STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

LYNNE M. RUSSELL	)	
	)	
VS.	)	W.C.C. 02-04208
	)	
ANN & HOPE	)	
ANN & HOPE	)	
	)	
VS.	)	W.C.C. 02-02989
	)	
LYNNE RUSSELL	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. These two (2) matters were consolidated for hearing and decision at the trial level and are now before the Appellate Division as consolidated cases. An order was issued to the parties to show cause why this matter should not be summarily decided based upon the principle enunciated in Parenteau v. Zimmerman Eng., Inc., 111 R.I. 68, 299 A.2d 168 (1973). The trial judge made an election between conflicting medical opinions and we cannot embark upon a *de novo* review of the evidence absent a finding that the trial judge

overlooked or misconceived material evidence or was otherwise clearly erroneous. After considering the arguments of counsel and reviewing the record, we conclude that cause has not been shown and we shall summarily dispose of this matter.

W.C.C. No. 02-02989 is an Employer's Petition to Review alleging that the employee's incapacity for work resulting from a work-related injury she sustained on April 4, 1998 has ended. The petition was granted at the pretrial conference on August 20, 2002 and the employee's weekly benefits were discontinued based upon the report of an impartial medical examiner. The employee claimed a trial. At the conclusion of the trial, the trial judge affirmed his previous decision granting the employer's petition. The employee then filed a claim of appeal.

W.C.CC. No. 02-04208 is an Employee's Petition to Review requesting permission for back surgery as recommended by Dr. Christopher F. Huntington. The petition was denied at the pretrial conference on August 20, 2002 and the employee claimed a trial. After completion of the trial, the trial judge rendered a bench decision denying the employee's petition. The employee then filed a claim of appeal.

After thoroughly reviewing the record in these matters and carefully considering the arguments of the parties, we find no error on the part of the trial judge and affirm his decision and decrees.

The employee had been receiving weekly benefits for partial incapacity since April 5, 1998 pursuant to a decree entered in W.C.C. No. 98-04771 on November 15, 1999. In that decree, it was found that she sustained a low back

strain on April 4, 1998 which resulted in partial incapacity from April 5, 1998 and continuing.

Ms. Russell testified that she continues to have pain in her low back, left buttocks and left leg. She explained that on September 17, 2000, she went to a NASCAR race in Loudon, New Hampshire. During the drive up there, her back and left leg were bothering her. After arriving at the track, she was walking when her left leg began to go numb and she had back spasms. Her left leg gave out and she fell forward, breaking her right kneecap and chipping a bone in her right arm.

The employee stated that when she was examined by Dr. Medhat Kader at the request of the court, she brought MRI films, films from a discogram and CT scan, and x-rays of her knee. As she was leaving the doctor's office, he came out and called her back in to the office because he had forgotten to look at the films. While she was in a room with him, the doctor simply held up each of the films and glanced at them quickly. She also asserted that the examination only took about ten (10) minutes.

Tammy Norman, the employee's cousin and best friend, had gone to Dr. Kader's office with Ms. Russell and corroborated her testimony regarding the doctor's viewing of the films, as well as what occurred in New Hampshire.

The medical evidence consists of the depositions and reports of Dr. Christopher F. Huntington, Dr. Norman A. Kornwitz, and Dr. Medhat A. Kader. Dr. Huntington, an orthopedic surgeon, began treating the employee in

September 1998. An MRI was done on October 2, 1998 which Dr. Huntington reported as revealing significant degenerative disc disease at L4-5 without herniation or nerve impingement. In a later report dated December 21, 1998, the doctor stated that the MRI study showed disc disease with an annular tear at L4-5 and end plate changes in the L5 superior end plate consistent with bone inflammation.

The employee was treated conservatively with medication and injections but reported no significant relief. Her physical examinations revealed only tenderness, some loss of motion, and occasional spasm in the low back area. Her reflexes and motor and sensory findings were normal despite her complaints of severe low back pain radiating down her left leg and weakness in the left leg. A second MRI was performed in early January 2000 and revealed inflammatory changes in the bone around the L4-5 disc, disc dessication at L4-5, a small left paracentral protrusion at L4-5 without impingement, and facet arthritis at L4-5. In November 2000, Dr. Huntington performed a discogram. He described the results of that procedure as consistent with the results of the MRI study. In December 2000, Dr. Huntington began to discuss the possibility of surgery.

The doctor testified that the employee is unable to return to her regular job and the surgery he has proposed is necessary to treat her current condition which was caused by the work injury. He asserted that Ms. Russell will not get any better without surgery.

On cross-examination, Dr. Huntington indicated that he had nothing in his records or reports regarding the incident on September 17, 2000 when the employee fell and broke her kneecap. Therefore, he could not render an opinion as to whether this incident was related to, or caused by, the work-related injury to her back.

Dr. Kornwitz, an orthopedic surgeon, examined the employee on April 2, 2002 at the request of the insurer. As part of his evaluation, he reviewed the reports of three (3) MRI studies and the reports of the discogram. The doctor noted that the employee was hypersensitive to touch throughout her low back and although she complained of spasm, he could not detect any. Based upon the normal neurological and orthopedic findings, Dr. Kornwitz concluded that the employee could return to work without restrictions. He also noted that the MRI studies and the discogram failed to demonstrate any significant neuroforaminal encroachment or spinal stenosis that would cause chronic neurological symptoms of which the employee complained.

Dr. Kader, an orthopedic surgeon, conducted an impartial medical examination of Ms. Russell on July 23, 2002 at the request of the court. Dr. Kader stated that he reviewed the films brought to his office by the employee and he also reviewed the reports of the MRI studies and the discogram. It was his opinion that the diagnostic testing was essentially negative. He noted "serious inconsistencies" during his physical examination, which he documented in his report. He concluded that the employee was not disabled and no longer suffered

from the effects of the work-related injury. He also stated that the injury to her kneecap from the fall in September 2000 was not related to the 1998 injury to her low back.

The trial judge acknowledged he was presented with conflicting medical opinions from the three (3) physicians. He pointed out that the 1998 work injury had been described as a low back strain and this description had never been amended. However, he noted that even accepting Dr. Huntington's contention that the employee has an annular tear at L4-5, this abnormality has not resulted in any neurological deficits or positive objective findings. The trial judge therefore found the opinions of Dr. Kornwitz and Dr. Kader to be more probative and persuasive and concluded that the employee's incapacity had ended. Based upon that finding, he discontinued the employee's weekly benefits and denied permission for the surgery proposed by Dr. Huntington.

A trial judge's findings on factual matters are final unless the appellate panel finds them to be clearly erroneous. R.I.G.L. § 28-35-28(b). In a case such as the present matter involving the trial judge's election between conflicting expert medical opinions, we cannot substitute our evaluation of the evidence for that of the trial judge absent an initial finding that he overlooked or misconstrued material evidence, or was otherwise clearly wrong.

The employee has filed three (3) reasons of appeal. In the first reason of appeal, she seems to suggest that the trial judge rejected the opinions of Dr. Huntington because his diagnosis of her condition differed from the original

description of the work-related injury and that this was improper. The trial judge did note that the injury was originally described as a low back strain and that description was never amended. At different times, Dr. Huntington's diagnosis was degenerative disc disease with an annular tear at L4-5, lumbar radiculopathy, and a herniated disc at L4-5. However, the trial judge noted that even accepting that the employee had these abnormalities in her back, as revealed by the MRI studies and discogram, his conclusion was that she was no longer disabled from her regular employment.

The mere fact that an individual has some structural abnormalities in her spine does not translate automatically into disability. The focus is on the physical ability to work, not the injury or condition itself. In this case, the employee's physical examinations were very benign with no positive objective findings to substantiate her complaints. Even the diagnostic testing did not reveal any impingement or encroachment of any neural structures. It is clear from his decision that the trial judge considered all of the evidence and did not simply conclude that the employee must have recovered from a lumbar strain after four (4) years. He chose to accept the opinions of Drs. Kornwitz and Kader regarding the employee's ability to work based upon the totality of the evidence.

In her second reason of appeal, the employee is apparently arguing that the trial judge was wrong to accept the opinions of Drs. Kornwitz and Kader once he accepted the fact that the employee had an abnormality in her back, namely an annular tear as described by Dr. Huntington. However, as noted above, based

upon the evidence presented, the trial judge concluded that the annular tear, assuming it was present, was not disabling. The mere fact that the annular tear existed is not sufficient to establish an entitlement to ongoing benefits.

In her final reason of appeal, the employee contends that the opinions of Dr. Huntington should have been accorded more weight because he is the only physician who actually examined all of the films of the diagnostic testing. This argument has no merit. Both Dr. Kornwitz and Dr. Kader had the opportunity to review the reports of the radiologists who interpreted the films. The radiologists are physicians who specialize in the interpretation of diagnostic testing such as MRI studies and discograms. Obviously, other physicians can use their interpretations in formulating opinions regarding patients. Drs. Kornwitz and Kader also had the report of the discogram authored by Dr. Huntington and were well aware of his opinion that the employee had an annular tear. No one disagreed with that opinion. The difference of opinion arose regarding the employee's ability to work.

Dr. Huntington testified that before performing surgery, he prefers to review the actual films of the studies himself. He explained that prior to surgery he reviews the films because he looks for different things than a radiologist does, such as how to approach the surgery and formulating options for treatment. A radiologist is simply stating his interpretation of what is shown on the film. In the present case, neither Dr. Kader nor Dr. Kornwitz was preparing to perform surgery on the employee. They utilized the reports of the radiologists in the same

way Dr. Huntington does at this stage – as a reference to assist in diagnosis and treatment. Therefore, the fact that the doctors did not view the actual films does not affect the foundation for their expert opinions.

We find that the trial judge was not clearly erroneous in finding that the employee's incapacity had ended and that the proposed surgery was not necessary to treat the effects of the work-related injury of April 4, 1998. Consequently, the employee's appeal is denied and dismissed and the decision and decree of the trial judge is affirmed.

In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, final decrees, copies of which are enclosed, shall be entered on

Connor and Salem, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Connor, J.

_____
Salem, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

ANN & HOPE	)	
	)	
VS.	)	W.C.C. 02-02989
	)	
LYNNE RUSSELL	)	

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 June 26, 2003 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Olsson, J.

_____
Connor, J.

_____
Salem, J.

I hereby certify that copies were mailed to Arthur E. Chatfield III, Esq., and Kevin O. Flood, Esq., on

_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

LYNNE M. RUSSELL	)	
	)	
VS.	)	W.C.C. 02-04208
	)	
ANN & HOPE	)	

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 June 26, 2003 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Olsson, J.

_____
Connor, J.

_____
Salem, J.

I hereby certify that copies were mailed to Arthur E. Chatfield III, Esq., and Kevin O. Flood, Esq., on

_____