STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

JOHN KIDD)
)
VS.) W.C.C. 03-08123
)
RYDER TRANSPORTATION SERVICES)

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the petitioner/employee's appeal from a decision and decree of the trial judge awarding him weekly benefits for a closed period of time. The parties were directed to appear and show cause why the matter should not be summarily decided on the grounds that the issue on appeal involves the exercise of the trial judge's discretion in selecting one (1) medical opinion over another. After thoroughly reviewing the record and considering the arguments of counsel, we find that cause has not been shown and we will proceed to render our decision in this matter without further argument.

The employee filed an original petition in which he alleged that he sustained an injury to his back on June 6, 2003 during the course of his employment with the respondent resulting in disability beginning August 27, 2003. At the pretrial conference, the trial judge granted the petition, finding that the employee sustained a lumbar strain on June 6, 2003 which resulted in partial incapacity from June 7, 2003 to February 22, 2004. The employee claimed a trial in a timely manner.

At the commencement of the trial, the parties stipulated to all of the findings of the pretrial order except for the closed period of incapacity. It was agreed that the only issue for trial was whether the employee remained disabled beyond February 22, 2004. The employee testified that he was employed by the respondent as a service technician which involved fueling and washing the rental trucks, and opening the hoods and checking fluids. He explained that this required frequent bending, climbing, and lifting up to 100 pounds.

Mr. Kidd indicated that after he was injured, he returned to a light duty job with the employer doing office work for about a month until that position was terminated. He asserted that his low back is still stiff and sore and he cannot do the lifting required in his former position as a service technician. He acknowledged that he had continued to work as a real estate agent, which he had been doing prior to the injury on June 6, 2003.

The medical evidence consists of the deposition, affidavit, and reports of Dr. William F. Brennan, Jr., and the report of Dr. Vincent I. MacAndrew, Jr. Dr. Brennan began treating the employee on June 18, 2003 for complaints of low back and right leg pain. He recommended physical therapy and light duty work. The employee attended physical therapy for about two (2) months with some initial improvement; however, his progress reached a plateau and he continued to complain of low back pain. An MRI of the lumbar spine on August 27, 2003 revealed only early disc degeneration at L4-5 and L5-S1.

Dr. Brennan testified that as of his last office visit on June 30, 2004, the employee remained partially disabled with restrictions of no repetitive bending or twisting, no lifting in excess of twenty-five (25) pounds, and no pulling down the hoods of trucks.

Dr. MacAndrew conducted an impartial medical examination of the employee on February 23, 2004 at the request of the court. The doctor noted "trace evidence of spasm on the right side," but concluded that there were no objective findings to substantiate any ongoing disability. (Ct.'s Exh. 1.) He stated that a return to his regular employment would not be injurious to the employee's health.

The trial judge reviewed the medical evidence and chose to rely on the opinion of Dr. MacAndrew as to the employee's ability to work. He noted that Dr. Brennan was apparently giving the employee the benefit of the doubt in restricting his work activities based upon his subjective complaints rather than any significant examination findings.

The employee appealed the trial judge's decision and has filed a single reason of appeal arguing that the trial judge's conclusion that there were no objective findings in the examinations done by both Dr. Brennan and Dr. MacAndrew is clearly erroneous because both doctors noted spasm in their evaluations in February 2004.

Our review of a trial judge's findings of fact on appeal is strictly circumscribed. Section 28-35-28(b) of the Rhode Island General Laws provides that a trial judge's findings of fact 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). In a case involving conflicting medical opinions, it is within the trial judge's discretion to select one (1) competent expert medical opinion over another. Parenteau v. Zimmerman Eng., Inc., 111 R.I. 68, 299 A.2d 168 (1973). The Appellate Division is prohibited from conducting *de novo* review of the evidence absent a finding that the trial judge overlooked or misconceived material evidence, or was otherwise clearly wrong in

exercising that discretion. Id.; Grimes Box Co., Inc. v. Miguel, 509 A.2d 1002 (R.I. 1986).

In his report of his February 23, 2004 examination, Dr. MacAndrew noted only trace evidence of spasm. Based upon the findings of his physical examination, the doctor stated that the employee had normal function of his lumbar spine. He went on to report that the employee had "ongoing symptomatic complaints but no objective findings." (Ct. Exh. #1.) Considering the results of the physical examination, the results of the MRI, and the fact that seven (7) months had elapsed since the lumbar strain occurred, Dr. MacAndrew concluded that the employee was capable of returning to his regular job. Obviously, the doctor did not consider the "trace" evidence of spasm to be sufficient to substantiate any ongoing disability.

Dr. Brennan did note that he found mild spasm during his examinations in February and March 2004. However, this was not a consistent finding. Out of the thirteen (13) monthly office visits since June 18, 2003, the doctor noted mild spasm in four (4) reports. The only other positive findings have been tenderness and pain with motion. During his deposition, the doctor acknowledged that at the first evaluation on June 18, 2003, the employee had a "fairly normal examination." (Pet. Exh. #2, p. 8.) He agreed that the MRI did not reveal any significant abnormalities.

Dr. Brennan discounted the finding of spasm as insignificant. The following exchange during cross-examination was noted by the trial judge:

> "Q. Now, when you saw him on November 19, 2003, you did note some mild spasm; is that correct?
>
> "A. Yes.
>
> "Q. Any significance to that finding at that time?

"A. No.

"Q. The last time you saw him was June 30, 2004?

"A. Yes.

"Q. And his findings at that time were essentially the same as when you had seen him during 2003?

"A. Yes.

"Q. Is it fair to state that the restrictions that you placed on him are primarily based upon complaints to you?

"A. Yes."

(Pet. Exh. #2, pp. 10-11.)

It is clear from the statements of both Drs. Brennan and MacAndrew that any findings of spasm which were noted during their examinations were not considered significant. Dr. Brennan did not rely on the findings of spasm to support his opinion that the employee remained disabled, but rather testified that it was primarily based upon the employee's subjective complaints.

Based upon the foregoing, we cannot say that the trial judge abused his discretion in finding the opinion of Dr. MacAndrew to be more probative and persuasive on the issue of disability than that of Dr. Brennan. His finding that the employee's incapacity for work ended on February 22, 2004 is well-supported by the competent evidence in the record. Consequently, the employee's appeal is denied and dismissed and the decision and decree of the trial judge are affirmed.

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

Sowa and Ricci, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Sowa, J.

_____
Ricci, 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 employee's 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 August 31, 2004 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Interim Administrator

ENTER:

_____
Olsson, J.

_____
Sowa, J.

_____
Ricci, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq., and Susan Pepin Fay, Esq., on

_____