STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT APPELLATE DIVISION

OCEAN STATE COMMUNITY RESOURCES)
)
VS.) W.C.C. 02-00947
)
ANN MARIE BAILEY)

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the respondent/employee's appeal from a decree of the trial court which found that the employee's incapacity had ended. After careful review of the record and consideration of the arguments of counsel, we find no error on the part of the trial judge and therefore deny the employee's appeal.

The employee was receiving weekly benefits for partial incapacity pursuant to a Memorandum of Agreement dated November 13, 2001. The memorandum indicated that the employee sustained a "cervical/lumbar strain" on August 28, 2001 which resulted in partial incapacity beginning August 29, 2001. The description of the injury was subsequently amended pursuant to a decree entered in W.C.C. No. 02-06944 on January 10, 2003 which added a right shoulder injury to the description.

At the time of her injury, the employee was employed as a home-based therapeutic aide working with physically and mentally impaired children. She estimated that she would lift from 150 to 200 pounds at times while assisting patients in dressing, changing diapers, lifting wheelchairs and generally maneuvering her clients.

Ms. Bailey was involved in a motor vehicle accident on August 28, 2001 in which the vehicle she was driving was struck at the door and front fender of the driver's side, throwing her to the right and injuring her neck, back and right shoulder. She has treated for these injuries with Dr. Daniel R. Gaccione. At the time of her testimony in October 2002, the employee asserted that she was still having problems with her shoulder and neck and was unable to perform the regular duties of her job.

The medical evidence consists of the depositions and reports of Dr. Daniel R. Gaccione and Dr. Norman A. Kornwitz. Dr. Gaccione, an orthopedic surgeon, began treating the employee on September 24, 2001. The employee had been seen in the emergency room on the day of the accident and had already begun a course of physical therapy. The doctor's initial diagnoses were a cervical strain, a lumbar strain and a possible right rotator cuff tear. He ordered an MRI of the right shoulder which did not reveal a tear but did show some evidence of impingement.

Dr. Gaccione saw the employee on a monthly basis through December 2001. He noted little improvement in her condition. The employee was

continuing to take pain medication on a regular basis. As of November 15, 2001, the doctor found that the employee was capable of light duty work with no overhead lifting, no lifting in excess of fifteen (15) pounds, no pulling more than twenty-five (25) pounds, no crawling and no climbing.

The doctor did not see the employee from mid-December until July 1, 2002. During that time, Ms. Bailey had been seeing her primary care physician and also undergone evaluation by Dr. Sumit Das, a neurosurgeon. That evaluation included an MRI of the cervical spine on April 26, 2002 which revealed a bulge/protrusion at C5-6 to the right side indenting the right ventral thecal sac without significant central stenosis and moderate right sided neural foraminal narrowing. Dr. Gaccione testified that these findings could be the cause of some of the employee's ongoing complaints, although she was having more problems with her right shoulder than her neck in July 2002. In fact, he injected her right shoulder at the office visit on July 1, 2002.

The doctor concluded that Ms. Bailey was still partially disabled. He prescribed an anti-inflammatory in an effort to wean her off of the pain medication she was still taking. Dr. Gaccione also discussed performing arthroscopic surgery on the shoulder in light of the lack of improvement in her symptoms.

Dr. Kornwitz, an orthopedic surgeon, evaluated the employee on two (2) occasions at the request of the insurer. On October 10, 2001, the doctor found that the employee suffered from a cervical strain and right rotator cuff tendinitis.

He stated that the cervical strain had improved based upon his examination and that condition did not require any further treatment. He agreed that Ms. Bailey would likely benefit from an injection to her right shoulder. Dr. Kornwitz found the employee partially disabled with restrictions of no restraining patients, no movement of her arm above shoulder height and no lifting in excess of twenty (20) pounds.

Dr. Kornwitz evaluated the employee again on January 9, 2002. The doctor noted inconsistencies in his examination of her right shoulder with a normal neurological examination and good upper body strength. Based upon these findings, he concluded that Ms. Bailey was capable of returning to work without restrictions.

The trial judge chose to rely upon the testimony and opinions of Dr. Kornwitz and found that the employee's incapacity for work had ended. On appeal, the employee contends that the opinions of Dr. Kornwitz are not competent and that the trial judge overlooked or misconceived the medical evidence presented by the employee. We find the employee's arguments to be without merit.

The employee points out that Dr. Kornwitz only examined Ms. Bailey on two (2) occasions and the physical examination lasted only ten (10) minutes. These facts have no bearing on the competency of the doctor's opinion. It is well-settled that the opinions of a treating physician are not afforded any greater weight or probative value than a physician who examines an employee at the request of the

insurer or the request of the court. In addition, Dr. Kornwitz testified that the actual physical examination was likely about ten (10) minutes in duration, but he spent additional time with Ms. Bailey discussing her complaints and her course of treatment to date. There is nothing in the record to indicate that the examination was inadequate.

The employee argues that the opinions of Dr. Kornwitz are not probative because he did not review any of the diagnostic tests and did not review the reports of Dr. Gaccione. The employee underwent an MRI of her right shoulder on October 1, 2001. The results of that test were never introduced into evidence in this matter. However, Dr. Gaccione noted that the test revealed some evidence of impingement, but no rotator cuff tear. Ms. Bailey informed Dr. Kornwitz that she had an MRI of her shoulder which revealed bursitis. Although the doctor stated that he would have liked to have seen the MRI results, he stood by the opinions he rendered based upon his physical examination.

The cervical MRI was done on April 26, 2002, several months after Dr. Kornwitz's second examination in January 2002. His examination of the neck area was objectively normal and the neck was not the employee's primary area of complaint. Furthermore, Ms. Bailey was later evaluated by a neurosurgeon and found not to be a surgical candidate.

It is clear from Dr. Kornwitz's reports that he took a fairly detailed history of the employee's complaints and course of treatment at each examination. The treating physician's reports may have been helpful as additional background

material, but their absence does not destroy the foundation of the doctor's opinion. In fact, Dr. Gaccione treated the employee from September to December 2001, and then did not see the employee for seven (7) months. There would have been limited information that his four (4) reports would have contributed to Dr. Kornwitz's opinions in January 2002.

The employee also takes issue with the extent of Dr. Kornwitz's knowledge of her job duties as a home-based physical therapy aide. The doctor indicated that he works with physical therapy aides in his office and noted that home-based aides perform similar duties. He acknowledged that lifting requirements may range up to 500 pounds depending upon the patient the aide is assisting. It is clear that the doctor took into consideration the physical activities involved in the employee's job, in particular the lifting.

Finally, the employee contends that the trial judge relied upon incorrect information that the employee did not have an injection in her shoulder. In fact, at the time of Dr. Kornwitz's examination in January 2002, the employee had not had an injection in her shoulder. Dr. Gaccione first discussed giving her an injection in November 2001 if she continued to have problems with the shoulder. He mentioned it again in December, but put off the injection again. The employee did not return to see Dr. Gaccione until July 1, 2002, when he did finally give her an injection. However, Dr. Kornwitz was deposed in June 2002. Obviously, he could not have known about the injection. The trial judge in his decision simply mentions what Ms. Bailey told Dr. Kornwitz about the reason for

not having the injection in November 2001. There is no indication that the question of whether the injection took place was a significant factor in the trial judge's decision.

Admittedly, the trial judge did not review in detail in his decision the testimony or reports of Dr. Gaccione, the treating physician. However, he made clear that he had in fact read the reports and the doctor's deposition. In fact, the trial judge did specifically cite portions of Dr. Gaccione's testimony in explaining why he chose to rely upon the opinions of Dr. Kornwitz.

After our review of the record, we find that the testimony and opinions of Dr. Kornwitz were competent. It is well-settled that the trial judge has the right to weigh the evidence and choose between conflicting medical opinions. Parenteau v. Zimmerman Eng., Inc., 111 R.I. 68, 299 A.2d 168 (1973). We will not disturb the findings and orders of the trial judge resulting from that choice absent a finding of clear error. In this case, we find no such error and therefore deny and dismiss the appeal of the employee.

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, and Connor, JJ. concur.

ENTER:

_____
Healy, J.

_____
Olsson, J.

_____
Connor, J.

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the respondent/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 January 10, 2003 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Healy, J.

_____
Olsson, J.

_____
Connor, J.

I hereby certify that copies were mailed to Robert D. Goldberg, Esq., and Ronald A. Izzo, Esq., on _____