STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

STEVEN GAVIN	)	
	)	
VS.	)	W.C.C. 05-06821
	)	
DYNAMIC MARKETING, INC.	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the petitioner/employee's appeal from the decision and decree of the trial judge denying his request to amend the description of his work-related injury. After carefully reviewing the record in this matter and considering the arguments of the parties, we conclude that the trial judge was not clearly erroneous in finding that the employee failed to establish that he sustained a T12 compression fracture in addition to cervical, thoracic and lumbar strains on October 30, 2002 during the course of his employment. We, therefore, deny and dismiss the appeal and affirm the decision and decree of the trial judge.

The employee was paid weekly benefits for partial incapacity pursuant to a Memorandum of Agreement dated February 11, 2003. The Memorandum of Agreement indicated that the employee sustained cervical, thoracic, and lumbar strains on October 30, 2002 resulting in partial incapacity from that date and continuing. Pursuant to a pretrial order entered in W.C.C. No. 05-06165, the employee's weekly benefits were discontinued based upon an examination by Dr. A. Louis Mariorenzi. While that petition was pending, the employee filed an employee's petition to

review seeking to amend the description of the injury in the Memorandum of Agreement to include a T12 compression fracture. The matter was denied at the pretrial conference and the employee timely filed a claim for trial.

The employee testified he was employed by the respondent, Dynamic Marketing, as a truck driver. On October 30, 2002, he was involved in a motor vehicle accident while on his way home after making a delivery. He was taken by rescue to Miriam Hospital where he complained of neck and low back pain and numbness in his right leg. X-rays of the cervical spine were taken and medication was prescribed.

The employee saw Dr. Kenneth J. Morrissey on November 4, 2002. He complained of headaches, neck pain radiating to both hands with numbness and tingling, pain in the shoulder blades and over the thoracic spine, and back pain radiating to the buttock and occasionally down into the leg. X-rays of the cervical, thoracic, and lumbar spines were normal except for what the doctor estimated was a twenty percent (20%) compression at T12. The employee denied any prior problems, pain, or discomfort relating to his back. Mr. Gavin has been employed as a poker dealer at Foxwoods Casino since March 2005.

The medical evidence pertinent to this petition consisted of the depositions and records of Dr. Kenneth J. Morrissey, Dr. David J. Cicerchia, and Dr. A. Louis Mariorenzi.

Dr. Morrissey, an orthopedic surgeon, testified that his diagnoses of cervical strain, T12 compression fracture, lumbosacral strain and cerebral concussion were caused by the motor vehicle accident on October 30, 2002. The employee underwent an MRI of the lower thoracic and lumbar spine on January 28, 2003. The radiologist's findings included the following:

> "There is a mild wedge compression deformity of T12. I see no marrow edema suggesting this is old. There is degenerative fatty endplate change at the anterior inferior margin of T12 with anterior T12-L1 spurring noted."

Ee's Exh. 2, MRI report attached. In his impression, he states that the "fracture appears to be chronic." He also notes that "[t]here is mild degenerative disc disease at T11-12, T12-L1 and L5-S1." Id.

Dr. Morrissey testified that based on the MRI, and as shown in the earlier X-rays, the employee had a compression fracture at T12 that was consistent with his physical examination and the trauma of the motor vehicle accident. In particular, the doctor pointed out that the employee had no history of any previous back problems and it would be unusual for someone thirty-two (32) years old to have a fracture like this without a history of an injury to explain it. Dr. Morrissey disagreed with the radiologist's statement that the fracture was chronic, i.e., that it likely pre-existed the work injury. He discounted the lack of marrow edema, stating that after three (3) months he would expect the edema to have significantly resolved. The doctor also ruled out a diagnosis of Scheuermann's disease, which is a developmental condition characterized by thoracic kyphosis, or a humpback, resulting from the angling or wedging of three (3) or more vertebral bodies fifteen (15°) degrees or more. In the employee's case, the wedging was confined to the T12 level and he did not exhibit thoracic kyphosis.

Dr. Cicerchia, an orthopedic surgeon, examined the employee on two (2) occasions at the request of the insurer (both employee's counsel and the trial judge erroneously referred to Dr. Cicerchia as a court-appointed impartial medical examiner). After examining Mr. Gavin on February 9, 2004 and reviewing the medical reports of Dr. Morrissey as well as the report of the MRI, the doctor concluded that the employee suffered a T12 compression fracture, which was healed, and chronic muscular mechanical low back pain. He attributed the T12 compression fracture to the motor vehicle accident. Dr. Cicerchia examined the employee a second time on November 2, 2004 and maintained his opinion as to the diagnosis and causal relationship.

Dr. Cicerchia pointed out that the fracture was mild and would not result in a significant amount of marrow edema and swelling. Therefore, it was possible that an MRI taken three (3) months after the incident would no longer show any acute changes such as marrow edema. He also stated that he did not find any indication of Scheuermann's disease, but he did not view any plain films or radiographs of the thoracic spine which would show if there were defects at more than one (1) level. Dr. Cicerchia explained that limited range of motion, pain to palpation, spasm, difficulty changing position and difficulty staying in one position for prolonged periods, are physical findings which he would expect to see immediately after a compression fracture. The doctor did not see the employee until over a year after the injury. Therefore, he relied on the MRI report, the employee's history of the incident and his symptoms, and the absence of any prior back injuries or pain in formulating his opinion as to the cause of the fracture.

Dr. Mariorenzi, an orthopedic surgeon, examined the employee on one (1) occasion at the request of the insurer, on August 22, 2005. His assessment was that the employee likely suffered cervical, thoracic, and lumbar strains as a result of the accident and had made a full recovery by the time of his examination. The doctor reviewed the report of x-rays of the cervical spine taken the day of the accident, October 30, 2002, which were normal. He also reviewed the MRI films as well as the radiologist's report from the study done on January 28, 2003.

Dr. Mariorenzi concluded that there was no causal relationship between the motor vehicle accident and the compression fracture at T12 and that the deformity preexisted the work injury. He asserted that bone marrow edema should be present for six (6) months or longer after an acute fracture. In further support of his opinion, Dr. Mariorenzi pointed out that the MRI revealed degenerative changes in the fatty end plates and bone spurring, which take longer than

three (3) months to develop. He indicated that this condition was the result of an old injury, or possibly secondary to adolescent Scheuermann's disease.

On cross-examination, Dr. Mariorenzi testified that there was no doubt that the abnormality at T12 was old and was not caused by the motor vehicle accident in October 2002. He noted the lack of a significant history of trauma to the area and the lack of complaints at the emergency room of severe pain that one would expect with an acute fracture substantiated by the fact that no x-rays were taken of the thoracic or lumbar spine. The doctor stated that whether the abnormality was classified as a developmental condition or a compression fracture, it definitely predated the work injury.

The trial judge reviewed all of the medical evidence and chose to accept the medical opinions of Dr. Mariorenzi over the opinions offered by Dr. Morrissey and Dr. Cicerchia regarding the causal relationship between the abnormality at T12 and the work-related accident of October 30, 2002. Consequently, he denied and dismissed the employee's petition to amend the Memorandum of Agreement. The employee then filed this claim of appeal.

In reviewing the decision of the trial judge, we must bear in mind that the findings of fact made by a trial judge must be deemed final on appeal absent a determination that one (1) or more of those findings are clearly erroneous. R.I.G.L. § 28-35-28(b); Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). Only after specifically finding that the trial judge was clearly wrong, may the appellate panel conduct its own *de novo* review of the evidence. 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 evidence sufficient to support the trial judge's findings, the decision must stand. We have carefully examined the entire record of this proceeding. For

the following reasons, we find no merit in the employee's appeal, and we, accordingly, affirm the trial judge's decision and decree.

The employee has filed one (1) reason of appeal in which he argues the trial judge was clearly erroneous and overlooked or misconceived the medical testimony in failing to find that the employee sustained a T12 compression fracture as a result of a work-related accident on October 30, 2002. The employee contends that the trial judge erred in rejecting the testimony of Dr. Morrissey and Dr. Cicerchia and choosing to rely on the less competent testimony of Dr. Mariorenzi.

The three (3) doctors are all in agreement that there is a deformity at the T12 level. The issue is whether it is the result of a compression fracture caused by the work-related accident. Drs. Morrissey and Cicerchia primarily rely on the facts that the employee sustained a traumatic injury in the motor vehicle accident and there was no evidence of any prior back problems to support their opinions that the employee sustained a compression fracture as a result of the work-related accident. They both indicated that the lack of marrow edema three (3) months later was not unusual, particularly since the fracture was mild. However, neither physician addressed the other degenerative changes at the T12 level as noted by the radiologist in his report of the MRI and by Dr. Mariorenzi.

Dr. Mariorenzi thoroughly explained the basis for his opinion that the deformity predated the motor vehicle accident. Based upon his reading of the MRI films, the radiologist noted that the lack of marrow edema suggested that the compression deformity was old. In addition, he found degenerative fatty endplate changes at the anterior inferior margin of T12 with anterior T12-L1 spurring. Dr. Mariorenzi pointed out that bone spurring takes longer than three (3) months to develop. He also stated that if the employee had sustained an acute fracture of his

spine on October 30, 2002, that he would have immediately experienced severe pain in that area which would likely have led the emergency room personnel to order x-rays of his thoracic and/or lumbar spine. In fact, only x-rays of his cervical spine were done that day at the hospital. Dr. Mariorenzi provided a detailed explanation of the basis for his opinion which was substantiated by the evidence in the record.

The employee argues that the trial judge was wrong to reject Dr. Morrissey's opinion because he incorrectly assumed that Dr. Morrissey did not review the MRI films in addition to the report. Although the trial judge does seem to indicate that there was some difference in the opinions of the physicians because Dr. Mariorenzi actually saw the films and Drs. Morrissey and Cicerchia did not, we believe this was insignificant. The degenerative findings, including the fatty end plate changes and bone spurring, were all detailed in the radiologist's report of the MRI, which was read by all of the physicians. Dr. Mariorenzi did not make any additional findings or conclusions as a result of his review of the actual films. The same information as to the findings on the MRI was available to all of the physicians. The difference is that while Dr. Mariorenzi referenced the degenerative changes to substantiate his opinion that the deformity was old, neither Dr. Morrissey nor Dr. Cicerchia ever mentioned the degenerative changes.

The employee also contends that Dr. Mariorenzi's comment that the deformity may represent adolescent Scheuermann's disease is unfounded and renders his opinions incompetent. Certainly, the doctor never offered this as a firm diagnosis, but merely as a possible explanation of the existence of the deformity, particularly if the employee's history of the absence of any other trauma to his back is true. As the doctor pointed out, whether the deformity is the result of adolescent Scheuermann's disease or an old fracture is not the issue. His opinion that the

deformity pre-dates the motor vehicle accident in October 2002 is still valid and provides the basis for denying the employee's petition.

The trial judge exercised his discretion in choosing to rely on the medical opinions of Dr. Mariorenzi in the face of conflicting testimony. The Rhode Island Supreme Court held in Parenteau v. Zimmerman Eng., Inc., 111 R.I. 68, 299 A.2d 168 (1973), that the trial judge has the prerogative to accept the medical opinions of one (1) provider over another when there are conflicting medical opinions of competent and probative value. In the present case, the trial judge discussed the medical opinions of the three (3) physicians in considerable detail. After a vigilant review of the medical evidence, the trial judge concluded that the opinion of Dr. Mariorenzi was more probative and persuasive as to whether the T12 compression fracture was a result of the motor vehicle accident. Dr. Mariorenzi provided an adequate foundation for his opinion and explained his reasoning in arriving at that competent opinion. Therefore, we cannot say the trial judge was clearly wrong in relying on that opinion pursuant to Parenteau.

Based upon our review of the record, the trial judge's finding that the employee failed to prove that the description of her injury should be amended is not clearly erroneous. We, therefore, deny and dismiss the employee's appeal and affirm the decision and decree of the trial judge.

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

Ricci and Hardman, JJ. concur.

ENTER:

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Olsson, J.

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Ricci, J.

_____
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 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 October 26, 2006 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

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Olsson, J.

_____
Ricci, J.

_____
Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to G. Eben Milne, Esq., and Francis T. Connor, Esq. on

_____