STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

DANIEL L. MANGLE, JR.	)	
	)	
VS.	)	W.C.C. 01-06813
	)	
LAWSON-HEMPHILL, INC.	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the petitioner/employee's appeal from the denial of his original petition in which he alleged that he sustained an L4-5 disc herniation and injuries to his back and right hip on December 1, 2000 resulting in total incapacity from January 1, 2001 to January 14, 2001 and partial incapacity from April 5, 2001 and continuing. After review of the record and consideration of the arguments of the parties, we deny the employee's appeal and affirm the decision and decree of the trial judge.

The employee testified that he was hired by the employer as the director of business development on November 1, 2000. The position involved a significant amount of travel, including overseas. On his first trip for the company, he spent four (4) days in Zurich, Switzerland, and then flew to Milan, Italy, on December 1, 2000. He explained that as he was leaving the plane, he was standing in the aisle and reached over to grab the bag containing his laptop computer from

underneath the seat. He stated that as he did so, "I felt something, I wasn't really sure what it was." Tr. at 19. He described it as a "weird sensation" in the right side of his low back.

He developed increasing pain in his right leg as the day went on. The next day he felt worse and contacted his boss, Avishai Nevel, the president of the company. Mr. Mangle cut short his trip and flew back to the United States the next day. A limousine picked him up at the airport in Boston and drove him to the bus station in Providence where he picked up his own car and drove to his apartment in Narragansett.

On Monday, December 4, 2000, the employee saw Dr. Robert C. Marchand, an orthopedic surgeon, for complaints of severe pain in his right leg and difficulty walking. He underwent an MRI of the lumbar spine at the recommendation of Dr. Marchand, but never returned to see the doctor. Instead, he drove to Pennsylvania and stayed with his parents for about six (6) weeks. The employer continued to pay him his regular salary during this time.

On December 11, 2000, the employee went to the emergency room at Abington Medical Center in Pennsylvania. He then saw Dr. Michael J. Gratch, an orthopedic surgeon in Pennsylvania, on December 18, 2000. Dr. Gratch had treated the employee for a work-related back injury he sustained in 1988. Mr. Mangle had originally treated with another physician who performed surgery. The surgery was not successful and he switched his care to Dr. Gratch in 1989. Dr.

Gratch performed a second surgery on his back in October 1990. The employee eventually settled the workers' compensation case.

The employee returned to work on or about January 15, 2001. He indicated that he continued to have problems walking due to pain in his right leg. He would develop more pain if he sat for too long. In the middle of February 2001, he embarked on a two (2) week business trip to Italy, Turkey, and the United Kingdom. On or about March 16, 2001, he left the United States for a two (2) week trip to China.

Mr. Mangle was back in the office on Tuesday, April 3, 2001 when Tom Gannon, the comptroller, advised him that the company had erroneously been paying him twice the amount of weekly salary he was supposed to be receiving under his contract. Mr. Nevel also mentioned the problem to the employee and indicated he would like to see it resolved as soon as possible by the employee initiating return of the overpayment. In a memorandum confirming the conversation, Mr. Nevel stated that while this was being worked out, he had stopped any further salary payment to Mr. Mangle. On that same day, the employee sent an e-mail to a business contact stating that he was tired from sightseeing all day on the past Saturday while in China. Mr. Mangle worked the next day, but then called in sick on Thursday and Friday. He drove to Pennsylvania that weekend and saw Dr. Gratch on April 10, 2001. The employee had not seen the doctor since January 9, 2001.

On April 11, 2001, he received an e-mail from the company regarding the pay dispute. Mr. Mangle called his employer and advised them that he would be out of work for a while because he was having back problems. He had never mentioned to anyone at work when he left the week before that he was having difficulty with his back again.

On April 13, 2001, Mr. Nevel sent a letter to the employee advising him that he was giving Mr. Mangle a last opportunity to pay back the overpayment by April 17, 2001. The employee apparently never responded to this offer. On April 19, 2001, a letter was sent to him from the company's attorney stating that he could repay the money before April 23, 2001 and resign his position, or he would be terminated. When the employee did not respond, the attorney sent a letter dated April 24, 2001 terminating his employment and informing him that the company intended to pursue legal action to recover the salary overpayment.

Mr. Mangle stated that, since taking the job with Lawson Hemphill, he had been living in Narragansett under a six (6) month lease. He packed up his belongings and moved back to Pennsylvania when his lease expired at the end of April 2001. The company did, in fact, file suit against him in Rhode Island and obtained a default judgment in excess of Twenty-nine Thousand and 00/100 ($29,000.00) Dollars.

The employee acknowledged that during the time he worked for the company, he spent most weekends in Pennsylvania, where his parents lived, or

New Jersey, where his girlfriend lived. The ride to Pennsylvania was about five (5) hours one (1) way.

Kristine Coury, the director of accounting for the employer in 2000, testified that on Monday, November 20, 2000, the employee was at a copy machine near her desk when he related that he had encountered a motor vehicle accident on the highway the night before while driving from Pennsylvania. The employee stated that a person had been decapitated and that he had to slam on his brakes and swerve to avoid the accident. She asserted that Mr. Mangle was complaining that he had pain in his back and hip and he was not sure if it was the result of the incident the night before. Ms. Coury further stated that she observed the employee limping on that day and on several other occasions.

Lise Genest, an employee in the export sales division, was also present for the conversation regarding the accident. She recalled a general discussion about the accident Mr. Mangle encountered which was made rather vivid because it involved a decapitation. She related that Mr. Mangle stated that he felt something in his back and hip when he had to hit the brakes to avoid the accident and his back and hip were bothering him that day. Ms. Genest also asserted that she observed the employee limping that day.

Mr. Mangle stated that he had only a general conversation about the traffic jam resulting from the accident he encountered while driving back to Rhode Island. He downplayed taking any dramatic evasive action and he denied that he was limping when he was at work that week. In support of his contention that he

did not injure himself at all while avoiding the accident, he testified that on November 20, 2000, he went to an office supply store and purchased a credenza/printer stand for his office. He loaded it into his vehicle with some assistance and when he arrived back at the office, someone from the shipping department helped him carry it up to his office. A document entitled "Weekly Expense Report" with the company logo, for the week beginning November 20, 2000, was marked for identification only. The employee was unable to produce a receipt for the purchase.

The medical evidence consists of the affidavit and report of Dr. Robert C. Marchand, the report of the MRI study done on December 8, 2000, the deposition, affidavit and records of Dr. Michael J. Gratch, and the deposition and records of Dr. A. Louis Mariorenzi.

Dr. Marchand saw the employee on one (1) occasion on December 4, 2000. The employee reported the history of his complaints to the doctor as follows:

> "He has had progressive pain and dysfunction across his low back that now is going down into his right leg. It has gotten worse since this past Friday. He was in Italy doing some business and the pain became progressively worse while sitting. He thinks he may have exacerbated it by reaching for a computer bag." Pet. Exh. 4.

The doctor noted that the employee had a nonantalgic gait although his range of motion was limited due to spasm. Straight leg raising was positive on the right, but there were no sensory abnormalities. Dr. Marchand recommended an MRI and medication.

The MRI study revealed a fairly broad left-sided disc protrusion at L5-S1 which caused some minimal indentation of the ventral aspect of the thecal sac and a more prominent right-sided disc protrusion at L4-5 which also indented the ventral aspect of the thecal sac.

The employee saw Dr. Gratch on December 18, 2000 after an apparent hiatus of about seven (7) years. In the doctor's records is a report of an office visit on October 29, 1993 during which the employee related that he was having some pain in his left ankle, left buttock and low back. The report further states that the pain has been with him off and on since his back problem began, but it is not severe.

The history recorded by Dr. Gratch on December 18, 2000 reads as follows:

> "Having a significant amount of pain in the L4 distribution on the right. He was in Europe December 1st and developed significant pain just lifting a computer; no significant injury. He has been doing reasonably well prior to this; no significant episodes of pain; some ups and downs but generally living his life normally." Pet. Exh. 6.

The physical examination revealed decreased sensation in the L4 nerve root distribution on the right and a decreased knee jerk on the right. The doctor reviewed the MRI study and concluded that the employee had a disc herniation. He recommended medication and an epidural injection. Dr. Gratch testified that based upon the history provided to him, the disc herniation at L4-5 was caused

by the incident lifting the computer on December 1, 2000. He further indicated that the employee was not able to do the traveling required in his job at that time.

While Mr. Mangle was in Pennsylvania and out of work, he saw Dr. Gratch two (2) more times, on December 29, 2000 and January 9, 2001. The employee complained of some pain in his right hip as well, but by the visit in January, he was improving somewhat. The employee returned to work shortly after the January visit and did not see Dr. Gratch again until April 10, 2001, after his abrupt departure from work. In April, Mr. Mangle complained of pain in his right buttock radiating down his right leg. He told the doctor that he "does not wish to live with this pain any longer." Dr. Gratch advised him to stay out of work for six (6) weeks and participate in an aggressive physical therapy program.

The employee returned on May 22, 2001, reporting some improvement, but still experiencing persistent right leg pain. Dr. Gratch did not see the employee again until May 21, 2002. At that time, he still had complaints of back and leg pain. His examination had not changed. The doctor basically stated he could not do anything else for him and he should just rest, exercise, and take medication.

Dr. Gratch had done the second surgery on the employee's back in October 1990. At that time, he did a discectomy at L4-5 and L5-S1, as well as a fusion at those levels. He indicated that although the employee's current problem involved the L4-5 disc as well; the employee's symptoms were on the right side now when they were on the left side before the surgery.

The doctor acknowledged that stopping suddenly in a motor vehicle and being thrown back and forth could cause a recurrent disc herniation if the person complained of buttock and leg pain in the distribution of the L4 nerve root immediately following the incident.

Dr. Mariorenzi, an orthopedic surgeon, evaluated the employee on January 28, 2002 at the request of the employer. The history reflects that the employee noted pain in his low back when he pulled a computer out from under a seat on an airplane. The doctor concluded that Mr. Mangle had suffered a lumbosacral strain from which he had fully recovered. Although he noted some sensory changes in the L4 nerve distribution, Dr. Mariorenzi indicated that this was likely due to his prior back surgery. He also stated that the lumbosacral strain could have been caused by the incident in November 2000 with his motor vehicle.

The doctor disagreed with Dr. Gratch's conclusion that there was a disc herniation and it was caused by the incident on December 1, 2000. He explained that the changes on the MRI were not uncommon post-surgical changes and there was some scar tissue shown on the study as well. In addition, there was minimal evidence on physical examination to support that conclusion. Consequently, Dr. Mariorenzi stated that there was nothing to indicate that the condition shown on the MRI was not already present prior to any incident in November or December 2000.

The trial judge denied the employee's petition, citing two (2) points to support his conclusion that the employee's testimony was not credible. He noted

that Mr. Mangle had failed to inform any of the physicians about the November 2000 motor vehicle incident which he found was a significant incident based upon the testimony of Ms. Coury and Ms. Genest. The trial judge also cited the fact that the employee told Dr. Mariorenzi that he was absolutely pain free and had no further problems with his back after his surgery in 1990. Dr. Mariorenzi testified that this would be remarkable if it was true. However, Mr. Mangle's statement is contradicted by the reports of Dr. Gratch in which he notes that the employee had problems at least until October 1993 and off and on after that.

The role of the Appellate Division in reviewing the decision of a trial judge is strictly circumscribed by statute. Rhode Island General Laws § 28-35-28(b) provides that the factual findings of the trial judge are final unless an appellate panel finds them to be clearly erroneous. Only after finding that the trial judge was clearly wrong can the appellate panel undertake a *de novo* review of the record. Grimes Box Co., Inc. v. Miguel, 509 A.2d 1002 (R.I. 1986).

The employee filed ten (10) reasons of appeal. He then filed a Memorandum in Support of Reasons of Appeal which details ten (10) reasons of appeal and arguments in support thereof. We will address the reasons set forth in the Memorandum. The first reason cites the trial judge's failure to specifically mention the rebuttal testimony of the employee regarding the purchase and lifting of a credenza on the day that two (2) co-workers stated he was noticeably limping and complained of low back and right hip pain after slamming on his brakes to avoid an accident the night before. The employee was questioned

regarding the motor vehicle incident on direct and cross-examination and denied limping or complaining of pain that day. He acknowledged a conversation with a co-worker, but downplayed the evasive actions he took and any physical effects from the incident.

In the face of this directly contradictory testimony, the trial judge chose to believe the testimony of the co-workers over that of the employee. The fact that the trial judge did not specifically refer to the testimony regarding the purchase of the credenza is inconsequential. There was no receipt for the purchase and no other documentary or testimonial evidence to substantiate the employee's story. Under the circumstances, we cannot fault the trial judge for accepting the co-workers' testimony over that of the employee.

In the second and third reasons of appeal, the employee contends that the trial judge overlooked the deposition testimony of Dr. Gratch or erroneously rejected it. The trial decision refers to the fact that the deposition was admitted into evidence but does not provide any details as to the content. However, the trial judge did not need to engage in a lengthy discussion of the doctor's testimony because he rejected it due to lack of foundation, specifically lack of information as to the November motor vehicle incident. The trial judge concluded that without this additional history, the doctor's opinion regarding causation was tainted.

Causation was the primary issue in the case. There was a history of a prior back problem, as well as indications that the employee's back problems flared up

as a result of the motor vehicle incident. The trial judge found that the employee's testimony and the history he provided to the doctors lacked credibility, thereby tainting any opinions based upon that testimony or history. There was no evidence independent of the employee's testimony to substantiate his version of when he sustained this back injury. We find no error on the part of the trial judge with regard to review of the reports or deposition of Dr. Gratch.

Frankly, the deposition testimony of Dr. Gratch may be used to disprove the employee's allegations as much as prove them. Dr. Gratch stated that the jolting back and forth caused by suddenly braking could have caused the employee's condition if he complained of pain in his back and right leg immediately afterwards. Two (2) co-workers testified that he was limping and complaining about his back and right hip the next day.

In his fourth reason of appeal, the employee argues that the trial judge overlooked the report of the MRI done by X-Ray Associates. Again, it was not necessary for the trial judge to discuss the findings set forth in that report because the issue was the cause of those findings. The MRI report itself did nothing but explain the radiologist's findings and had no bearing on the trial judge's assessment of the credibility of the employee.

The fifth and sixth reasons of appeal allege error on the part of the trial judge in failing to rule or ruling incorrectly on objections to hypothetical questions in the depositions of Dr. Gratch and Dr. Mariorenzi. At the time the depositions were presented for admission as evidence, counsel did not object or request

argument and ruling on the objections on the record. There was no discussion on the record with regard to the objections raised in the depositions. Consequently, the objections may be considered waived. In any case, the trial judge did not rely upon any of the testimony brought forth via the hypothetical questions in denying the petition. Based upon the testimony of the employee and the lay witnesses, he concluded that he simply did not believe the employee's version of events. Any rulings on hypothetical questions, or lack thereof, were irrelevant to the outcome of this matter.

In his seventh reason of appeal, the employee contends that he was harmed by the fact that he testified prior to conducting discovery depositions of the two (2) co-workers and the depositions of the doctors. However, he does not explain in what manner he was harmed. The employee filed the petition in October 2001. A pretrial conference was held the end of the month at which time there must have been some indication of the nature of the employer's defense since the petition was denied at that time. In February 2002, an initial hearing was held. At that time, both sides provided information as to what they intended to present at trial, including the names of potential witnesses. The first day of trial was June 6, 2002.

The employee had ample time to conduct any depositions he felt necessary during the period from October 2001 to June 2002. No complaint was made to the trial judge that the employee was not prepared to proceed on June 6, 2002 or

that he was being denied sufficient time to prepare his case. We find no merit in this reason of appeal.

In the eighth reason of appeal, the employee argues that the trial judge erroneously sustained several objections to portions of his rebuttal testimony. We have reviewed the record and find no error on the part of the trial judge in his rulings.

In the ninth reason of appeal, the employee contends that the trial judge's assessment of the employee's credibility was clearly erroneous. Based upon the testimony of the two (2) co-workers, the trial judge found that the employee was not entirely truthful about the nature of the motor vehicle incident. The employee never informed any of the doctors about this incident. The history provided to Dr. Marchand could be interpreted to indicate that the employee was having problems with his back prior to December 1, 2000. The employee informed Dr. Mariorenzi that he was pain free after his second surgery and had no further difficulties with his back until December 1, 2000. However, Dr. Gratch's reports reflect that in October 1993, the employee reported to Dr. Gratch with complaints of minor backache and buttock pain and told the doctor that he has had these problems off and on since the surgery. In addition, there was information in the record regarding the ongoing dispute over the employee's pay.

The cumulative effect of all of this evidence led the trial judge to conclude that he did not believe the employee's testimony regarding how the alleged injury occurred. None of the evidence cited by the employee in his memorandum would

affect that conclusion. Based upon the record before us, the trial judge was not clearly wrong in his evaluation of the employee's credibility.

In his final reason of appeal, the employee contends that the trial judge erroneously relied upon the opinions and testimony of Dr. Mariorenzi. However, the trial judge did not rely on Dr. Mariorenzi's opinion regarding causation; he simply did not believe the employee's version of how the injury allegedly occurred. The trial judge referred to statements the employee made to Dr. Mariorenzi, or did not make, in arriving at his credibility determination. Therefore, this reason has no merit.

Based upon the foregoing, we deny and dismiss the employee's 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

Healy, C.J. and Connor, J. concur.

ENTER:

_____
Healy, C.J.

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Olsson, J.

_____
Connor, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
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LAWSON HEMPHILL INC.	)	

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the 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 July 9, 2003 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Healy, C.J.

_____
Olsson, J.

_____
Connor, J.

I hereby certify that copies were mailed to James A. Currier, Esq., and Michael T. Wallor, Esq., on _____