

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

KENNETH PALAZZO)

)

VS.)

W.C.C. 03-05467

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CHEM-TAINER INDUSTRIES, 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 petition alleging that he sustained a return of incapacity beginning May 5, 2003 and that the employer has refused to pay for necessary medical services, specifically low back surgery done by Dr. William F. Brennan, Jr.

The employee sustained a low back contusion/sprain on May 13, 1999 resulting in partial incapacity beginning May 14, 1999. He received weekly workers' compensation benefits until August 23, 1999 when his benefits were stopped pursuant to a Suspension Agreement and Receipt signed by both parties.

The Appellate Division was not provided with any portion of the trial transcript although it appears that the employee was the only witness to testify before the trial judge who then rendered a written decision. At the time of his injury in 1999, Mr. Palazzo was working as a shipper/receiver/material handler which was heavy work involving lifting weights from fifteen (15) to one hundred twenty-five (125) pounds. After recovering from his injury, he returned to work performing similar jobs for a couple of different employers. In January 2003, he was laid

off and received unemployment benefits until June 2003. This petition was filed on August 13, 2003.

The medical evidence consists of the records of Dr. Dennis Botelho, the deposition and records of Dr. William F. Brennan, Jr., and the report of Dr. Stanley Stutz. Dr. Botelho is the employee's primary care physician. In March 2003, the employee complained to the doctor of back pain and Dr. Botelho referred him to Dr. Brennan for a consultation. There is no mention of any other back complaints in the records of Dr. Botelho, which date back to 1995.

Included in the deposition of Dr. Brennan were the records of Dr. Vincent I. MacAndrew, Jr., an orthopedic surgeon who treated the employee in 1999 for his low back injury. A CT scan of the lumbar spine was done on July 9, 1999 and revealed marked annular bulging at L3-4 with end plate degenerative changes as well as shallow annular bulging at L4-5 and L5-S1. Dr. MacAndrew indicated that he thought the employee had a soft tissue injury with inflammation. He referred the employee for physical therapy and prescribed medication. On September 16, 1999, the employee reported that he had no back pain or radiation of pain or discomfort. Dr. MacAndrew discharged the employee to return to his regular job.

There is no record of any further treatment for back problems until November 15, 2001 when Mr. Palazzo returned to see Dr. MacAndrew. He reported that he recently experienced a flare-up of back discomfort and has had intermittent discomfort since 1999. However, he had continued to work at a fairly heavy job. Dr. MacAndrew noted that too much twisting while lifting would likely cause back pain considering the degenerative disc disease in the employee's spine. He prescribed exercises and some medication.

Dr. Stutz evaluated the employee on two (2) occasions at the request of the employer. The first examination took place on August 2, 1999 and was essentially normal. The doctor

indicated that the employee had likely sustained a lumbar strain but at the time of his examination, he was able to return to his regular work.

Dr. Stutz conducted a second evaluation on February 2, 2004. The employee reported to the doctor that after seeing him in August 1999, he had continued to treat with Dr. MacAndrew until he changed his office practice. He then began treating with Dr. Brennan and has been seeing him for a couple of years. Mr. Palazzo also informed the doctor that he had stopped working in January 2003 due to increasing back pain. There were no objective findings noted during the physical examination. Dr. Stutz was able to review the records of Dr. MacAndrew and Dr. Brennan as well as the report of an MRI done on April 22, 2003. He concluded that the employee had “lumbar instability, based on radiographic findings, as per the notes of Dr. Brennan.” However, he stated that he could not relate that diagnosis to the work-related injury in 1999, noting that the employee had returned to work in a heavy job for almost two (2) years thereafter and there was no record of any treatment during that time.

Dr. Brennan first examined the employee on April 14, 2003. In the history, he notes that the employee has been treated intermittently since the injury in May 1999 with physical therapy and medication. Mr. Palazzo further indicated to the doctor that the pain had continued and has worsened over time. An MRI was done on April 22, 2003 which revealed degenerative disc disease and facet joint disease as well as tiny disc protrusions at L4-5 and the lumbosacral junction. After reviewing the results of the MRI, Dr. Brennan stated that the employee had obvious instability at L3-4 and L4-5 and proposed surgery to relieve his symptoms since conservative measures had failed.

The employee did not return to see Dr. Brennan again until November 20, 2003. He informed the doctor that he wanted to have the surgery which would involve a laminectomy and

fusion. Dr. Brennan testified that based upon the history he obtained from the employee, his examinations, and the results of the MRI, the employee's current condition was caused by the 1999 injury and that the surgery was necessary to treat that condition. He acknowledged that the degenerative changes revealed on the diagnostic testing predated the injury in 1999 and could worsen without any further incident. He agreed that his opinion was in part based upon the employee's statements that he had continuous back pain and discomfort since 1999 and had undergone at least intermittent treatment since then.

The trial judge chose to rely upon the opinion of Dr. Stutz that the employee's current condition was not caused by the work-related injury he sustained in 1999. He noted that the history provided by the employee to both Drs. Stutz and Brennan was not consistent with the employee's testimony or the prior medical records. He therefore denied the employee's petition in its entirety.

Appellate review of a trial judge's decision is strictly circumscribed by statute. Pursuant to R.I.G.L. § 28-35-28(b) findings of fact made by a trial judge are final unless an appellate panel determines that they are clearly erroneous. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). Only after such a finding may the appellate panel conduct a *de novo* review of the record. Id. (citing Grimes Box Co., Inc. v. Miguel, 509 A.2d 1002 (R.I. 1986)).

The employee has filed three (3) reasons of appeal. In the first reason, the employee contends that the trial judge was wrong to deny his petition after concluding that the employee's credibility was "highly suspect." (Dec. p. 9) The employee argues that his credibility should not be a consideration in a petition for a return of incapacity because liability for the underlying work injury has already been established. However, credibility is always an issue. Expert medical opinions generally are based to some degree upon the history of the event, course of

treatment, and subsequent activities as related by the injured worker to the doctor. If that history is contradicted by other evidence, the foundation of the doctor's opinion may be affected.

In the present case, the trial judge pointed out several inconsistencies between the employee's testimony and the history he provided to Drs. Brennan and Stutz. The employee told Dr. Brennan that he had ongoing problems with his back since the 1999 injury and had treated at least intermittently since then. However, Dr. MacAndrew discharged the employee in September 1999 with the notation that he had no symptoms at all. Mr. Palazzo proceeded to work for at least two (2) years in a heavy job. The only complaint of back problems or treatment in the interim was on one (1) occasion in November 2001. The employee told Dr. Stutz that he left work in January 2003 because of increasing back pain. However, Mr. Palazzo acknowledged that he was laid off and collected unemployment for almost six (6) months.

All of these conflicting facts would obviously influence a physician's opinion as to the cause of the employee's present condition. Dr. Brennan stated that his opinion that the current condition was caused by or related to the 1999 injury was based upon the history provided to him by Mr. Palazzo. That history was inaccurate and/or incomplete which reflected poorly on the employee's credibility. We cannot say that the trial judge was wrong to reject the opinion of Dr. Brennan on the basis that the foundation was faulty.

In his second reason of appeal, the employee argues that the trial judge erred in stating that Dr. Brennan did not have an accurate and complete history when the doctor had the opportunity to review the records of Drs. MacAndrew, Garrahan and Stutz. The trial judge noted that Dr. Brennan reviewed those reports during his deposition and they did not affect his opinion as to causation. However, the trial judge's statement that the history provided to Dr. Brennan was inaccurate and incomplete was based upon the inconsistencies noted in the previous

discussion, in particular the employee's statements that he had continuing problems since 1999 and at least intermittent treatment for those problems. Dr. Brennan specifically testified that his opinion that the employee's current condition was due to the 1999 work injury was based entirely upon this history as provided to him by Mr. Palazzo. (Pet. Exh. 3, p. 17.) That history was in conflict with the employee's testimony and the other records introduced into evidence. Under the circumstances, the trial judge acted within his discretion in rejecting the opinions of Dr. Brennan on that basis.

In his final reason, the employee contends that the trial judge erred in relying upon the opinion of Dr. Stutz when he was not provided with the records of Drs. Brennan or MacAndrew. However, in his report dated February 2, 2004, Dr. Stutz specifically references the records he was provided by the insurer, including notes of Drs. MacAndrew and Brennan. Consequently, this reason of appeal has no merit.

Based upon the foregoing discussion, the appeal of the employee is denied and dismissed. 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

Rotondi and Connor, JJ. concur.

ENTER:

Rotondi, 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 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 May 13, 2004 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

ENTER:

Rotondi, J.

Olsson, J.

Connor, J.

I hereby certify that copies were mailed to Robert M. Ferrieri, Esq., and Susan Pepin Fay,
Esq., on
