STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

WINIFRED WOOD	)	
	)	
VS.	)	W.C.C. 04-05293
	)	
ARAMARK FOOD SERVICES	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the respondent/employer's appeal from the decision and decree of the trial judge which granted the employee's original petition and ordered the payment of weekly benefits for a work-related injury which occurred on June 3, 2004. We have thoroughly reviewed the record in this matter and have determined that the findings made by the trial judge in this matter are not clearly erroneous. We, therefore, deny the appeal and affirm the decision and decree of the trial judge.

The employee, a fifty-six (56) year old female, testified that she was employed by Aramark Corporation as a production manager based at East Providence High School. Her employer was a food service business and she was responsible for the daily operations, including ordering, distribution and proper preparation and presentation of food for the elementary, middle and high schools in East Providence. On June 3, 2004, the employee was involved in putting on a buffet dinner at the high school for the local Lions' Club. As she was putting a container of mashed potatoes into a chafing dish, the hot water was tilting towards her and she jerked to her left. With that movement, she felt an excruciating pain go into her head on the right side of her

neck. Ms. Wood put down the tray of mashed potatoes, went into her office, and informed her assistant that something had just happened and she felt severe pain in her head. It was like nothing she had ever previously experienced. She finished supervising the dinner that night and left work between 8:30 and 9:00 p.m.

The following day, the severe pain was still present so she went to the emergency room at Miriam Hospital. She was referred to Dr. W. Lloyd Barnard for further evaluation. Prior to seeing Dr. Barnard, the employee was seen by Dr. Daniel T. Shreve, her primary care physician, on June 8, 2004. At that time, she complained of pain in the right side of her neck up into her head. She had also developed numbness and tingling in the right index and middle fingers. She saw Dr. Barnard on two (2) occasions. At the second visit on July 2, 2004, the doctor referred her to Dr. Samuel Greenblatt for a neurosurgical consultation on July 30, 2004.

Prior to her scheduled appointment with Dr. Greenblatt, the pain in her head and numbness in her right hand was so uncomfortable that she returned to the emergency room at Miriam Hospital on July 9, 2004. The emergency room personnel sent her to Rhode Island Hospital where Dr. J. F. Harrington performed surgery on her neck on July 11, 2004.

Ms. Wood had continued to work from June 4, 2004 through June 25, 2004, when the East Providence schools closed for the summer and she was laid off. She testified that she felt an obligation to keep working, at least until school closed. She modified her duties such that she spent most of her time at her desk. She was unable to move her neck due to the pain and she could not hold or lift anything with her right hand. She never returned to work after June 25, 2004. She did receive unemployment benefits for a couple of weeks after the layoff.

The employee acknowledged that she had previously complained to Dr. Shreve of left-sided neck problems, which she thought was a sprain or strain. She tried chiropractic treatment

without success. However, after she took Celebrex, which was prescribed by Dr. Shreve, the problem resolved and she has had no neck complaints until this incident in June 2004. Ms. Wood testified that the soreness she experienced in 2002 was nothing like the severe pain she felt in 2004.

The medical evidence consists of the records of Miriam Hospital, the records and deposition of Dr. Daniel T. Shreve, and the records and deposition of Dr. W. Lloyd Barnard. The hospital records reflect that the employee was seen in the emergency department the morning of June 4, 2004 for a work-related injury. The employee complained of right-sided pain in the neck and shoulder areas after lifting a heavy object the day before. Examination of the neck area revealed muscle spasm and decreased range of motion. X-rays of the cervical spine indicated advanced degenerative disc disease at C4-5 and C5-6 and reversed cervical curvature. The initial diagnosis was torticollis, a condition in which the muscles have been overstretched, causing spasm and headache.

Ms. Wood saw Dr. Shreve, a family practitioner, on June 8, 2004 for complaints of pain in the back of the neck, radiating down the intrascapular area, down the back of the arm, and over to the front of the forearm with burning and stinging in the thumb, index and ring fingers. His diagnosis was C7 nerve root irritation on the right side which he indicated was probably related to the incident at work. During his deposition, the doctor pointed out that the employee's complaints in 2002 were on the left side, while the complaints in 2004 were on the right. In addition, she did not have any neck complaints from 2002 until the incident in June 2004. He stated that the incident at work in June 2004 likely aggravated her preexisting osteoarthritis and she ended up having the surgery when she could no longer tolerate the pain. Dr. Shreve also testified that Ms. Wood was not capable of working when he saw her on June 8, 2004.

On June 19, 2004, the employee underwent an MRI of her cervical spine which revealed moderate spondylitic changes from C3-C4 through C5-C6 with disc/osteophyte complexes as well as moderate foraminal stenosis with moderate to severe right foraminal narrowing at C5-C6. No cord compression was noted.

Dr. Barnard, an orthopedic surgeon, evaluated the employee on June 25, 2004 on referral from the Miriam Hospital emergency room. The history recorded by the doctor as to the incident at work is consistent with Ms. Wood's testimony. The doctor performed a physical examination and reviewed the recent x-rays and MRI of the cervical spine. His diagnosis was cervical radiculopathy which he attributed to the incident at work. After re-examining the employee on July 2, 2004, Dr. Barnard referred her to Dr. Greenblatt because she was not improving and had distinct symptoms indicative of nerve root irritation.

The doctor testified that the degenerative condition revealed on the MRI obviously preexisted the injury, but the employee did not have any of the symptoms she was now experiencing prior to June 2004. Therefore, he attributed her current condition to the injury at work.

The trial judge, after reviewing the evidence in detail, stated that she found the employee to be a credible witness and accepted her testimony as to the severity of the pain she felt immediately following the incident and that it was different than anything she had previously experienced. While acknowledging that Ms. Wood had moderate to severe degenerative arthritic changes in her cervical spine prior to the alleged injury, the trial judge stated that, based upon the employee's testimony, she accepted the opinions of Drs. Shreve and Barnard that the cervical radiculopathy was caused by the incident at work which aggravated her preexisting condition.

The employee's petition was granted and she was awarded weekly benefits for partial incapacity from June 25, 2004 and continuing.

The employer filed a timely claim of appeal and presented six (6) reasons of appeal. In considering the employee's arguments, we must bear in mind that our review of the findings of fact made by a trial judge is restricted by the standard set forth in R.I.G.L. § 28-35-28(b):

> "The findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous."

This panel is precluded from undertaking a *de novo* review of the evidence absent an initial finding that the trial judge was clearly wrong or overlooked or misconceived material evidence. Blecha v. Wells Fargo Guard-Company Serv., 610 A.2d 98, 102 (R.I. 1992). After reviewing the arguments put forth by the employer, the evidence in the record, and the decision and conclusions of the trial judge, we find that the factual findings contained in the decree are not clearly erroneous and we deny the employer's appeal.

The employer's primary argument on appeal, as presented in the first, second, fourth and fifth reasons of appeal, is that the trial judge committed clear error in finding that the employee sustained anything more than a cervical strain as a result of the incident on June 3, 2004. The employer has selectively extracted portions of the testimony of Drs. Shreve and Barnard which allegedly support its contention. However, we find that a review of the depositions in their entirety supports the conclusions of the trial judge in this matter.

The employer points to the response by Dr. Shreve that the incident at work "could" have caused simply a cervical strain as proof that the doctor was uncertain as to the "etiology of the patient's herniated cervical disc." Er's Memorandum of Law, p. 3. First, none of the doctors diagnosed a herniated cervical disc, although the employer refers to a herniated disc again in discussing Dr. Barnard's testimony. *See* Id. at 6. The trial judge did not make a finding that the

employee sustained a herniated cervical disc. Second, the statement by Dr. Shreve that the incident "could" have caused simply a cervical strain is nothing more than a statement that anything is possible. However, such a statement does not directly contradict his opinion that, more probably than not, the incident caused right C7 nerve root irritation or radiculopathy. Specifically, the doctor highlighted the fact that the employee reported severe radicular pain immediately after the incident which was consistent with his diagnosis of more than a strain.

The employer also focuses on Dr. Barnard's response that a past history of cervical radiculopathy could affect his opinion on causation. However, after presenting Dr. Barnard with the records of Dr. Shreve reflecting complaints of left-sided cervical radiculopathy in January 2002, the doctor acknowledged that the conditions were different. Throughout his deposition, Dr. Barnard maintained that based upon the history he received from the employee regarding the incident and onset of symptoms, it was his opinion that his diagnosis of cervical radiculopathy was caused by the incident at work.

In further support of its argument, the employer points to the fact that the employee had preexisting degenerative changes in her cervical spine which would cause the radicular symptoms she experienced. However, there is no evidence that Ms. Wood complained of right-sided radicular symptoms prior to the incident at work on June 3, 2004, despite the existence of these degenerative arthritic changes. "It is well settled in this state that where an incident connected with employment aggravates an existing condition with resulting incapacity for work, an employee is entitled to compensation for such incapacity." Clemm v. Frank Morrow Company, 90 R.I. 37, 42, 153 A.2d 557, 559 (1959); *see* Lomba v. Providence Gravure, Inc., 465 A.2d 186 (R.I. 1983). The incident at work irritated the employee's underlying condition causing the cervical radiculopathy, i.e., the radiating pain, numbness and tingling.

The trial judge stressed that she found the employee to be a credible and truthful witness and accepted Ms. Wood's recitation of how the incident occurred, the nature and onset of her symptoms, and the lack of previous complaints to the right side of her neck and of such severity. We find nothing in the record to second guess this credibility determination. As noted by both Dr. Shreve and Dr. Barnard, if the employee's version of events is relied upon, they are of the opinion that the incident at work caused the right-sided cervical radiculopathy and resulting disability. We find that in examining the testimony of the physicians and the employee in this matter, the finding of the trial judge that the work incident caused the cervical radiculopathy, rather than a cervical strain, is well-supported.

The employer also questions whether the surgery performed by Dr. Harrington was necessary to address the effects of the work injury or the preexisting arthritic condition. The employer attempts to somehow separate the preexisting degenerative condition from the effects of the work injury. As noted above, the work injury aggravated the preexisting condition, causing the employee's complaints and symptoms of radiculopathy. Although the degenerative condition existed prior to the incident at work, there is no evidence that Ms. Wood was experiencing any symptoms or complaints from that condition. By her own account, which was accepted by the trial judge, Ms. Wood only began to have the severe pain, as well as numbness and tingling in her right arm, after June 3, 2004. In order to relieve these symptoms, Dr. Harrington performed an operation which addressed the degenerative condition which was causing the employee's complaints. Absent the incident at work which caused the degenerative condition to become symptomatic, Ms. Wood would not have needed surgery at that time.

The employer cites testimony from Dr. Shreve that he could not say with certainty what caused the employee to undergo surgery in support of its contention that the surgery performed

by Dr. Harrington was not necessary to treat the work injury. However, Dr. Shreve saw the employee only once after the work injury and prior to the surgery, on June 8, 2004. At that time, he believed that Ms. Wood's symptoms would calm down and surgery would not be necessary. It would be difficult for him to comment on the need for surgery a month later when he was unaware of the severity of the employee's complaints at that time. When Dr. Barnard saw the employee for the second time on July 2, 2004, he noted that her condition had not improved and she had distinct symptoms indicative of radiculopathy. Based upon that examination, the doctor referred her to a neurosurgeon for evaluation. This referral would indicate that Dr. Barnard believed that surgical intervention was a possibility. Both physicians indicated that the surgery performed by Dr. Harrington would address symptoms of radiculopathy. Considering the medical opinions in their entirety, we find that the trial judge did not overlook or misconceive material evidence in concluding that the employee remained disabled due to the effects of the work injury, which the surgery sought to alleviate.

Finally, the employer contends that the trial judge erred in failing to find that the employee did not suffer any loss of earning capacity due to the injury because she continued to work until the end of the school year and was then laid off for the summer. We find this argument to be without merit. Ms. Wood stated that she continued to work, but, due to her administrative position, she was able to restrict her activities at work to accommodate her injury. Although she continued to report to work, it is clear that she was partially disabled in that she was not capable of performing all of the normal duties of her position. With only three (3) weeks left in the school year, she felt compelled to try to finish out the term. Her subsequent involuntary layoff does not preclude a finding of loss of earning capacity. *See* Lambert v. Stanley Bostitch, 723 A.2d 777 (R.I. 1999).

Dr. Shreve stated that he found the employee to be disabled on June 8, 2004. Dr. Barnard also completed an affidavit for the Medical Advisory Board indicating that the employee was not capable of returning to her regular employment. Even if the employee had desired to work in some other capacity after the layoff, she was restricted by the effects of the work injury. We find no support in the record or the applicable law for the contention that the employee did not suffer a compensable loss of earning capacity.

Based upon the foregoing, we deny and dismiss the appeal of the employer and affirm the decision and decree of the trial judge in this matter. We also award a counsel fee in the sum of Two Thousand Seven Hundred Fifty and 00/100 ($2,750.00) Dollars to Charles J. Vucci, Esq., attorney for the employee, for the successful defense of the employer's appeal.

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 Hardman, JJ, concur.

ENTER:

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Olsson, J.

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Sowa, J.

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Hardman, 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:

1. That the findings of fact and the orders contained in a decree of this Court entered on February 24, 2005 be, and they hereby are, affirmed.

2. That the respondent shall pay a counsel fee in the sum of Two Thousand Seven Hundred Fifty and 00/100 ($2,750.00) Dollars to Charles J. Vucci, Esq., 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, Administrator

ENTER:

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Olsson, J.

_____
Sowa, J.

_____
Hardman, J.

I hereby certify that copies of the within Decision and Final Decree of the Appellate Division were mailed to Tedford B. Radway, Esq., and Charles J. Vucci, Esq., on

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