STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

DENNIS DELBARONE	)	
	)	
VS.	)	W.C.C. 03-00406
	)	
MOTIVA ENTERPRISES	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division pursuant to an order directing the employer to show cause why this case should not be summarily decided. After considering the arguments of the parties, we find that cause has not been shown and the matter is in order for summary disposition.

This is the respondent/employer's appeal from the decision and decree of the trial judge which granted the employee's request for permission for major surgery based upon a finding that the herniated discs on the left and right at C6-7 which were discovered in October 2002, are the result of the work-related injury sustained by the employee on October 16, 1995. After thorough review of the record and consideration of the arguments of the parties, we deny the appeal and affirm the trial judge's decision and decree.

The employee is currently receiving weekly benefits in accordance with the

last decree in the case which was entered in W.C.C. No. 97-00502 on November 28, 1997. In that decree, it was found that the employee was partially disabled and his condition had reached maximum medical improvement. The judge in that case reduced the employee's weekly benefits to seventy percent (70%) of his weekly compensation rate, but declined to reduce his weekly benefits any further based upon the degree of functional impairment of his whole body.

Shortly after the present petition was filed, the employee filed an Employee's Petition to Review alleging that the Memorandum of Agreement dated January 10, 1997 which memorialized his work injury of October 16, 1995, did not correctly describe his injury. At the pretrial conference on March 11, 2003, the trial judge agreed with the employee and amended the description to read "C6 nerve root compression and irritation, neuroforaminal stenosis with radiculitis into the right upper extremity." This pretrial order was apparently not appealed by either party.

The matter before the Appellate Division is an Employee's Petition to Review alleging that the employer refuses to pay for necessary medical services and refuses to give permission for major surgery, specifically an anterior cervical discectomy and fusion with allow graft at C6-7. The petition was denied at the pretrial conference and the employee claimed a trial in a timely manner.

The employee did not testify. The medical evidence consisted of the deposition and records of Dr. Melvyn M. Gelch, which included a copy of his deposition testimony from 1997 in a prior case, and two (2) depositions of Dr.

Steven L. Blazar with records attached, one (1) of which was also from the prior case in 1997.

Dr. Gelch, a neurosurgeon, examined the employee for the first time on October 23, 1995; only a week after Mr. DelBarone sustained his work-related injury. The employee's primary complaints were neck pain and pain radiating down his right arm. An MRI of the cervical spine on November 1, 1995 revealed a posterior osteophyte and disc bulge with right-sided uncovertebral hypertrophy resulting in mild right neural foraminal stenosis at C5-6 and C6-7. An EMG study showed evidence of some C6 nerve root abnormalities. The doctor's diagnosis was C6 nerve root irritation and compression caused by neuroforaminal stenosis.

As of March 20, 1996, Dr. Gelch found that the employee's condition had reached maximum medical improvement and he remained partially disabled.

Dr. Gelch did not see the employee again until October 30, 2002. At that time, Mr. DelBarone informed the doctor that his condition was stable until about two (2) months earlier when he began to experience severe pain in the left scapular area radiating down his left arm, similar to the problems he had on the right side. Dr. Gelch had the opportunity to review the report and the films of an MRI of the cervical spine which was done on October 16, 2002. The report noted a sizable disc herniation on the left at C6-7, progression of degenerative disc disease at C6-7 and to a greater degree at C5-6 with osteophyte encroachment on the spinal canal and neural foramina bilaterally at both levels, osteophyte encroachment most severe to the right of midline at C6-7, and spinal stenosis at

both levels. However, Dr. Gelch stated that the films indicated a disc herniation on the right as well as the left at the C6-7 level. He recommended that the employee undergo surgery to alleviate his symptoms.

Dr. Gelch acknowledged that during the previous period of treatment in 1995 and 1996, the employee's complaints were confined to the right side of his neck and his right arm. In addition, the MRI done in 1995 revealed only right-sided abnormalities. The doctor admitted that he had no knowledge of the employee's activities from 1996 to 2002, but he stated that such information would have no effect on his opinion because the recent MRI study revealed the progression of the problems the employee had with the discs at C5-6 and C6-7 since 1995.

Dr. Blazar, an orthopedic surgeon, examined the employee on December 5, 1996 and again on June 6, 2003, at the request of the insurer. He also reviewed the reports of the MRI studies from 1995 and 2002. He stated that there was no relationship between the herniated disc on the left at C6-7 and the employee's injury in 1995. Dr. Blazar testified that the natural progression of the neuroforaminal stenosis would not cause a disc herniation without some intervening activity. In addition, he noted that a person with stenosis is actually less likely to herniate a disc spontaneously because stenosis causes more bone formation and results in less movement of the disc.

After thoroughly reviewing the medical evidence, the trial judge, citing Parenteau v. Zimmerman Eng., Inc., 111 R.I. 68, 299 A.2d 168 (1973), opted to

rely upon the opinion of Dr. Gelch as the most probative and reliable with regard to the cause of the herniated disc at C6-7. Consequently, he found that the disc herniations on the left and right at C6-7 were the result of the work-related injury the employee sustained on October 16, 1995, and that the surgery recommended by Dr. Gelch was necessary to treat the condition.

The employer has filed one (1) reason of appeal arguing that the trial judge misapplied and misconstrued the medical evidence because the opinions put forth by Dr. Gelch were not competent or probative. We find no merit in the employer's argument and therefore, deny the appeal.

The scope of review of the Appellate Division is limited by statute and case law. Section 28-35-28(b) of the Rhode Island General Laws provides that a trial judge's findings on factual matters are final unless the Appellate Division determines that they are clearly erroneous. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). This panel is not permitted to undertake a *de novo* review of the evidence without first making a specific finding 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)).

The employer contends that Dr. Gelch failed to provide an adequate explanation regarding how the disc herniations were related to the work injury and his opinion was flawed because the disc herniations were not at the same level as the 1995 injury. In fact, Dr. Gelch was asked the basis for his opinion and responded as follows:

> "October 16th, 1995 injury lead to two nerves on the right side that were irritated or compressed between C5-6 and C6-7. Both discs being injured can produce trouble right side or left side since the disc goes right across from one side to the other. It is true that the arthritic ridges, the bony ridges pre-existed but they were aggravated as was the disc by his injury of October 16th, 1995; therefore, if you find a herniated disc at the same level as his previous injury, whether right side or left side, it is related to what caused the disc to become abnormal." (Pet. Exh. 3, pp. 11-12)

The description of the 1995 injury, as agreed upon by the parties and documented in the pretrial order entered in W.C.C. No. 03-01386, is "C6 nerve root compression and irritation, neuroforaminal stenosis with radiculitis into the right upper extremity." (Pet. Exh. 2) The employer mistakenly states that the description mentioned the C5-6 level. It is clear from the medical records that there were abnormalities at both the C5-6 and C6-7 levels.

The trial judge acknowledged that the opinions of Dr. Gelch and Dr. Blazar were diametrically opposed. As noted above, Dr. Gelch provided an explanation for his opinion as to how the employee's current condition was related to the 1995 injury. Dr. Blazar adamantly disagreed with that opinion and testified that it was not possible that they were related in any way. The employer obviously believes that Dr. Blazar is correct and provided the more plausible explanation for his opinion. However, the opinion of Dr. Gelch is just as plausible and is certainly competent evidence.

The trial judge found the testimony of Dr. Gelch to be more persuasive than that of Dr. Blazar. It is clearly within his discretion to choose between conflicting

medical opinions. Parenteau v. Zimmerman Eng., Inc., 111 R.I. 68, 299 A.2d 168 (1973). Based upon our review of the record, we cannot say that he was clearly wrong in making his determination. Therefore, we deny the employer'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

Connor and Salem, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Connor, J.

_____
Salem, J.

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AMENDED FINAL DECREE OF THE APPELLATE DIVISION

In accordance with Rule 1.5 of the Rules of Practice of the Workers' Compensation Court, an amended decree is hereby entered in order to award a counsel fee to the employee's attorney for the successful defense of the employer's appeal.

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:

The findings of fact and the order contained in a decree of this Court entered on September 4, 2003 be, and they hereby are, affirmed.

The employer shall pay a counsel fee in the amount of Seven Hundred Fifty and 00/100 ($750.00) Dollars to Lewis J. Paras, 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:

_____

ENTER:

_____
Olsson, J.

_____
Connor, J.

_____
Salem, J.

I hereby certify that copies were mailed to Fred L. Mason, Esq., and Lewis Paras, Esq., on

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