with regard to his neck and upper back.

The doctor indicated that the employee was also seen by a chiropractor, Dr. John Sotis, in October 1999, who was seeing the employee three (3) times a week for problems with his neck and upper dorsal area, as well as radiculopathy. At that time there was also a question of whether the employee suffered from thoracic outlet syndrome.

Dr. Gonsalves referred the employee to a rheumatologist, Dr. Ali, due to problems that he was having with the radicular component in his upper extremities which the doctor believed was the result of a problem at C7. Dr. Ali gave the employee two (2) shots of cortisone to address the condition of thoracic outlet syndrome.

Throughout the year 2000, the employee continued to treat with Dr. Ali, Dr. Golini, Dr. Gonsalves and Dr. Sotis for cervical radiculopathy, upper back pain, neck pain, and pain and numbness in his hands and arms. He continued to undergo chiropractic treatments, as well as manipulative therapy during this time. In June 2000, Dr. Gonsalves prescribed the employee a cervical collar to use at all times unless he was doing his home traction. At that time, the doctor noted spasm in the employee's neck. As of October 3, 2000, the doctor felt that the employee may be suffering from a wryneck, which is a paresthetic spasm and tenderness with restricted motion.

The doctor saw the employee in December 2000 for right and left wrist pain and felt that the employee may be suffering from carpal tunnel syndrome. He saw the employee again on February 28, 2001, at which time the notes indicate that the employee complained of a continuing backache, as well as neck pain. The employee told the doctor that he was sleeping with a cervical collar. Manipulative therapy for the neck and the back were performed by Dr. Gonsalves on this visit, and the employee was given a prescription for cortical steroids and antibiotics for a middle ear infection, a rash and a sinus infection. The doctor

saw the employee again on March 6, 2001, at which time he complained of shoulder pain that had been on and off for three (3) years. The doctor told him that he ought to see Dr. Golini because the doctor felt that the employee continued to suffer from cervical radiculopathy. The doctor gave the employee an out-of-work note dated March 6, 2001, whereby he took the employee out of work because of back pain, neck pain and cervical radiculopathy.

Dr. Gonsalves testified during redirect examination that he understood that the employee had chronic problems with his neck and shoulders and upper back and felt that the incident that occurred on March 22, 2001 was an acute exacerbation of his condition. The doctor agreed that on March 6, 2001 he took the employee out of work because of the employee's complaints of pain and the objective findings he determined were substantial enough on examination to keep him out of work. The employee did not give him a history on March 6 of any event occurring at work that precipitated these problems.

The transcript of the deposition of Dr. A. Louis Mariorenzi was introduced into evidence by the employer. The doctor testified as a board certified orthopedic surgeon. The doctor testified that he saw the employee for the first time on July 16, 2001, at the request of the employer's insurance carrier. The doctor understood from the employee that he worked as a formulator/packer, which the doctor understood to be heavy strenuous type of work with frequent lifting, bending, shifting and pushing. The employee complained to the doctor of pain in his neck and lower back. He gave the doctor a history of moving two (2)

boxes onto a skid on March 22, 2001, when he noted pain in the cervical area which radiated down into the arm and into the fingers. He also noted pain in his lower back.

When Dr. Mariorenzi examined him, the employee was complaining of pain at the base of his neck with some symptoms radiating into both arms, primarily at night. He also complained of pain in his mid and low back area.

The doctor took a past medical history from the employee in which he stated that he had injured his neck and lower back in 1998 at home, and he was out of work for about three (3) weeks. The employee denied any other particular problems with his neck and back until March 22, 2001. The doctor noted that this statement by the employee was inconsistent with the medical records that he reviewed from Dr. Gonsalves indicating that the employee was told to remain out of work as of March 6, 2001.

Dr. Mariorenzi conducted a physical examination which was essentially normal. The doctor did not review any diagnostic studies but did review medical records regarding some of the employee's prior medical treatment. The doctor felt that as of the date of his examination the employee was capable of returning to his usual type of employment with no restrictions or limitations. He offered that opinion to a reasonable degree of medical certainty. The doctor questioned whether the problem that the employee complained of on the date of this examination was the result of his occupational injury, or was merely a continuation of his preexisting problem.

The doctor saw the employee again on April 19, 2002 and took an additional history from him that he continued to complain of pain in his neck and lower back and had been treating with Dr. Gonsalves and receiving physical therapy for the past two (2) months. The employee complained of a pinching sensation in his neck and numbness along the ulnar aspect of his arm and hand on the right side. He complained of low back pain with walking and sitting. He stated that his pain radiates into his right leg to the level of his knee. Since the time of Dr. Mariorenzi's last examination, the employee had undergone surgery to his left elbow in the form of an ulnar nerve transposition which was not occupationally related.

The doctor examined the employee and could find no spasm in his paracervical muscles and no localized tenderness over the cervical musculature. There was no evidence of atrophy. He had full range of motion of both shoulders, elbows and wrists. His sensory examination was normal. An examination of his low back revealed no tenderness over the paravertebral muscles in the lumbar area. He had a normal lumbar lordotic curvature. His reflexes, knee jerks and ankle jerks were normal. His straight leg raising in the sitting and recumbent position were not associated with leg pain. The doctor continued to opine that the employee was capable of a full return to work and that same would not be unduly injurious to his health. The doctor testified that based on the records that he reviewed it is his opinion to a reasonable degree of medical certainty that the

employee's problems are more likely due to a preexisting problem than to the effects of the occupational injury of March 22, 2001.

At the conclusion of the evidence, the trial judge chose to accept the medical opinions of Dr. Mariorenzi over the opinions offered by Dr. Gonsalves regarding the causal relationship and disability status of the employee. The court stated that it did not doubt that the employee suffered an injury at work; however, the judge found that the employee failed to meet his burden of proof regarding the disabling effects of that injury. The trial judge found that there was no evidence presented to support the employee's contention that his condition was anything other than a condition for which he had been actively treating immediately prior to the work incident.

The trial judge then entered the previously referenced decree, and the employee filed a timely claim of appeal.

Pursuant to R.I.G.L. § 28-35-28(b), a trial judge's findings on factual matters are final unless found to be clearly erroneous. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). The Appellate Division is entitled to conduct a *de novo* review only when a finding is made that the trial judge was clearly wrong. Id. (citing R.I.G.L. § 28-35-28(b); Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986)). Such review, however, is limited to the record made before the trial judge. Vaz, supra (citing Whittaker v. Health-Tex, Inc. 440 A.2d 122 (R.I. 1982)).

Cognizant of this legal duty imposed upon us, we have carefully reviewed the entire record of this proceeding, and we find no merit in the employee's reason of appeal. We, therefore, affirm the decision and decree of the trial judge.

The employee filed one (1) reason of appeal alleging that the trial judge's decision was erroneous because the record showed that the employee suffered a compensable injury in the nature of an aggravation of a preexisting condition. We disagree.

A careful review of the record shows that the trial judge was presented with medical opinions from Dr. Wallace E. Gonsalves and Dr. A. Louis Mariorenzi. After carefully considering the medical opinions offered by each doctor, the trial judge, as is her prerogative, chose to rely on those opinions offered by Dr. Mariorenzi as opposed to those opinions offered by Dr. Gonsalves.

Our Supreme Court held in Parenteau v. Zimmerman Eng., Inc., 111 R.I. 68, 299 A.2d 168 (1973), that where there are conflicting medical opinions of competent and probative value, it is the prerogative of the trial court to accept the medical opinions of one (1) health care provider over the opinions of the other. Certainly, there has been no issue raised by the employee with regard to the competency of those opinions offered by Dr. Mariorenzi, and certainly the trial judge, as is her prerogative, could rely on same in denying the employee's request for workers' compensation benefits.

Dr. Mariorenzi, after examining the employee on two (2) occasions, found that the employee did not suffer from any disability that was a result of an

incident that occurred on March 22, 2001. It was Dr. Marioenzi's opinion that the employee had preexisting problems with his back that were not, in fact, exacerbated by the March 22, 2001 incident. He found that the employee was not disabled from his regular work. Although the trial judge did find that the employee had an incident at work, whereby he felt pain in his back, she relied on Dr. Marioenzi's opinion that that incident did not cause the employee any resulting disability.

As the employee well knows, the petitioner in a workers' compensation proceeding has the burden of producing credible evidence of a probative force to support his or her petition for benefits. DeLage v. Imperial Knife Co., Inc., 121 R.I. 146, 148, 396 A.2d 938, 939 (1979). We find that there is substantial evidence in the record, particularly the opinion of Dr. A. Louis Marioenzi, to support the trial judge's decision. We, therefore, deny and dismiss the employee's reason of appeal and affirm the decision 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

Olsson and Sowa, JJ., concur.

ENTER:

Olsson, J.

Sowa, J.

Connor, J.

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VS.)

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the appeal of the petitioner/employee, and upon consideration thereof, the appeal of the petitioner 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 August 26, 2003 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

ENTER:

Olsson, J.

Sowa, J.

Connor, J.

I hereby certify that copies were sent to Stephen J. Dennis, Esq., and
Michael T. Wallor, Esq., on
