STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

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| LEON NACAROGLU | ) | |
| | ) | |
| VS. | ) | W.C.C. 03-05956 |
| | ) | |
| D. B. KELLY ASSOCIATES, INC. | ) | |

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division pursuant to an order issued to the parties to show cause why the appeal should not be summarily decided on the grounds that the issue on appeal involves the exercise of the trial judge's discretion in relying upon the opinion of one (1) medical expert over the opinion of another. See Parenteau v. Zimmerman Eng., Inc., 111 R.I. 68, 299 A.2d 168 (R.I. 1973). After reviewing the record and considering the arguments of the parties, we find that cause has not been shown and the matter is in order for decision.

The employee was injured on October 8, 2000 when he was kicked in the chest while attempting to restrain a patient at Rhode Island Hospital. Pursuant to a pretrial order entered on March 27, 2001 in W.C.C. No. 03-05956, it was found that the employee sustained a left chest wall contusion and a cervical strain resulting in partial incapacity from October 9, 2000 and continuing. Subsequently, Mr. Nacaroglu's weekly benefits were discontinued as of February 8, 2002 in accordance with a decree entered on August 8, 2002 in W.C.C. No. 02-00507.

The present case arises from an Employee's Petition to Review in which the employee alleges that his disability returned as of May 29, 2003 and that the description of his work injury should be amended to include "chest wall pain." The trial judge, in a decree entered on June 28, 2004, found that the employee failed to prove that the description of the injury should be amended. However, he did find that the employee sustained a return of incapacity due to the effects of the work injury on October 8, 2000 and he awarded weekly benefits for partial incapacity from May 29, 2003 to December 15, 2003. The employer has appealed that decision.

The employee, a sixty-six (66) year old male, testified that he had persistent chest pain after his benefits were discontinued in February 2002. He sees his treating physician every six (6) weeks and takes about four (4) or five (5) Vicodin each day for pain relief. On April 7, 2003, he began working at a 7-Eleven store, cleaning the store and keeping an eye on the cash register. He only worked for about seven (7) weeks and stopped on May 29, 2003, because his chest and neck bothered him so much. He explained that he also had neck pain from the injury and this caused headaches.

Mr. Nacaroglu recounted that he sustained a collapsed left lung in March 2000 while working for the employer and was out of work for three (3) months thereafter. He then returned to work for D. B. Kelly at a different location. He asserted that he had no chest pain from this incident when he returned to work.

The medical evidence consists of the depositions and records of Dr. John J. Machata and Dr. Gilbert L. Shapiro. Dr. Machata, the employee's primary care physician, has treated the employee for the effects of his work injury since October 10, 2000, as well as his other medical problems. He also has some additional education in the area of chronic pain management. The doctor noted that when Mr. Nacaroglu's chest wall pain did not resolve after a lengthy period of

time, he referred him to a pain clinic where the employee underwent a series of injections. The injections significantly decreased the pain he was experiencing to the point that Dr. Machata discharged him from his care regarding that condition on May 16, 2002. Although the employee experienced some increase in pain about a month later, he was still functioning relatively well.

After the employee began working at 7-Eleven in April 2003, he informed Dr. Machata that he experienced increased pain in the chest wall area and his neck after mopping the floors. The employee subsequently stopped working due to the increased pain. Dr. Machata testified that his diagnosis for some time has been chronic chest wall pain which he attributed to the incident when Mr. Nacaroglu was kicked in the chest. He noted that the employee had not complained of ongoing chest pain after experiencing the collapsed lung and undergoing surgery in the spring of 2000. However, since the incident on October 8, 2000, Mr. Nacaroglu has suffered from persistent significant chest wall pain, except for a brief period after undergoing the series of injections in April 2002. In addition, the activities he performed at 7-Eleven exacerbated his condition. Based upon these facts, Dr. Machata attributed the employee's chest wall pain to the work injury. He further stated that when he saw him in June 2003, the employee was unable to return to his regular job as a security guard due to the effects of that injury.

Dr. Shapiro, an orthopedic surgeon, evaluated the employee on two (2) occasions at the request of the insurer. The results of his first examination, on October 16, 2001, were introduced into evidence during the trial on the employer's petition to review and relied upon by the trial judge in that matter to discontinue the employee's weekly benefits as of February 8, 2002. At that time, the doctor's diagnoses were an acute cervical strain and a contusion to the left chest, both of which had resolved. He also noted that there was some question of degenerative cervical disc disease.

Dr. Shapiro re-examined Mr. Nacaroglu on December 15, 2003. The employee complained of continued left anterior chest pain and sensitivity to touch, as well as frontal headaches and cervical spine pain. In the diagnosis section of the report, Dr. Shapiro reiterated his diagnoses from his first report except for one (1) small difference – he left out the word "resolved" after "contusion left chest." He then writes that "[t]he major difficulty appears to be the left chest problem and that would appear to be secondary to his stated injury of October 8, 2000." (Res. Exh. #1, 12/15/03 report, p. 2) With regard to disability, the doctor stated:

> "The present difficulty appears to be predominately one of sensitivity over the left anterior chest cage. On the basis of this evaluation, Mr. Nacaroglu is not disabled. He certainly is able to sit, stand, walk, bend, and drive. He would be able to lift 20 to 30 lbs. on a regular basis. He can sit with full use of his upper extremities." (Id., p.3)

During his deposition, Dr. Shapiro testified that he felt that the prior problem with the collapsed lung, including the surgery, would aggravate the situation with the employee's chest, although he was unaware whether the employee had continued complaints of chest pain after that incident. He acknowledged that sensitivity to touch is not a typical residual complaint after a pneumothorax, or collapsed lung. He attributed any neck complaints to pre-existing degenerative changes in the cervical spine. The doctor explained that the restriction he noted in his report were due to these pre-existing problems and not due to the effects of the work-related injury.

The trial judge, based upon the testimony and reports of Dr. Machata, found that the employee had sustained a return of incapacity on May 29, 2003 due to the effects of the work-related injury which occurred on October 8, 2000, specifically the left chest wall injury. However, the trial judge also accepted the opinion of Dr. Shapiro that as of his examination on

December 15, 2003, the employee was no longer disabled. The employer filed an appeal from this decision.

When reviewing the decision of a trial judge, the role of the Appellate Division is dictated by statute. Section 28-35-28(b) of the Rhode Island General Laws provides that the findings of fact made by a trial judge shall be final, unless an appellate panel determines that they are clearly erroneous. A *de novo* review of the evidence may only be conducted at the appellate level after a specific finding is made that the trial judge was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996); Grimes Box Co., Inc. v. Miguel, 509 A.2d 1002 (R.I. 1986). In cases involving conflicting medical opinions, the trial judge must exercise his discretion in choosing between the opposing experts. See Parenteau v. Zimmerman Eng., Inc., 111 R.I. 68, 299 A.2d 168 (1973). We will not disturb the trial judge's evaluation of the medical evidence absent a finding that he committed clear error.

The employer has filed three (3) reasons of appeal arguing that the trial judge was clearly wrong to award benefits for a return of incapacity when that incapacity is due to "chronic chest wall pain" which is not included in the description of the injury the employee sustained on October 8, 2000. We find no merit in this argument.

A few months after he was injured, the employee filed an Original Petition in which he alleged that he sustained injuries to his chest, lungs, neck and left arm on October 8, 2000. On March 27, 2001, a pretrial order was entered regarding this petition which described the injury as "left chest wall contusion and cervical strain." (Pet. Exh. #1) There was no appeal from this order. There is no question that any incapacity alleged by the employee in May 2003 is not related to the cervical strain.

Dr. Machata originally diagnosed a left chest wall contusion caused by being kicked in the chest area. A contusion is equivalent to a bruise and is generally recognized as a discoloration of the skin caused by trauma and accompanied by some degree of pain or tenderness in the area. Usually, a contusion will resolve within a couple weeks. In Mr. Nacaroglu's case, the bruising went away, but the pain and tenderness remained. Consequently, Dr. Machata modified his diagnosis to "left chest wall pain" or "chronic chest wall pain," to reflect the fact that the condition was past the acute stage.

The employer now argues that because the employee is disabled due to "chest wall pain," which is not specifically named in the description of the injury, he is not entitled to benefits. We believe that such an argument falls into the category of "splitting hairs." The chest wall pain is a residual symptom from the trauma that caused the acute diagnosis of a contusion. It would seem academic that some pain accompanied the more visible bruising. Unfortunately, although the bruise faded away, the pain remained. To argue that the employee was required to amend the description of his injury to include "pain" is unreasonable.

This is not a situation in which the original injury a right wrist strain, but now the employee is seeking benefits for a shoulder strain that he claims occurred at the same time. Similarly, a neck injury may cause headaches. Must an employee amend the description of his injury to include migraine headaches in order to receive benefits, if that is the problem that disables him? We believe that acceptance of the employer's arguments in this case would lead to an absurd result and a distortion of the law of workers' compensation. Accordingly, we find no error on the part of the trial judge in his assessment of the evidence and his application of the law.

Based upon the foregoing, the employer'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, a final decree, a copy of which is enclosed, shall be entered on

Sowa and Connor, JJ. concur.

ENTER:

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Olsson, J.

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Sowa, 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 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 orders contained in a decree of this Court entered on June 28, 2004 be, and they hereby are, affirmed.

The respondent/employer shall pay a counsel fee in the sum of One Thousand Two Hundred and 00/100 ($1,200.00) Dollars to Carl J. Asprinio, 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, Interim Administrator

ENTER:

_____
Olsson, J.

_____
Sowa, J.

_____
Connor, J.

I hereby certify that copies were mailed to Jessica Cleary, Esq., and Carl J. Asprinio, Esq., on _____