STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

DEBRA PACHECO	)	
	)	
VS.	)	W.C.C. 2006-04574
	)	
JOHNSTON PUBLIC SCHOOLS	)	
JOHNSTON PUBLIC SCHOOLS	)	
	)	
VS.	)	W.C.C. 2006-04173
	)	
DEBRA PACHECO	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. These two (2) matters were consolidated for hearing at the trial level and remain consolidated for our consideration on appeal. W.C.C. No. 2006-04173 is an employer's petition to review alleging that the employee's incapacity has ended. At the pretrial conference, the petition was denied and the employer was ordered to continue paying the employee weekly benefits for partial incapacity. The employer claimed a trial and after a full hearing on the merits, the trial judge found that the employee was no longer disabled in whole or in part as a result of the work-related injury she sustained on December 9, 2005. Consequently, the

employer discontinued payment of weekly benefits as of April 6, 2007, the date of the entry of the decree. The employee then filed a claim of appeal.

W.C.C. No. 2006-04574 is an employee's petition to review requesting permission for major surgery, specifically decompression of the fifth lumbar nerve root. The petition was denied at the pretrial conference and the employee claimed a trial. The two (2) matters were consolidated for trial. After the trial was concluded, the trial judge issued his decision finding that the surgery was not necessary to address the effects of the work-related injury, but rather a pre-existing congenital condition and he denied the petition. The employee filed a timely claim of appeal from this decision as well.

We have undertaken a thorough review of the record in this matter in conjunction with the extensive reasons of appeal presented by the employee, and conclude that the trial judge misconstrued and overlooked material evidence in a number of instances such that his factual findings in both matters are clearly erroneous. We have, therefore, conducted a *de novo* review of the evidence and find that the employee remains partially disabled due to the effects of the work-related injury and that the proposed surgery is necessary to cure, rehabilitate or relieve her from the effects of that injury.

Ms. Pacheco was employed as a special education teacher in grades one (1) to three (3) for approximately fifteen (15) years and worked for the Johnston school department since 2000. At the time of her injury, she was teaching a class of six (6) young children with mixed disabilities. She had to be on her feet most of her work day and get up and down from small chairs designed for children throughout the day as she worked with her class. On December 9, 2005, she slipped on ice on her way into the school and fell flat on her back. A memorandum of agreement was issued by the employer on March 17, 2006 describing the injury as a lumbar

strain and providing for the payment of weekly benefits for partial incapacity from December 10, 2005 and continuing.

The employee testified that, immediately following her fall, her left leg and right arm were numb, she had pain in her lower back, and neck pain radiating into her right arm. The pain in her neck and arm subsided after a week, but the back pain and the pain radiating into her left leg has never gone away. The employee testified that she has not returned to work since December 9, 2005 and does not feel capable of returning because she is still in a lot of pain and takes pain pills every four (4) hours. She stated that as soon as the pain medication wears off, she cannot walk very far and she still has numbness in her left leg. The employee also testified that her left ankle frequently collapsed on her. On October 26, 2006, Dr. Mark A. Palumbo, a specialist in orthopedic spine surgery, performed surgery on her back. At the time of her testimony, Ms. Pacheco was unsure of the effects of the surgery, but noted that her ankle felt better although she still had some numbness.

The employee first sought medical treatment at the Cranston Medical clinic the day after her fall, complaining of numbness in her left leg and right arm and pain in her lower back and neck. On the following Monday, December 12th, because the pain was not relieved by taking the medication she was given at Cranston Medical, she went to Spine Tech and treated with Dr. John A. Herner, a chiropractic physician.

Dr. Herner's deposition testimony was entered into evidence at trial. The chiropractor testified that on December 12, 2005, he examined the employee and took her history as it related to the fall and diagnosed her with, among other things, "aggravated congenital lumbar scoliosis with foraminal stenosis of the lumbar spine, and aggravated left lumbar radiculitis." Pet. Ex. 1 at 6. Dr. Herner opined that the employee was totally disabled as to her work duties and that the

injury she sustained on December 9, 2005 was the cause of her disability. He provided treatment to the employee two (2) to three (3) times per week over the next six (6) weeks. When her condition did not improve, she was referred to Dr. Joseph A. Centofanti, a neurologist. Dr. Centofanti administered EMG testing on January 19, 2006 which suggested left lower lumbar radiculopathy, which supported Dr. Herner's diagnosis.

At her appointment with Dr. Herner on February 14, 2006, the employee continued to complain of constant left ankle pain which had been progressively worsening since the injury. She also described numbness, tingling and weakness in her left foot. Dr. Herner testified that at that time she presented with a left foot drop and he fitted her for a brace. He last saw the employee in September 2006 and at that time the employee was complaining of left lower extremity pain and weakness. She was also starting to develop a pinching sensation in her right lateral hip. Dr. Herner maintained his opinion that the employee was totally disabled as to her job duties.

At trial, the defense focused on the employee's complaints of, and treatment for, back pain prior to the fall in December of 2005. Ms. Pacheco testified that she was born with scoliosis and wore a back brace for about seven (7) months when she was thirteen (13) years old. The records of Dr. Robert A. L'Europa, a chiropractor, reflect that the employee treated with him at Spine Tech from April 5, 2002 through May 7, 2002 for an injury sustained while moving furniture at her home. Ms. Pacheco explained that at that time she experienced pain in her low back and tingling down her left leg, which was diagnosed as sciatica. She underwent MRI and EMG testing which revealed the scoliosis but nothing else of significance. After treatment with the chiropractor and physical therapy, her symptoms resolved.

Ms. Pacheco also treated with Dr. L'Europa twice in April 2003 and twice in June 2003 for similar complaints of low back pain along with tingling and numbness in her left foot. Upon questioning from the court, the employee explained that the numbness she is experiencing presently, as opposed to the tingling she experienced in 2002, causes her leg to feel like it fell asleep and the sensation in her leg does not come back unless she sits for a while. On cross-examination, the employee did concede that she had some numbness in her foot when she treated at Spine Tech in 2003 as reflected in the Spine Tech reports; however, she claimed it was a "different kind" of numbness. Tr. at 20.

In the spring of 2005, the employee experienced another flare-up of back pain and tingling in her left leg after working in her garden, and treated with Dr. Herner at Spine Tech from May 27 to July 15, 2005. He testified that when he first saw the employee on May 27, 2005, she complained of lower back pain with left thigh and leg pain. The employee also complained that she had been experiencing foot numbness in the past few months and stated that it was getting progressively worse that week. At this time, however, Dr. Herner did not diagnose the employee with a foot drop, or disable her from work.

After reviewing the records involving the employee's prior low back and leg complaints from 2002 and 2003, Dr. Herner maintained his opinion that the injury in December 2005 aggravated the employee's condition and brought her symptoms to a new level, based on her complaints and the progressive worsening of the findings regarding her left lower extremity.

During the period he treated the employee in the summer of 2005, Dr. Herner referred Ms. Pacheco to Dr. Matthew Smith, a specialist in physical medicine and rehabilitation. Dr. Smith evaluated the employee on July 14, 2005 and recorded a history of worsening back pain over the last three (3) years. The employee related that she had intermittent pain across her low

back of fluctuating intensity with pins and needles down her left leg into the outside of her foot. Dr. Smith's diagnosis was left L5 or S1 lumbar radiculopathy due to severe foraminal stenosis caused by severe scoliosis. He recommended a series of epidural injections and prescribed Ultracet and Amitriptyline to alleviate pain and help her sleep.

The initial injection was scheduled for July 19, 2005, but the employee cancelled her appointment and never rescheduled. Initially, Ms. Pacheco testified that she cancelled the appointment because she felt better and she had heard some negative things about the injections. Upon further questioning, the employee stated that on July 15, 2005, she went to Nevada because her pregnant daughter had been in a motor vehicle accident and her grandson had been born prematurely. She denied that she felt worse at this time and noted that she went hiking in the Grand Canyon while in Nevada. She testified that it was her understanding that Dr. Smith had prescribed the Amitriptyline to help her sleep because she was having some anxiety problems. She stated that she returned to Rhode Island in mid-August and from July 16, 2005 until she fell on December 9, 2005, she did not treat with anyone for her back or have any other injuries. She asserted that her back was fine and she returned to her regular job when the school year began in September 2005. On cross-examination, the employee clarified that she had some issues with back pain and tingling in her left foot prior to the work injury, but she never had problems with her ankle collapsing as she did after the injury. She also explained that the numbness she experienced after the injury was different than anything she felt previously in that it felt like her foot and leg would fall asleep.

On cross-examination, Dr. Smith acknowledged that at the time he evaluated the employee in the summer of 2005, he found that her reflexes and sensory examination were normal; however, when Dr. Palumbo examined the employee on February 17, 2006, he found

diminished sensation, an absent left Achilles reflex and a mildly diminished patella reflex. Dr. Smith testified that he did not diagnose the employee with a foot drop on July 14, 2005, but he did note that the weakness in her foot upon motor testing suggested something "along the same lines" as a foot drop. Resp. Ex. 2 at 24.

Dr. Palumbo evaluated Ms. Pacheco for the first time on February 17, 2006 on referral from Dr. Herner. At that time, the employee was wearing an air cast splint on her left foot because she was experiencing weakness in her foot and ankle. After conducting a physical examination and reviewing diagnostic test results, the doctor diagnosed a left lumbar radiculopathy involving L4 and L5, as well as congenital lumbar scoliosis. He recommended epidural steroid injections at the left L4-5 and L5-S1 nerve roots. The doctor indicated that Ms. Pacheco was temporarily totally disabled from work.

In March of 2006, Dr. Smith administered the injections on referral from Dr. Palumbo. On June 6, 2006, the employee returned to Dr. Palumbo and informed him that she had not experienced any substantial improvement in her condition. She advised the doctor that she wished to consider surgery. After reviewing the most recent MRI and CT scan films, Dr. Palumbo recommended an L5-S1 posterior decompression and fusion. The surgery was performed on October 26, 2006. At the follow-up examination two (2) weeks later, the employee reported improved strength and less pain in her left leg. Dr. Palumbo noted that her motor examination had returned to normal.

During his initial evaluation and his subsequent office visits, Dr. Palumbo did not have the employee's complete medical history. Prior to his deposition, the doctor had the opportunity to review the July 15, 2005 report of Dr. Smith. In response to a hypothetical which included accurate facts regarding the employee's past medical history derived from the reports of Drs.

L'Europa and Herner and testimony of the employee, Dr. Palumbo opined that although the employee had pre-existing structural changes and symptomatology involving her spine, the fall at work had exacerbated her condition both in terms of severity and frequency of pain and the development of weakness in her ankle.

The doctor concluded that the employee's condition was caused by the work-related injury on December 9, 2005 and that the surgery he performed was necessary to cure, rehabilitate, or relieve her from the effects of that injury. He further stated that she remained totally disabled. Dr. Palumbo noted that his opinion was not affected by reviewing the employee's MRI results from 2002 and 2005. In addition, he indicated that the EMG testing in 2002 supported his opinion that the injury exacerbated the employee's condition because the 2002 test was essentially negative and an EMG test in 2006 demonstrated a neurologic abnormality.

Dr. James E. McLennan, a neurosurgeon, examined Ms. Pacheco on May 12, 2006, prior to her surgery, at the request of the employer. The doctor's deposition and records were introduced into evidence. In Dr. McLennan's report, he documented that the employee had given a medical history where she informed him that although she had chiropractic treatment and massage for her back over the years, she never had any leg pain before the fall at work. The employee testified that Dr. McLennan saw her for about two (2) minutes and she found it hard to believe she would tell the doctor she never had leg pain before the fall. During the examination, the doctor did note decreased sensation in the L5 distribution, an absent left ankle reflex, and weakness in the left ankle, although he indicated she did not have an actual foot drop. Dr. McLennan also made note of the employee's congenital scoliosis as well as foraminal stenosis at L4-5 and L5-S1 which was demonstrated on diagnostic tests he reviewed. When questioned as

to the facts surrounding the employee's fall, Dr. McLennan responded that he did not "really know, . . . it was a slip and fall, it was icy, supposedly, is what she told me. I didn't get the real details of how she fell, or whatever." Resp. Ex. 1 at 6.

At the time of his examination, the doctor was provided with results of EMG and MRI testing done in January 2006, and reports of Drs. Stanley J. Stutz, Herner, and Palumbo. At his deposition, Dr. McLennan reviewed the results of MRI studies from 2002 and 2005, as well as the July 14, 2005 report of Dr. Smith. He indicated that Ms. Pacheco has congenital curvature of the spine, chronic degenerative disc disease and high grade foraminal stenosis at L4-5 and L5-S1 on the left. Although he originally questioned whether the employee may have contused a nerve root when she fell resulting in left leg pain, after reviewing these records, the doctor stated that he could not attribute any of her symptoms to the fall at work because she had the same symptoms prior to the incident in December 2005. Id. at 11.

Dr. McLennan was aware that the employee worked as a special education teacher which he understood to require lifting no more than (10) pounds. He classified this position as a "very light duty job," and concluded that Ms. Pacheco could perform those duties without restrictions. Id. at 12. He noted that although surgery may be necessary to relieve the employee's symptoms, it was not related to the fall.

On cross-examination, Dr. McLennan conceded that he did not know whether the employee was having leg pain at the time of her slip and fall, whether she had missed work as a result of her prior leg pain, or whether she treated with any physician for leg pain between July and December 2005. Dr. McLennan acknowledged that the July 15, 2005 report of Dr. Smith states that the employee's reflexes were normal whereas during his examination in May 2006 the employee's left ankle jerk was absent. He indicated that leg pain can be caused by a contusion to

a nerve root in someone with foraminal stenosis and conceded that an individual can aggravate a pre-existing condition in a slip and fall. Although he was not aware of what type of surgery Dr. Palumbo was recommending, Dr. McLennan stated that he thought it was to address her pre-existing condition because she had the symptoms prior to the fall at work.

In light of the conflicting medical opinions, the trial judge appointed Dr. Vernon H. Mark, a neurosurgeon, to conduct an impartial medical examination of the employee on August 25, 2006. The doctor was provided with a functional job description, records of Spine Tech regarding chiropractic and physical therapy treatments, the July 14, 2005 report of Dr. Smith, records of Dr. Palumbo, reports of Drs. McLennan and Stutz, and reports of EMG, MRI, and CT scan studies done in 2005 and 2006. The employee informed Dr. Mark that thirteen (13) months ago she developed shooting pain down her left leg with back pain after doing yard work. She indicated that after two (2) weeks of chiropractic treatment, the pain subsided and she had no more back or leg pain until the fall at work.

Dr. Mark's diagnosis was a left L5 radiculopathy with a partial foot drop. His opinion regarding the cause of the employee's current condition was that "in spite of her preexisting lumbar pathology and with foraminal narrowing, the patient's work injury and subsequent attempts at treatment exacerbated the underlying pathology and made it much more symptomatic." Ct.'s Ex. 1 at 19. He indicated that his opinion was based upon the employee's history, some statements from Dr. Palumbo, and the fact that Ms. Pacheco was not having any, or minimal, symptoms for almost five (5) months prior to the fall at work. Dr. Mark agreed that surgery involving decompression of the L5 nerve root was appropriate to address the partial foot drop, although he did not agree that a fusion was necessary as well.

During Dr. Mark's testimony, he was asked hypothetical questions by both the employer's attorney and that of the employee, which included detailed and accurate facts regarding the employee's past medical history, especially her back and leg problems and treatment of such. On cross-examination, Dr. Mark agreed that the employee's preexisting condition made her more susceptible to having another injury, and that the effects of such an injury would be more pronounced. After reviewing Dr. McLennan's report, he indicated that he felt that Ms. Pacheco had more severe physical findings than Dr. McLennan had documented in his report. The doctor also clarified that although Dr. Smith noted weakness in the employee's foot in July 2005, the fall caused a worsening in her condition to the point that she required a foot drop brace.

The trial judge found that the employer proved that the employee was no longer disabled in total or in part from the injury she sustained on December 9, 2005, and that any condition she currently suffered from was not work-related. He also found that the employee had failed to prove that the surgery, decompression of the fifth nerve root, was related to the effects of the work-related incident and instead found it was related to the employee's personal medical profile. The trial judge based his findings in large part on his observation of the employee's testimony and his assessment of her credibility, noting that at one point during cross-examination, "her testimony during this questioning was evasive, and she appeared to be manufacturing answers as she went along." Dec. at 5. Based on his assessment that the employee lacked credibility, the trial judge rejected the testimony of Drs. Palumbo and Mark, because their opinions were based upon the incomplete medical history provided by the employee. He chose to rely on the opinion of Dr. McLennan despite the fact that he also

received an incomplete history from the employee. The employee filed claims of appeal in both matters.

The Appellate Division's standard of review is narrowly delineated by statute. Section 28-35-28(b) of the Rhode Island General Laws states, "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." *See also* Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). The findings of the trial judge will not be disturbed on appeal absent a finding by the appellate panel that he is clearly wrong or that he overlooked or misconceived material evidence. Mulcahey v. New England Newspapers, Inc., 488 A.2d 681, 683 (R.I. 1985); Davol, Inc. v. Aguiar, 463 A.2d 170, 174 (R.I. 1983). Only after concluding that the trial judge clearly erred, may the appellate panel conduct its own *de novo* review of the evidence. R.I.G.L. § 28-35-28(b); Grimes Box Co., Inc. v. Miguel, 509 A.2d 1002, 1004 (R.I. 1986).

The employee has filed thirteen (13) reasons of appeal, the bulk of which contend that the trial judge overlooked or misconceived pieces of material evidence when he found that the employee had recovered from her work-related injury and denied her request for surgery. We agree with the employee's contentions and find the trial judge misconceived and overlooked portions of the testimony and opinions of Drs. Herner, Mark, Palumbo and McLennan when he terminated the employee's benefits. The trial judge misconceived and overlooked this same evidence in his consideration of whether a decompression of the left L5 nerve root was necessary to relieve her work-related symptoms.

The trial judge based his decision to terminate the employee's benefits largely on his assessment of the employee's credibility at trial. In his decision, the trial judge repeatedly pointed to several occasions where he felt the employee's testimony was contradicted and at

times was what he categorized as "evasive." Dec. at 5. He also focused on the medical issues the employee had prior to the fall and found that neither Dr. Mark nor Dr. Palumbo had an accurate or complete description of her medical history. It was his conclusion that because the employee relayed an incomplete or inaccurate medical history to these doctors, their opinions were not probative. We find two (2) errors in this line of reasoning.

First, in terminating the employee's benefits, the trial judge ultimately relied on the opinion of Dr. McLennan that the employee's condition was not related to the fall at work, but was solely attributable to her pre-existing degenerative condition. In his report, Dr. McLennan noted that the employee informed him that she previously had treatment for back pain but she denied any previous leg pain. It is clear from the employee's testimony as well as other medical evidence in the record that she did have leg pain and tingling prior to December 2005. Therefore, prior to their deposition testimony, Drs. McLennan, Mark and Palumbo all had incomplete or inaccurate histories recorded in their reports. It is difficult for this panel to accept the idea that one misinformed doctor was any more reliable than the others who testified.

Second, it is clear that the trial judge's decision rested largely on his assessment of the employee's truthfulness, and although we recognize the great weight that should be given to a trial judge's findings on issues of credibility, his reliance on this factor is misplaced in this instance. This is not a case where "medical testimony is based to a large extent on statements of medical history by the employee whose credibility carries little if any weight" as to justify the trial judge in not accepting it. Mazzarella v. ITT Royal Electric Div., 120 R.I. 333, 338, 339 A.2d 4, 8 (1978); *see* La Fazia v. Canada Dry Corp., 99 R.I. 9, 13, 205 A.2d 16, 19 (1964).

Ms. Pacheco had been receiving weekly benefits pursuant to a memorandum of agreement issued by the employer in which it accepted responsibility for a work-related injury

which occurred on December 9, 2005. The agreement was issued after the employee was examined by Dr. Stutz at the request of the employer. Information was provided to Dr. Stutz regarding her pre-existing condition. The employee had also been seen by Drs. Herner and Centofanti, both of whom she had treated with prior to the work injury. She was obviously not trying to hide her condition as she returned to the same doctors who treated her previously.

The two (2) petitions before the trial judge involved allegations requiring expert medical testimony addressing whether the employee remains disabled due to the effects of her work-related injury and whether surgery is necessary to address those effects. This is not a situation where an employee gives a physician false information as to how she was injured or what her activities are and the physician relies upon that information in rendering an opinion regarding causation or disability. The issue before the trial judge was medical in nature – whether the employee remained disabled due to the effects of the work-related injury. As such, the credibility of the employee was not a factor. We would also point out that the trial judge never explains why he disregards the opinions rendered by Dr. Herner, who was fully aware of the employee's past medical history and saw her both before and after the fall at work.

Certainly an expert medical opinion may be rejected if the foundation for that opinion is lacking or inaccurate. Although the trial judge gave credence to Dr. McLennan's amended opinion after the doctor was provided with information that filled in his incomplete history, he ignored the fact that both Drs. Palumbo and Mark provided opinions in response to lengthy hypothetical questions detailing the employee's prior treatment and complaints. Because all of the doctors were given the complete picture of the employee's medical history at the time they testified, the issue of the employee's credibility had no impact upon the doctor's opinions. It was as if she gave each of them a complete and correct medical history and they were asked to

generate an opinion regarding her current disability. After considering the employee's complete medical history provided in the hypothetical questions, Drs. Mark and Palumbo reiterated their initial opinions that although the employee did have medical issues prior to December 2005, the fall exacerbated her baseline level and made it much more symptomatic and persistent. On the other hand, Dr. McLennan, upon learning that Ms. Pacheco did have leg pain previously, concluded that none of her current problems were related to the fall at work, but were due to her preexisting condition.

We do recognize the trial judge's prerogative, when faced with conflicting competent medical testimony of probative value, to accept the opinions of one health care provider over another. Parenteau v. Zimmerman Eng'g, Inc., 111 R.I. 68, 78, 299 A.2d 168, 173 (R.I. 1973). However, in choosing to rely on one (1) doctor's opinion and reject others, *some* reason must be given. The trial judge rejected the opinions of Drs. Mark and Palumbo because they were based upon an incomplete history and declined to consider the opinions they rendered after being provided a complete history. Despite the fact that Dr. McLennan recorded an incomplete history, the trial judge accepted his amended opinion after he was provided the additional information. We find this reasoning contradictory and insufficient to support the trial judge's choice to rely upon Dr. McLennan's opinion over the other physicians.

In his decision, the trial judge adopts the position that the employee's symptoms continued from July 2005 until the date of the fall at work and therefore her current condition is simply a continuation of her preexisting problems. We find this reasoning to be faulty and without sufficient substantiation in the record. First, we cannot ignore the fact that the employee fell on her back at work and this injury was accepted by the employer. One cannot look behind

the memorandum of agreement and state that in hindsight the fall had no effect on the employee's condition.

Second, there is no evidence that the employee sought any medical treatment for back or leg complaints from July to December 2005. After the episode at the end of May 2005, for which she treated until mid-July, she hiked in the Grand Canyon in August and returned to work for the new school year in September. She continued to work at her regular job until the fall in December. There is no evidence that Ms. Pacheco saw Dr. Herner or any other physician during that time period. The medical records from Spine Tech indicate that when the employee experienced a flare-up of symptoms, she would usually treat with Dr. L'Europa or Dr. Herner, the chiropractors at Spine Tech.

The trial judge emphasized that the employee refilled a prescription for Amitriptyline in September and November and cited this as evidence that she had continuing back and leg pain. When the employee saw Dr. Smith in July 2005, on referral from Dr. Herner, she completed an intake questionnaire in which she indicated that in addition to her back problems, she had episodes of sadness, depression, and anxiety and was having difficulty sleeping. Dr. Smith gave her prescriptions for Ultracet, which is a pain medication, and Amitriptyline. Amitriptyline is classified as an anti-depressant and has a sedative effect. *See* AMA Complete Medical Encyclopedia, 1st ed. (2003). It is generally prescribed to treat depression and sometimes utilized to control chronic pain. Dr. Smith noted in his report that he prescribed it for pain, sleep and mood. The employee acknowledged that she has a prescription for pain medication to deal with flare-ups of pain caused by the scoliosis and she believed the Amitriptyline was to help her sleep. Tr. at 35. The records introduced into evidence from CVS pharmacy do not indicate that the employee refilled the prescription for Ultracet, the pain medication. Considering all of the

circumstances, we believe the trial judge erred in concluding that the evidence established that Ms. Pacheco continued to suffer from severe back and leg pain from May 2005 until the fall at work in December.

Based upon the foregoing review of the trial judge's decision, we find that he overlooked and/or misconceived material evidence such that his conclusions that the employee was no longer disabled due to the effects of her work-related injury and that surgery was not necessary to cure, rehabilitate or relieve her from the effects of the injury are clearly erroneous. Consequently, it is our duty to undertake a *de novo* review of the record and decide whether the medical evidence establishes that the employee has recovered from the effects of her work injury. We find that the employer did not meet this burden by a fair preponderance of the evidence.

At trial, the employer relied on the testimony and reports of Dr. McLennan and, in part, the testimony and reports of Dr. Smith, in its attempt to prove that the employee was no longer disabled in total or in part from the work injury. It was Dr. McLennan's opinion that the employee's current medical issues and symptoms were not related to the work injury and were instead caused by congenital progressive degenerative changes in the spine which have been worsening over time. We note that Dr. McLennan developed this opinion without extracting whether the employee was experiencing leg pain at the time of her fall, whether she had missed work due to her condition, whether she had treated for back and/or leg pain during the five (5) months prior to the fall, or even the specifics of what part of her body she hit when she fell.

We reject Dr. McLennan's opinion for several reasons, including the fact that he lacked the pertinent information noted above. The employee sustained a work related injury on December 9, 2005 which was memorialized in a memorandum of agreement. There was no

dispute that the employee suffered a trauma on that date. For Dr. McLennan to then opine that, essentially, the employee suffered no ill effects due to the fall is in direct conflict with the facts of this case. The employer contends that the employee is no longer suffering from the effects of the work injury, but is instead suffering from symptoms related to her personal medical profile. To prove this assertion, there must be some medical evidence or testimony offered which tends to prove that the employee's symptoms related to the fall subsided at some point afterward, and that the employee is now simply suffering the effects of the progression of her degenerative condition. However, the employer presents no evidence to that effect.

The employer attempts to compare Dr. Smith's findings in the summer of 2005 and Dr. McLennan's findings at his exam on May 12, 2006, to show that the employee's symptoms are a natural progression of her degenerative condition. The employee, however, did not treat with any physician for back or leg pain from the time she saw Dr. Smith on July 14, 2005, until she fell on December 9, 2005, which strongly suggests that it was the fall that aggravated her condition, as opposed to just a natural progression. Although the employee's credibility was called into question as to her reason for cancelling an appointment with Dr. Smith for an injection, she did not make any attempt to contact Dr. Smith or Dr. Herner upon her return from Nevada in August and even hiked in the Grand Canyon while she was there.

At the time that the employee saw Dr. Smith in July 2005, he noted some weakness in the employee's foot upon motor testing, but he did not definitively diagnose the employee with a foot drop. A partial foot drop, after the fall in December, however, was positively diagnosed by Dr. Herner (who fitted her for a brace), Dr. Mark and Dr. Palumbo. Dr. Smith conceded on cross-examination that when he examined the employee in July 2005, he found her reflexes to be normal, but when he evaluated her again in March 2006 at the request of Dr. Palumbo, he found

diminished reflexes on her left side. Dr. McLennan also conceded that in May 2006 he could not find a reflex in the employee's left ankle when Dr. Smith's records noted that her reflexes were normal in July 2005. The medical evidence demonstrates that there was a worsening of the employee's condition after the fall in December which, unlike past episodes of exacerbation, persisted despite the conservative treatment she has received.

Drs. Palumbo, Herner and Mark recognized that the employee did have some prior back and leg problems for short periods of time in 2002, 2003, and the summer of 2005. Taking this medical history into consideration, Dr. Palumbo concluded that the employee's current condition was causally related to the fall at work and resulted in her total disability. His explained the basis for his opinion as follows:

> . . . first there was pre-existing structural change in the form of the congenital scoliosis and the pre-existing spinal stenosis. Secondly, there was pre-existing symptomatology in the form of recurring episodes usually time limited of both back pain and predominantly left lower extremity sensory symptoms. Those episodes tended to be, as I stated, time limited and responded to short periods of treatment over the years. There was then a protracted period of time where somewhere between July and December 2005 where she was reasonably functional and apparently on a low level of symptoms. With those things in mind, she certainly had a pre-existing issue, structural changes and radicular symptoms but there definitely seemed to be an exacerbation of her baseline level of symptomatology related to the fall in December 2005, and that exacerbation appeared to take a form of increased frequency and severity of her pain along with a significant alteration in the motor function or strength of her left lower extremity such that she showed definite changes on physical examination and developed major issues with ankle instability requiring the use of a brace.

Ee's Ex. 3 at 15-16. His analysis is entirely consistent with the evidence in the record.

Dr. Mark also opined that the employee's underlying pathology was exacerbated as a result of her fall in December 2005 and the subsequent epidural injection by Dr. Smith, making it much more symptomatic and causing her to be temporarily disabled from work. In support of

his opinion, he cited the five (5) month period that the employee had minimal, if any, symptoms immediately prior to the fall at work, and the significant physical findings noted by Dr. Palumbo which demonstrated a worsening in her condition compared to the reports he reviewed from July 2005. The doctor was provided with a complete history of the employee's treatment for back and leg problems in the documents he reviewed and the hypothetical questions he was asked. Dr. Mark testified that he thought the employee had more severe findings than Dr. McLennan recorded in his report.

In addition, Dr. Herner stated that the fall at work aggravated the employee's pre-existing condition, bringing her symptoms to a new level and causing a worsening of the symptoms in her left lower extremity. As her treating physician at Spine Tech, Dr. Herner had access to all of the employee's previous treatment records and he had treated her in the summer of 2005, when he did not find a foot drop, and did not disable her from work. Dr. Herner clearly had an adequate foundation for his opinion as to the cause of Ms. Pacheco's current condition and disability as he was one of the last physicians to treat her prior to the work injury and one of the first to see her afterwards.

It is clear that the employee did have a pre-existing degenerative condition in her spine due to severe scoliosis which caused some radicular symptoms in the past, however, these problems were not disabling until her fall at work on December 9, 2005. Three (3) doctors opined that the employee was disabled due to the work related incident, in that it aggravated her pre-existing symptoms to a point where the pain did not resolve with short bouts of chiropractic treatment as it had in the past, and exacerbated the weakness in her foot to the point where she developed a partial foot drop. Their opinions were based upon a complete and accurate foundation and we find no reason to reject them. Dr. McLennan, after finding out that the

employee previously had left leg symptoms, adamantly stated that her current symptoms were in no way related to the fall at work because he believed she had the exact same symptoms prior to December 2005. At one point, he stated that he assumed that she had ongoing symptoms up to the date of the fall. Er's Ex. 1 at 24. The doctor's statements seem to suggest that Ms. Pacheco never suffered any symptoms related to her fall, which flies in the face of the memorandum of agreement entered into by the parties. After a thorough review of the medical evidence, we find the opinions of Drs. Herner, Palumbo and Mark to be more persuasive and probative than the statements of Dr. McLennan with regard to the employee's disability and the cause thereof. Consequently, we deny the employer's petition to discontinue the employee's benefits.

We would apply the same analysis and reasoning regarding the employee's request for permission for surgery. Both Drs. Mark and Palumbo testified that decompression of the left L5 nerve root was necessary to cure, relieve or rehabilitate the employee from the effects of the work-related injury, particularly the weakness, numbness and tingling in the left lower extremity, including the ankle. Dr. Palumbo noted that although the employee's pre-existing condition was a factor in his decision to recommend the surgery, "there was some distinct change in her symptomatology immediately subsequent to the December injury, namely an elevation in her level of symptoms, her frequency of symptoms, her persistence of symptoms and in particularly [sic] the effect of her motor weakness on the leg function, a very weak foot and ankle requiring the use of a brace causing instability, so those recent alterations or changes were a major factor in the decision that was made." Ee's Ex. 3 at 32. He estimated that the surgery would result in seventy-five percent (75%) to eighty percent (80%) improvement in nerve root function and motor strength in the employee's leg. In fact, at the first post-operative visit on November 15,

2006, the employee reported improved strength and reduced pain in the leg and Dr. Palumbo noted that the motor examination was normal.

Dr. Mark was in agreement with Dr. Palumbo as to the need for decompression of the nerve root, although he was not as optimistic about the likelihood of improvement in the employee's condition. He testified that the surgery had about a fifty percent (50%) chance of improving her symptoms because the nerve root may be irreparably damaged due to the length of time that had passed. Dr. Mark was not convinced that the second part of the surgery, the fusion, was necessary. Dr. McLennan also acknowledged that surgery may be necessary to address the symptoms the employee was having in her left leg, but he did not specifically comment on the surgery proposed by Dr. Palumbo. After reviewing the medical testimony, we find that the surgery proposed by Dr. Palumbo, specifically decompression of the L5 nerve root and fusion is necessary to cure, relieve, or rehabilitate her from the effects of her work-related injury.

Based upon the foregoing, the employee's appeal in W.C.C. No. 2006-04173 is granted and the decision and decree of the trial judge are hereby vacated. A new decree shall enter containing the following findings and orders:

1. That the employer has failed to prove by a fair preponderance of the credible evidence that the employee is no longer disabled due to the effects of the work-related injury she sustained on December 9, 2005.

2. That the employee remains partially disabled due to the effects of the work-related injury she sustained on December 9, 2005.

It is, therefore, ordered in W.C.C. No. 2006-04173:

1. That the employer's petition to review is denied.

2. That the employer shall reinstate the payment of weekly benefits for partial incapacity beginning April 6, 2007 and continuing until further order of this court or agreement of the parties.

3. That the employer shall reimburse the employee's attorney the sum of One Hundred Fifty-four and 00/100 ($154.00) Dollars for the cost of preparing the transcript of the trial and the cost of filing the claim of appeal in this matter.

4. That the employer shall reimburse the employee's attorney the sum of Seven Hundred Seven and 45/100 ($707.45) Dollars for the cost of stenographic services for the deposition of Dr. Mark A. Palumbo and the expert witness fee paid to the doctor.

5. That the employer shall reimburse the employee's attorney for the cost of stenographic services for the deposition of Dr. John A. Herner, the expert witness fee paid to Dr. Herner, and the cost of copies of the depositions of Drs. Vernon H. Mark, Matthew J. Smith and James E. McLennan upon presentation of proof of payment of those costs.

6. That the employer shall pay a counsel fee in the sum of Eleven Thousand and 00/100 ($11,000.00) Dollars to Frank S. Lombardi, Esq., attorney for the employee, for services rendered during the trial and successful appeals of this matter and the companion case, W.C.C. No. 2006-04574.

With regard to W.C.C. No. 2006-04574, the employee's claim of appeal is granted and the decision and decree of the trial judge are vacated. A new decree shall enter containing the following findings and orders:

1. That the surgery recommended by Dr. Mark A. Palumbo, specifically decompression of the L5 nerve root and fusion, is necessary to cure, rehabilitate and relieve the employee from the effects of the work-related injury she sustained on December 9, 2005.

It is, therefore, ordered in W.C.C. No. 2006-04574:

1. That the employee's petition requesting permission for surgery is granted.

2. That the employer shall pay all necessary medical expenses associated with the performance of said surgery in accordance with the medical fee schedule.

3. That the employer shall reimburse the employee's attorney the sum of Forty-five and 00/100 ($45.00) Dollars for the cost of filing the petition and the claim of appeal in this matter.

4. That all other appropriate costs and fees associated with the trial and appeal of this matter have been awarded in the companion case, W.C.C. No. 2006-04173.

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

Salem and Hardman, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Salem, J.

_____
Hardman, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

JOHNSTON PUBLIC SCHOOLS	)	
	)	
VS.	)	W.C.C. 2006-04173
	)	
DEBRA PACHECO	)	

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division on the claim of appeal of the respondent/employee and upon consideration thereof, the appeal of the employee is granted. In accordance with the Decision of the Appellate Division, the following findings of fact are made:

1. That the employer has failed to prove by a fair preponderance of the credible evidence that the employee is no longer disabled due to the effects of the work-related injury she sustained on December 9, 2005.

2. That the employee remains partially disabled due to the effects of the work-related injury she sustained on December 9, 2005.

It is, therefore, ORDERED:

1. That the employer's petition to review is denied.

2. That the employer shall reinstate the payment of weekly benefits for partial incapacity beginning April 6, 2007 and continuing until further order of this court or agreement of the parties.

3. That the employer shall reimburse the employee's attorney the sum of One Hundred Fifty-four and 00/100 ($154.00) Dollars for the cost of preparing the transcript of the trial and the cost of filing the claim of appeal in this matter.

4. That the employer shall reimburse the employee's attorney the sum of Seven Hundred Seven and 45/100 ($707.45) Dollars for the cost of stenographic services for the deposition of Dr. Mark A. Palumbo and the expert witness fee paid to the doctor.

5. That the employer shall reimburse the employee's attorney for the cost of stenographic services for the deposition of Dr. John A. Herner, the expert witness fee paid to Dr. Herner, and the cost of copies of the depositions of Drs. Vernon H. Mark, Matthew J. Smith and James E. McLennan upon presentation of proof of payment of those costs.

6. That the employer shall pay a counsel fee in the sum of Eleven Thousand and 00/100 ($11,000.00) Dollars to Frank S. Lombardi, Esq., attorney for the employee, for services rendered during the trial and successful appeals of this matter and the companion case, W.C.C. No. 2006-04574.

Entered as the final decree of this Court this day of

PER ORDER:

_____

John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Salem, J.

_____
Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Frank S. Lombardi, Esq., and George E. Furtado, Esq., on

_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

DEBRA PACHECO	)	
	)	
VS.	)	W.C.C. 2006-04574
	)	
JOHNSTON PUBLIC SCHOOLS	)	

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division on the claim of appeal of the petitioner/employee and upon consideration thereof, the appeal of the employee is granted. In accordance with the Decision of the Appellate Division, the following findings of fact are made:

1. That the surgery recommended by Dr. Mark A. Palumbo, specifically decompression of the L5 nerve root and fusion, is necessary to cure, rehabilitate and relieve the employee from the effects of the work-related injury she sustained on December 9, 2005.

It is, therefore, ORDERED:

1. That the employee's petition requesting permission for surgery is granted.

2. That the employer shall pay all necessary medical expenses associated with the performance of said surgery in accordance with the medical fee schedule.

3. That the employer shall reimburse the employee's attorney the sum of Forty-five and 00/100 ($45.00) Dollars for the cost of filing the petition and the claim of appeal in this matter.

4. That all other appropriate costs and fees associated with the trial and appeal of this matter have been awarded in the companion case, W.C.C. No. 2006-04173.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Salem, J.

_____
Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Frank S. Lombardi, Esq., and George E. Furtado, Esq., on

_____