STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
NELLIE FRANCIS	)	
	)	
VS.	)	W.C.C. 04-03284
	)	
PROVIDENCE SCHOOL DEPARTMENT	)	
PROVIDENCE SCHOOL DEPARTMENT	)	
	)	
VS.	)	W.C.C. 03-03023
	)	
NELLIE FRANCIS	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. These matters came to be heard before the Appellate Division upon the employee's appeal from the adverse decision and decrees of the trial judge finding that the employee's incapacity for work had ended and that the employee failed to establish a return to total incapacity. We have thoroughly reviewed the record and considered the respective arguments of the parties and find no error on the part of the trial judge in her rulings.

These two (2) matters were consolidated at the trial level and remain consolidated for purposes of this appeal. On October 5, 1998, the employee fell down some stairs at work and sustained injuries to her left thigh, left shoulder, neck, left pelvis, left arm, and low back. Pursuant to a decree entered in W.C.C. No. 99-00300 on November 17, 1999, Ms. Francis was

awarded weekly benefits for total incapacity from October 6, 1998 and continuing. W.C.C. No. 03-03023 is an employer's petition to review alleging that the employee's incapacity for work resulting from this injury has ended. The petition was granted at the pretrial conference, and the employee's weekly benefits were discontinued as of August 27, 2003. The employee claimed a trial from this order.

On March 4, 2003, Ms. Francis sustained a cervical strain and a right shoulder strain due to an incident at work. Pursuant to a pretrial order entered in W.C.C. No. 03-03410 on August 12, 2003, she was awarded weekly benefits for partial incapacity from March 5, 2003 to August 12, 2003. In W.C.C. No. 04-03284, Ms. Francis alleged that she became totally disabled as of October 2, 2003 due to the effects of the March 4, 2003 injury. The petition was denied at the pretrial conference, and the employee filed a claim for trial.

The employee did not testify during the trial. The medical evidence consists of the affidavit, deposition and reports of Dr. Christopher F. Huntington, the affidavit, deposition and reports of Dr. Steven G. McCloy, including a supplemental report dated May 12, 2004, , and the deposition and report of Dr. Medhat Kader.

Dr. Huntington, a board eligible orthopedic surgeon, began treating the employee on April 17, 2000 on a referral from Dr. Robert Miller. Records of previous medical treatment revealed numerous incidents resulting in various injuries: an altercation and arrest at a supermarket in June 1997, an accident in July 1997, an assault by a student in October 1997, catching a child falling off of a toilet in 1998, a fall down stairs at work on October 5, 1998, a fall in the hallway at work on October 7, 1998, an alleged assault by police in November 1998, and an injury from being struck by a tree branch in September 1999. Dr. Huntington diagnosed herniated cervical discs at C6-7 and C4-5, a herniated lumbar disc at L4-5, and left trochanteric

bursitis. Although he noted that it was difficult to conclusively determine the cause of her condition due to the number of incidents that occurred in the last three (3) years, the doctor indicated that the injuries in October 1998 were likely the cause of her current problems and disability. He recommended that she not work in any capacity.

Dr. Huntington saw Ms. Francis every six (6) to eight (8) weeks for several months and then more intermittently thereafter. At times the gap between visits was up to one (1) year. Ms. Francis apparently returned to work in late 2001 and was working on March 4, 2003 when another incident occurred at work. At the initial visit regarding this injury with Dr. Huntington on March 6, 2003, the employee was so emotionally distraught that the doctor referred her directly to the emergency room for evaluation. At the subsequent office visit on March 25, 2003, the doctor diagnosed a right shoulder strain, cervical strain and herniated cervical disc which he attributed to the incident at work. He further found that she was totally disabled for all employment.

Ms. Francis saw the doctor about every four (4) weeks after several biweekly visits. On August 21, 2003, Dr. Huntington stated that her condition had improved to the point that she could return to work with restrictions of no bending, no lifting over ten (10) pounds, no prolonged sitting or standing, no stooping, no crawling, no crouching, and no overhead reaching or lifting with her right arm. At the time of his deposition on April 30, 2004, the doctor maintained that Ms. Francis could perform modified duty work with the previously noted restrictions.

Dr. Huntington testified that since March 6, 2003, he has been treating Ms. Francis solely for the effects of the March 4, 2003 injury. He clearly stated that none of the restrictions he placed on her activities are related to the effects of the October 5, 1998 work injury. The doctor

explained that although the employee experienced some exacerbation of her right shoulder symptoms in April 2004, she remained capable of modified duty with the restrictions he had previously set forth.

Dr. McCloy, a specialist in occupational and internal medicine, examined the employee on April 25, 2003 at the request of the employer. The employee presented to the doctor's office wearing a cervical collar and a sling supporting her right arm and shoulder. Dr. Huntington had previously advised Ms. Francis to immediately discontinue use of the collar and sling because they were inappropriate for treatment of her injuries. During the physical examination of the employee, Dr. McCloy noted a number of instances of pain behavior and symptom magnification. Based upon the lack of objective findings of impairment, he concluded that Ms. Francis was capable of returning to work as a classroom teacher.

Subsequently, Dr. McCloy was provided with the deposition and complete reports of Dr. Huntington and the emergency room records regarding the March 4, 2003 incident. After thoroughly reviewing this information, the doctor reiterated his conclusion that the employee did not have "any reliable objective impairments related to her work injury. . . ." Er's Exh. G, p. 4. The doctor again opined that Ms. Francis was capable of returning to work as a schoolteacher and return to that position would not endanger her health.

Dr. Kader, an orthopedic surgeon, examined the employee on August 7, 2003 and reviewed medical reports of various doctors and medical facilities dating back to October 1998 at the request of the Workers' Compensation Court. Dr. Kader conducted a thorough examination of the employee's back, lower extremities, neck, upper extremities, shoulders and pelvis. The examination revealed numerous inconsistencies and exaggeration of symptoms which Dr. Kader described in detail in his report. The doctor concluded that the employee had no ongoing

traumatic pathology in her neck, shoulders, or lower back. He testified that the employee was capable of returning to her employment as a teacher without restrictions and that no further treatment was necessary.

After thoroughly reviewing all of the medical evidence, the trial judge, relying upon the opinions rendered by Drs. Huntington, McCloy and Kader, found that the employee was no longer disabled due to the effects of the October 5, 1998 work injury. Consequently, she affirmed her pretrial order in W.C.C. No. 03-03023 discontinuing weekly benefits as of August 27, 2003. With respect to the employee's petition alleging a return to total incapacity from October 2, 2003 and continuing as a result of her injury suffered on March 4, 2003 to her neck and shoulder, the trial judge chose to rely on the medical opinions offered by Drs. Kader and McCloy that Ms. Francis was capable of performing her duties as a biology teacher. That petition was denied. The employee has appealed both of these rulings.

Pursuant to R.I.G.L. § 28-35-28(b), the Appellate Division is bound by the trial judge's findings on factual matters in the absence of clear error. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). The Appellate Division is empowered to conduct a *de novo* review only after determining 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)). If the record before the Appellate Division contains sufficient evidence to support the trial judge's findings, then the decision must stand. We have carefully reviewed the entire record of this proceeding, and we find no merit in the employee's appeal.

The employee's appeal is somewhat unfocused. Ms. Francis filed eight (8) reasons of appeal in which she generally argues that the trial judge was incorrect in her evaluation of the medical evidence. We have also reviewed the statement of the case and summary of the issues

submitted by the employee. The first two (2) reasons are merely general recitations that the trial judge's decisions are against the law and the evidence in both petitions. Our statute and pertinent case law require that the appellant state with specificity the alleged errors committed by the trial judge. R.I.G.L. § 28-35-28(a); Falvey v. Women and Infants Hospital, 584 A.2d 417, 420 (R.I. 1991); Bissonnette v. Federal Dairy Co., Inc., 472 A.2d 1223, 1226 (R.I. 1984). Since the first two (2) reasons suffer from a lack of specificity, they are denied and dismissed.

In the third and eighth reasons of appeal, the employee contends that the trial judge erred in choosing to rely upon the opinions of Drs. Kader and McCloy while disregarding the opinion of her treating physician, Dr. Huntington. First, with regard to the employer's petition alleging the employee's incapacity for work has ended, Dr. Huntington concurred with Drs. Kader and McCloy that Ms. Francis was no longer disabled at all from the effects of her October 5, 1998 injury. When questioned regarding the employee's disability as related to her October 5, 1998 injury, Dr. Huntington testified that, "none of her current restrictions are related to that injury at this time." Ee's Exh. 6, p. 15. The trial judge clearly did not err in relying on the opinion of all three (3) doctors in finding the employee was no longer disabled as a result of the October 5, 1998 injury.

With regard to the employee's petition alleging a return to total incapacity as of October 2, 2003, Dr. Huntington stated that the employee was partially disabled as of August 21, 2003 and as of April 23, 2004, she remained partially disabled with the same restrictions he had previously imposed. There is no evidence in the record to support the contention that Ms. Francis became totally disabled as of October 2, 2003. Drs. Kader and McCloy both found significant inconsistencies during their physical examinations of the employee and concluded

that she was not disabled due to her work injury and was capable of returning to work as a schoolteacher.

The Rhode Island Supreme Court held in Parenteau v. Zimmerman Eng., Inc., 111 R.I. 68, 299 A.2d 168 (1973), that when conflicting medical opinions of competent and probative value are presented, it is the prerogative of the trial judge to accept the medical opinions of one (1) provider over another. In the present case, the trial judge discussed all of the medical evidence in considerable detail. After carefully reviewing all of this evidence, the trial judge concluded that the opinions of Dr. McCloy and Dr. Kader were more probative and persuasive as to whether the employee was disabled due to the effects of one (1) or more of her work injuries.

Dr. Kader and Dr. McCloy both performed a complete physical examination of the employee, and neither noted any objective findings. Rather, both doctors noted inconsistencies or exaggerated subjective findings of pain during their examinations. In addition, both doctors performed certain tests on the employee in which she exhibited non-anatomical distributions of pain, inconsistent results when similar tests were performed in different positions, and exaggerated pain behaviors. The trial judge found it extremely persuasive that two (2) highly regarded physicians determined that the employee had no objective findings of disability. Dr. Huntington is the only physician to find that the employee is partially disabled, and it appears from reviewing his reports that this opinion is based primarily on the employee's subjective complaints of pain, rather than any significant objective findings.

The trial judge appropriately exercised her discretion in choosing to rely upon the opinions of Drs. Kader and McCloy in the face of conflicting competent medical testimony. *See* Parenteau v. Zimmerman Eng., Inc., 111 R.I. 68, 299 A.2d 168 (1973). In addition, there was no medical evidence presented to support the contention that Ms. Francis became totally disabled as

of October 2, 2003, as she alleged in her petition (W.C.C. No. 04-03284). Based upon our review of the record, the trial judge's finding that the employee failed to prove a return to total incapacity from October 2, 2003 and continuing as a result of an injury suffered on March 4, 2003 is not clearly erroneous.

In her fourth and fifth reasons of appeal, the employee argues that the opinion of Dr. McCloy that the employee was not disabled must be disregarded because he stated that he relied upon medical reports of a number of doctors who treated Ms. Francis and found that she was disabled. The employee also states that in his first report, Dr. McCloy found that she was disabled, but after reviewing various medical records, he wrote a second report stating that she was not disabled. Ms. Francis is mistaken in both of these contentions.

Dr. McCloy examined the employee on one (1) occasion on April 25, 2003. The doctor reviewed three (3) out-of-work notes from Orthopaedic Institute, three (3) accident reports describing injuries in October and November of 2002, and a complaint regarding an assault by a student in March 2003, prior to his physical examination of the employee. Ms. Francis then sent him another out-of-work note from the Orthopaedic Institute, an out-of-work note from Dr. James A. Gallo, and records from Garden City Treatment Center regarding treatment in March 2003. Dr. McCloy issued a report in which he concluded that the employee was capable of returning to work as a schoolteacher.

Subsequently, the employer's attorney provided additional medical records and testimony to Dr. McCloy for his review. Those records included the deposition testimony of Dr. Huntington, office notes of Dr. Huntington and his associate, Dr. Eric Launer, from April 17, 2000 to April 23, 2004, and an emergency room report for treatment on March 5, 2003. In a

report dated May 12, 2004, Dr. McCloy reviewed the records in great detail and still concluded that Ms. Francis was capable of returning to her regular employment as a teacher.

There was no evidence produced at trial to support the employee's contention that Dr. McCloy initially found that the employee could not work, and then rendered a second opinion that she was capable of returning to work. On the contrary, Dr. McCloy was consistent in his opinion, even after reviewing additional records and testimony of her treating physician, Dr. Huntington. In addition, although Dr. McCloy reviewed all of the records of the employee's physicians in order to gain more information about her condition and treatment, there is nothing in the record stating that he agreed with or accepted any opinion that she remained unable to return to work. Dr. McCloy considered all of this information, as well as the results of his own physical examination, in formulating his own opinion regarding the employee's ability to work. There is nothing contradictory about his use of the medical records in this manner that would render his opinion incompetent.

In her sixth and seventh reasons of appeal, the employee argues that the trial judge erred in finding that the employee did not sustain a work-related injury on March 4, 2003. There is no such finding in the decree entered by the trial judge in W.C.C. No. 04-03284. In her decision, the trial judge acknowledged that a pretrial order was entered in a prior case, W.C.C. No. 03-03410, which found that Ms. Francis was injured on March 4, 2003 and ordered the payment of weekly benefits from March 5, 2003 through August 12, 2003. That pretrial order was not appealed and therefore stands as a final decree of the court. Consequently, the employee's work-related injury on March 4, 2003 was already established. The issue before the court in the present petition was whether the employee became unable to work on October 2, 2003 due to the effects of the injuries she sustained on March 4, 2003. As we stated earlier, there was no

medical evidence in the record from any physician, including Dr. Huntington, that Ms. Francis became totally disabled as of October 2, 2003. As a result, the trial judge properly denied the employee's petition.

Based upon our review of the record, the trial judge's findings that the employee's incapacity for work has ended and that she did not suffer a return to total incapacity are amply supported by the medical evidence presented. Therefore, we deny and dismiss the employee's appeals and affirm the decision and decrees of the trial judge.

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

Sowa and Hardman, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Sowa, J.

_____
Hardman, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

PROVIDENCE SCHOOL DEPARTMENT)
)
VS.) W.C.C. 03-03023
)
NELLIE FRANCIS)

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 September 27, 2004 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Sowa, J.

_____
Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Nellie Francis, 16 Miller Ave., Providence, RI 02903, and Paul Gionfriddo, Esq., on

_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

NELLIE FRANCIS)
)
VS.) W.C.C. 04-03284
)
PROVIDENCE SCHOOL DEPARTMENT)

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 September 27, 2004 be, and they hereby are, affirmed.

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Sowa, J.

_____
Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Nellie Francis, 16 Miller Avenue, Providence, RI 02903, and Paul Gionfriddo, Esq., on

_____