STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

BRENDA FERNANDES	)	
	)	
VS.	)	W.C.C. 02-00955
	)	
TECHNIC, INC.	)	

DECISION OF THE APPELLATE DIVISION

HEALY, C. J. This matter was heard before the Appellate Division upon the respondent/employer's appeal from the decision and decree of the trial court which granted the employee's original petition and awarded weekly benefits for partial incapacity from November 29, 2001 and continuing due to the development of urticaria, or hives. The employer filed a claim of appeal basically alleging that the trial judge was clearly erroneous to rely upon the opinion of a physician when the foundation of that opinion was faulty. After thorough review of the record and consideration of the arguments of the parties, we affirm the decision and decree of the trial judge.

The employee worked as a research chemist for Technic, Inc., for eleven (11) years. Her job involved the development and testing of products for the plating industry. The work required the use of tin, lead, various additives, liquid metals, and brass with copper plating. While working with these chemicals, she wore protective equipment including a lab coat, safety glasses, and vinyl gloves.

The employee had returned to work on November 5, 2001, after an absence of approximately six (6) months due to pneumonia and recurrent bronchitis. Upon her return to work, she resumed her regular duties as a research chemist. The employee testified that toward the end of the month, she noticed that her hands were irritated and reddened. She was unsure of the cause, but speculated that either contact with a chemical through a pinhole in her vinyl gloves or over-washing of her hands had caused the irritation. Because of this irritation she began to wear white cotton gloves under her vinyl gloves on November 28, 2001.

During her workday on November 28, 2001, she noted redness and some small lumps on her hands around the joints of her fingers. She finished the work day and then picked her children up from school before returning home. After retrieving her children, she noticed that her hands were extremely hot and itchy and hives were breaking out on her hands, arms, and neck. Ms. Fernandes obtained some Benadryl, an over-the-counter anti-histamine commonly used to treat allergic reactions, from her neighbor. She took the medication when she got home, some more that night, and another dose in the morning. The reaction had subsided by morning and Ms. Fernandes went to work. While the employee was at her station that morning, a co-worker noticed that her hands and arms were starting to break out again. The employee reported the situation to her safety director, Mr. Wayne Ganim, and then left work in order to see her primary care physician, Dr. Akua D. Wiredu.

By the time the employee was seen by Dr. Wiredu later in the day on November 29, 2001, the doctor noted only mild erythema on the left arm. Based upon the history provided by the employee regarding the outbreaks of the last two (2) days, Dr. Wiredu advised the employee to remain out of work until she could follow up with Dr. Thomas Hicks, an occupational medicine specialist she was seeing for respiratory complaints.

The employee saw Dr. Hicks on December 6, 2001 and related to him that she had developed a rash with redness and swelling on November 28, 2001 which spread over her arms, neck, chest, legs and face. She reported to the doctor that after taking Benadryl, the rash improved, but when she returned to work the next day, the rash came back in the same areas. At the time of the appointment, the employee's skin was clear. She testified that she had periodic bouts of hives and/or swelling and redness of her hands for a few months after work and she noted some exacerbation of this condition with exposure to cold and the outdoors. At the time of her testimony in May 2002, she had not experienced an outbreak since February of that year.

In addition to seeing Dr. Hicks, the employee was referred to two (2) allergists, Dr. David R. Katzen and Dr. Alan D. Gaines, for evaluation. On her own initiative, she saw Dr. Karen Mitchell at the Lahey Clinic. The employer forwarded all of her medical records to Dr. John F. Zwetchkenbaum, another allergist, for review. The depositions and medical records of the various physicians were introduced into evidence.

The trial judge chose to rely upon the opinion of Dr. Hicks, who concluded that the employee's condition was caused by an exposure at the workplace. As a result, he awarded weekly benefits for partial incapacity from November 29, 2001 and continuing.

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. See Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996). The Appellate Division is entitled to conduct a *de novo* review of the evidence only after a finding is made that the trial judge was clearly wrong. Id.; Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986). Mindful of this standard, we have carefully reviewed the entire record of this proceeding. For the reasons set forth, we find that the trial judge did not commit clear error.

Therefore, we find no merit in the employer's appeal and affirm the trial judge's decision and decree.

The employer filed eight (8) reasons of appeal in which it argues that the trial judge was clearly erroneous to rely upon the opinion of Dr. Hicks regarding causation because the doctor's opinion was based upon a faulty foundation. Pursuant to the oft-cited holding in Parenteau v. Zimmerman Eng'g, 111 R.I. 68, 299 A.2d 168 (1973), when presented with conflicting medical opinions, the trial judge is entitled to select one (1) expert opinion over another, either in whole or in part. As long as the medical opinion preferred by the court is competent, this exercise of the trial judge's discretion should not be disturbed.

Dr. Hicks noted two (2) primary factors in the formation of his opinion that the employee's condition was due to exposure at the workplace. First, he noted the temporal relationship – the employee only noted the development of the rash at work and it initially started in a localized area, but with continued exposure at work, it progressed to a more significant generalized reaction. Second, he pointed out that a number of the chemicals the employee worked with were considered potential skin sensitizers.

The employer contends that Dr. Hicks' belief that the outbreak of hives started while the employee was at work is erroneous. However, the employee's testimony is consistent with the history relied upon by Dr. Hicks. Ms. Fernandes testified that she had noticed some redness and swelling of her hands while at work beginning around November 20, 2001. At that time, she thought the dryness and small bumps might be due to either washing her hands too frequently or possibly exposure to a chemical through a pin hole in her vinyl gloves. (Tr. 13) When the employee left work on November 28, 2001, she noted that her hands were very red and somewhat swollen. (Tr. 35) She did state that after she left work and picked up her children

from school, she felt that her hands were extremely hot and very itchy. She then noted the hives breaking out on her hands, arms and neck. (Tr. 13) After taking Benadryl that night and again the next morning, the rash was gone. After being at work for a little over an hour on November 29, 2001, she began to break out on her hands and arms again.

Thus, the record demonstrates that the employee was suffering symptoms which originated at work, and those symptoms simply became more pronounced after she left work on November 28, 2001. Also, she developed the same reaction after only a brief period of time at work on November 29, 2001, even though she had taken some Benadryl that morning. Dr. Hicks testified that this progression of symptoms (from mild to pronounced and from localized to the hand and fingers to generalized over the body) indicated that the employee was becoming more and more sensitized by exposure to a chemical at work. The employee's testimony is therefore consistent with the history relied upon by Dr. Hicks that the urticarial reaction initially began while she was at work.

The appellant also argues that since the employee experienced several outbreaks of urticaria (or hives) after she permanently left the workplace on November 29, 2001, it is an indication that Dr. Hicks' opinion regarding causation is erroneous because it was based in part upon his understanding that the rash resolved while the employee was out of work. The employee testified in May 2002 that she had last experienced an outbreak in February 2002. The medical records indicate that she had several outbreaks after she left work at the end of November 2001. In particular, she noted that cold weather seemed to aggravate the condition. Dr. Hicks, however, explained why the subsequent outbreaks while she was out of work did not undermine his opinion regarding the triggering cause of the condition.

> "Q: And if she continued to have this problem after January 3, 2002, the likelihood that it was caused by work decreases as the

time goes on that she continues to have the problem; is that fair to say?

"A: No. I actually don't think it's fair to say because it might be that, in addition to reacting, potentially reacting to something at work she is now reacting to the cold. So it might be that she's generalizing, the urticaria's generalizing to react to other things like cold." (Pet. Exh. 1, pp. 46-47)

Dr. Hicks was aware that the employee had some periodic symptoms after she left work, but he attributed those outbreaks to an increased skin sensitivity which was caused by the exposure to chemicals or solutions at work. The initial reaction was caused by the environment at work, and that continued exposure caused a gradually increasing skin sensitivity which might then react to other agents or types of exposure, such as cold temperatures. Therefore, the fact that the employee had these outbreaks after she stopped working does not undermine Dr. Hicks' opinion as to causation.

The employer further contends that Dr. Hicks' opinion regarding causation is not competent because he relied on the erroneous belief that the blood tests conducted on the employee were normal. At her first office visit with Dr. Hicks on December 6, 2001 after the initial outbreak of hives, the doctor referred the employee to Dr. David R. Katzen, an allergist and immunologist. Dr. Katzen saw Ms. Fernandes on December 12, 2001 and ordered a series of blood tests. The employee saw Dr. Hicks again on January 3, 2002. The doctor testified that he did not have the actual results of the bloodwork, but the employee had informed him that the results were essentially normal. The normal results indicated to the doctor that there was no medical illness or condition causing the urticaria. The record does demonstrate that Dr. Hicks consistently stated that the blood tests were normal.

Dr. Katzen did note a slight abnormality in the blood tests.

> ". . . And I did some studies looking to see if there was a specific viral trigger. Cryoglobulin or cold agglutins are antibodies you can see in cold urticaria; they were negative. The mycoplasma titer showed an elevated IGH, so she had may have had a recent infection with mycoplasma which would give you what—they call that walking pneumonia, and that can be associated with cold urticaria. And I did some studies which showed a prior history of mono, but not an acute illness." (Res. Exh. 4, pp. 11-12)

The employer argues that this discrepancy demonstrates that the trial judge overlooked the fact that Dr. Hicks' testimony was based on a misunderstanding of the blood results. However, the second allergist seen by the employee, Dr. Alan D. Gaines, also reviewed the results of the blood tests and stated that the results were "reasonably within normal range." (Resp. Exh. 3, p. 11) He testified as follows:

> "The mycoplasma IGM was just at the borderline of being high which mycoplasma is a type of infection that can sometimes cause cold agglutinants to be positive. But the cold agglutinants were negative on this test, so it probably is not a significant finding here. The normal is less than one to 16, and this was exactly one to 16. So it was right on the edge of the normal range which is probably just a fluke, I would assess." (Res. Exh. 3, p. 21)

Thus, Dr. Hicks was not incorrect in stating that the blood test results were essentially within normal limits and using that premise in formulating his opinion as to the cause of the employee's condition.

Further, the blood tests did not establish a definitive link between the past viral infection and the employee's present condition. Dr. Katzen simply stated that the mycoplasma "can be associated" with cold urticaria. (Res. Exh. 4, p. 12) Dr. Gaines dismissed the blood test results as insignificant and stated that he did not know what caused the urticaria in the employee's case. He noted that many cases of urticaria are idiopathic, with no known cause. *See* Res. Exh. 3, p. 21. Consequently, the record demonstrates that Dr. Hicks was not the only physician who characterized the blood results as normal with respect to the presence of certain antibodies,

abnormal immunoglobulins, or abnormal proteins that can cause cold urticaria. In addition, none of the medical witnesses relied on the blood test results to establish a diagnosis and a definitive link between a past infection and the employee's current outbreak.

Finally, the employer argues that the trial judge ignored the weight of the evidence in relying on Dr. Hicks' opinion while the three (3) other doctors disagreed with it. This is the precise reason why such deference is accorded to the trial judge by Parenteau, *supra*. Under Parenteau, the trial judge is entitled to choose the opinion of one (1) medical expert over another. The simple fact that the three (3) other doctors, one of whom was hired by the employer to review the case, differed with Dr. Hicks regarding causation, does not alter or limit the court's authority to select what he views as the most persuasive opinion. In the instant case, the trial judge was convinced by the testimony of Dr. Hicks. We perceive no error in his choice. Dr. Hicks' opinion was based on competent evidence and he explained persuasively why he differed with the opinions of his colleagues.

It is axiomatic that the trial judge is the finder of facts and that great deference will be accorded his determination. He had the unique opportunity to observe the witnesses and to evaluate the testimony with the assistance of his present sense impressions. After listening to the testimony and reviewing the evidence, the trial judge selected Dr. Hicks' opinion over the testimony of the other witnesses. That decision will only be disturbed if it is clearly wrong. See Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996). In the instant petition, the trial judge's reliance on Dr. Hicks' testimony regarding the issue of causation is supported by competent evidence, and thus, will not be disturbed.

For the aforesaid reasons, we hereby deny and dismiss the employer's reasons of appeal and affirm the trial judge's decision and decree. Attorney Jack R. DeGiovanni, Jr., is awarded a

counsel fee in the amount of Two Thousand Five Hundred and 00/100 ($2,500.00) Dollars for services rendered to the employee in the successful defense of the employer's appeal.

In accordance with Rule 2.20 of the Rules of Practice of the Worker's Compensation Court, a final decree, a copy of which is enclosed, shall be entered on

Olsson and Connor, JJ. concur.

ENTER:

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Healy, C. J.

_____
Olsson, J.

_____
Connor, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

BRENDA FERNANDES)
)
VS.) W.C.C. 02-00955
)
TECHNIC, INC.)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the respondent/employer and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

1. That the findings of fact and the orders contained in a decree of this Court entered on October 9, 2002 be, and they hereby are, affirmed.

2. That the employer shall pay a counsel fee in the sum of Two Thousand Five Hundred and 00/100 ($2,500.00) Dollars to Jack R. DeGiovanni, Jr., Esq., attorney for the employee, for the successful defense of the employer's appeal.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Healy, C. J.

_____
Olsson, J.

_____
Connor, J.

I hereby certify that copies were mailed to Jack R. DeGiovanni, Jr., Esq., and Berndt W. Anderson, Esq., on

_____