STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.	WORKERS' COMPENSATION COURT APPELLATE DIVISION

ALDO GENCARELLI	)	
	)	
VS.	)	W.C.C. 07-01077
	)	
DARLINGTON FABRICS	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the respondent/employer's claim of appeal from the decision of the trial judge which granted the employee's original petition for workers' compensation benefits for an injury sustained on June 30, 2006. The employer contends that the trial judge was clearly wrong to find that the employee sustained a work-related injury when no competent medical evidence was introduced which could form the basis for that finding. After thorough review of the record and careful consideration of the arguments of the respective parties, we grant the appeal and reverse the decision of the trial judge.

Before delving into the specifics of this matter, we would note that the employee was already before the court with several petitions regarding a prior injury. In January 2004, Mr. Gencarelli sustained an inguinal hernia while working for Darlington Fabrics. He had surgery to repair the hernia in April 2004 and was out of work for a brief period of time. He was paid workers' compensation benefits during this incapacity. Over the course of the next year or so, he developed pain and swelling in the left testicular area which was diagnosed as a hydrocele. An

urologist, Dr. Erik G. Enquist, performed surgery on or about January 2006. The employee was out of work for about four (4) weeks and then returned to his regular job.

During the period Mr. Gencarelli was out of work in January 2006, he was paid workers' compensation benefits pursuant to a Memorandum of Agreement dated February 6, 2006. When he returned to work, the insurer stopped paying benefits, but never obtained a signed suspension agreement and receipt or sought an order from the court that the incapacity had ended. Consequently, when the employee stopped working in July 2006, the insurer was compelled to pay workers' compensation benefits pursuant to the outstanding Memorandum of Agreement. The insurer then filed an employer's petition to review on August 29, 2006, and a consent decree was entered on March 9, 2007 stopping the payments as of July 14, 2006.

In his original petition which was filed on February 15, 2007, the employee alleged that he sustained an injury to his back at work on June 30, 2006 which resulted in partial disability from July 1, 2006 to July 14, 2006 and total disability from July 15, 2006 and continuing. Mr. Gencarelli, a 47 year old male, testified he had been working for the employer for twenty-six (26) years at the time of the incident. His job on the second shift in June 2006 involved supervising employees who fixed the knitting machines, as well as doing repair work himself. The job required bending, climbing, changing gears and motors and lifting up to eighty (80) to ninety (90) pounds.

On Friday, June 30, 2006, the employee, while working on a machine, slipped on some oily papers on the floor which caused him to twist and fall backwards, hitting the machine behind him with the right side of his low back and then landing on the floor on his buttocks. He did not inform any supervisory personnel about the incident on that day and finished the work day. The following week, the plant was shut down for vacation. Mr. Gencarelli stated that he

returned to work on Monday, July 10, 2006, he told his supervisor, Mario Siciliano, about the incident on June 30 and that he was going to see a doctor because his back pain was worse. The employee worked that entire week, although he avoided doing any heavy lifting and asked his co-workers for assistance.

On Monday, July 17, 2006, the employee called the knitting department office and informed an employee that he was not coming to work because his back was bothering him. On Tuesday, his wife drove him to see Dr. David Siciliano, a chiropractor, and on the way home, they stopped at the plant, and his wife brought a note to the human resources office. Two (2) days later, on July 20, 2006, after he again saw the chiropractor, his wife dropped off another note at the human resources office. During this time, the employee remained out of work.

The following week, Mr. Gencarelli called James Murray, the knitting department manager, on several occasions without success. When he finally spoke with him, the employee inquired about leave of absence forms that were required after an absence of more than three (3) days. Mr. Murray indicated that he would look into the situation. The next day, Mr. Murray contacted the employee and told him to come in that day to sign some papers. When they met, Mr. Gencarelli was informed that he was terminated because he did not follow proper procedures for calling in and requesting a leave of absence. At the time of his testimony in April 2007, the employee had not worked anywhere since July 14, 2006.

Barbara Davis, a machine operator at the employer's plant, testified that Mr. Gencarelli was helping her do something on the machine when he slipped on some oil on the floor. She stated that he twisted and fell into the machine, hitting his low back. Ms. Davis indicated that the employee got up and said it hurt but he was feeling okay, so they finished what they had to do on the machine and each continued with their respective jobs. She could not recall the exact

date of the fall, but was certain that it was right before the shutdown in July because they were very busy.

James Murray, the knitting department manager, testified that he has worked for the employer for almost thirty-six (36) years. He explained that the employee handbook contains the company policy that all injuries, no matter how minor, are to be reported immediately to a supervisor. Mr. Murray stated that he never received a report from Mr. Gencarelli's supervisor regarding an injury on June 30, 2006. He acknowledged that he spoke with the employee on the phone when he inquired as to why he had not yet received any papers from the employer for Temporary Disability Insurance (hereinafter "TDI"). There was no mention of a work-related injury during that conversation.

Mr. Murray related that on August 1, 2006, a meeting was held with the employee and he was terminated because he had failed to call in and keep his supervisor informed as to why he was not coming to work. During the meeting, Mr. Gencarelli was asked if his back problem was work-related, and he responded that it was not.

Mario Siciliano, the supervisor on the second shift and a thirty-five (35) year employee, testified that Mr. Gencarelli did not report an injury to him on June 30, 2006 or any time thereafter. He asserted that the employee never told him that his back was bothering him or that he was going to see a doctor. Mr. Siciliano related that when he went in to work on Monday, July 17, 2006, there was a note on his desk stating that Mr. Gencarelli was out sick. The next day, when he went to work, there was a note from the front office that Mr. Gencarelli would be out of work until Thursday. Mr. Siciliano called the front office, and they explained that someone had dropped off a doctor's note stating that the employee would be out until Thursday. On Thursday, Mr. Siciliano did not receive a call or a note so he contacted the front office and

was told that another doctor's note had been dropped off stating that Mr. Gencarelli would be out of work until further notice. The witness indicated that he never knew why Mr. Gencarelli was out of work, although he later found out that he was terminated at some point.

The affidavit and complete records of Dr. Siciliano, a chiropractor, were admitted into evidence. The office notes are handwritten and difficult to decipher. The employee first treated with the doctor in 1997 for upper back and neck complaints. He treated once in 1999 for a similar problem. In November 2002, Mr. Gencarelli injured his low back at work and was apparently out of work for about one (1) week. In October 2004, he again reported low back complaints and was out of work for three (3) days. The office note for July 18, 2006 is difficult to read but indicates low back complaints. About a week later, the employee began to report some numbness in his left leg. When this symptom persisted on August 3, 2006, Dr. Siciliano referred Mr. Gencarelli for an MRI and made an appointment for him with Dr. A. John Elliot, an orthopedic surgeon. In two (2) notes stating that the employee was unable to work, the doctor indicated the employee suffered from an acute lower back strain/sprain, but did not state the cause of the problem.

Included in Dr. Siciliano's records is a letter dated March 8, 2007 addressed to the employee's attorney stating that Mr. Gencarelli never advised the doctor that the office visits from July 18, 2006 to August 3, 2006 were for treatment of a work-related injury. The doctor completed a form for TDI benefits on August 3, 2006 indicating that the disability was not work-related. In addition, in the attorney's request for the doctor' records dated March 19, 2007, the date of injury is stated as July 14, 2006.

Dr. Elliot saw the employee on August 8, 2006. In his records, the date of injury is stated as June 29, 2006. The history states that he slipped at Darlington Fabrics and did not report it

and then lost his job anyway. The doctor's diagnosis was recurrent L5-S1 herniated disc and arachnoiditis. Dr. Elliot recommended a series of epidural injections. It appears that the doctor did not review the results of the MRI because he makes no reference to it, and the report was not included in his records. The MRI study, which was done on August 3, 2006, revealed disc bulges at L1-L2, L3-L4, and L4-L5, as well as probable fibrotic change at L5-S1 secondary to the employee's prior back surgery in 1981. There was no evidence of recurrent disc herniation reported.

The employee was referred to the Lawrence & Memorial Hospital Pain Clinic in New London, Connecticut, for the injections. Dr. Sudhir Kadian saw Mr. Gencarelli on August 21, 2006. He noted that the employee fell at work on June 29, 2006 and did not report the injury. The doctor's diagnosis was low back pain and radiculopathy to the left leg. The first injection was administered on October 10, 2006. There is no indication that the employee underwent any further injections.

Dr. Dana Sparhawk, an occupational medicine specialist, evaluated the employee on October 23, 2006 at the request of the insurer to determine whether he had any disability due to the hernia and the hydrocele. Dr. Sparhawk recorded a detailed history which included statements from the employee that he developed sharp shooting pains in the left inguinal area in the spring of 2006, shortly after the surgery for the hydrocele. The employee also advised the doctor that he slipped and fell at work on or about June 30, 2006, striking the right side of his hip and buttock area on a machine. He informed the doctor that he has not had any back problems since he had surgery for a herniated disc in 1981. The employee did not know at what level or on what side he had the back surgery.

After performing a detailed physical examination, Dr. Sparhawk concluded that the employee had no further disability related to the hernia or the hydrocele. He indicated in his report that his current inability to work was due to a herniated disc, most likely at the L4-5 or L5-S1 level. The doctor did not have any reports of any treatment regarding the low back problem. Although the employee brought the MRI films to the doctor's office, he did not have the radiologist's report and Dr. Sparhawk acknowledged that he did not have the expertise to read the films.

The deposition of Dr. Sparhawk was introduced into evidence. He noted that the primary focus of his examination was the hernia and hydrocele, although he did discuss the employee's back problem. Based upon the employee's history that shortly after the hydrocele surgery in January 2006, he developed sharp, shooting left inguinal pain, which was worse with lifting and walking, the doctor formed an opinion that the employee slowly developed a herniated disc in the spring of 2006 which was causing this pain. On cross-examination, Dr. Sparhawk testified that he had no information as to how or exactly when the herniated disc may have occurred, and he did not know if it was work-related. Jt. Exh. 1, p. 21. He further stated that he did not believe that the fall on or about June 30, 2006 was the cause of the employee's low back symptoms because he reported that he had symptoms consistent with a herniated disc prior to that date.

The trial judge found the employee to be a credible witness despite his failure to immediately report the injury to his supervisor and failure to inform Dr. Siciliano of the injury. The trial judge also concluded that the testimony of Dr. Sparhawk was sufficient to establish that the employee sustained a herniated disc as a result of the incident at work on June 30, 2006. Consequently, he granted the petition and awarded weekly benefits for partial incapacity from June 30, 2006 and continuing. The employer filed a claim of appeal arguing that there was no

competent medical evidence presented to establish that the employee sustained a herniated lumbar disc due to the fall at work on or about June 30, 2006.

The standard of review employed by the appellate division is prescribed by R.I.G.L. § 28-35-28(b) which states that the findings of fact made by a trial judge are final unless the appellate panel determines that they are clearly erroneous. Before undertaking a *de novo* review of conflicting medical testimony, the appellate panel must first find that the trial judge was clearly wrong or misconceived or overlooked material evidence. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996); Blecha v. Wells Fargo Guard-Company Serv., 610 A.2d 98, 102 (R.I. 1992). After thoroughly reviewing the medical evidence presented in this matter, we find that the trial judge was clearly wrong in relying upon the opinions of Drs. Sparhawk and Siciliano as the basis for his finding that the employee sustained a work-related injury to his back on June 30, 2006 resulting in partial disability beginning that day.

In an original petition, the burden is upon the employee to establish a causal relationship between the alleged disability and his employment. Hicks v. Vennerbeck & Clase Co., 525 A.2d 37, 42 (R.I. 1987). In the vast majority of cases, including this one, expert medical testimony is required to resolve the question of whether an incident at work caused the employee's condition and disability. Id.; Valente v. Bourne Mills, 77 R.I. 274, 278-79, 75 A.2d 191, 194 (1950). The opinion of the medical expert regarding the causal connection between the work incident and the disability must be expressed as a probability, not merely a possibility. Hicks, 525 A.2d at 42 (citations omitted).

In his decision, the trial judge stated that he relied upon the opinions of Drs. Sparhawk and Siciliano in determining that the employee is disabled due to a work-related injury to his back. Dec. at 15. Our review of the doctors' testimony and records reveal that neither physician

provided an opinion to a reasonable degree of medical certainty that Mr. Gencarelli is disabled due to a back injury he sustained at work on June 30, 2006, which is the allegation of his petition.

Dr. Sparhawk recorded a fairly detailed history from the employee, including complaints of shooting pain in the left inguinal area after returning to work in February 2006 and prior to June 30, 2006. The doctor was also well aware of the details of the alleged fall at work on June 30, 2006. Dr. Sparhawk did state, to a reasonable degree of medical certainty, that Mr. Gencarelli's current symptoms and disability were due to a herniated disc at the L4-5 or L5-S1 level that developed over time in the spring of 2006. Jt. Exh. 1, pp. 17-18. He also stated that he did not know if it was work-related and specifically rejected the theory that the fall on June 30, 2006 caused the herniated disc.

> "Q: He did not, in his history, give you any specific incident in the spring of 2006, correct?
>
> "A: That's correct.
>
> "Q: You don't have any information as to how that herniated disc might have occurred in the spring of 2006, correct?
>
> "A: That's correct. He gave no history.
>
> "Q: So you don't know when it might have occurred?
>
> "A: That's correct.
>
> "Q: And you don't know if it was work related or not work related in the spring of 2006; is that fair?
>
> "A: That's fair.
>
> * * * *
>
> "Q: Isn't that the date that you used in giving your opinion as to your diagnosis of inability to work [referring to the June 30, 2006 incident]?

> "A: Not that date. I gave my opinion based on his symptoms, and I'm not convinced that the fall caused the herniated disc because he had symptoms consistent with a herniated disc before he fell."

Id. at 21-22. Dr. Sparhawk's statements and opinions do not support the conclusion that Mr. Gencarelli suffered a work-related injury to his back on June 30, 2006 which caused his current disability.

The trial judge indicated that he also relied upon the opinion offered by Dr. Siciliano in rendering his decision. Dr. Siciliano never testified; his records were admitted with his signed affidavit. As indicated by a letter from the doctor to the employee's attorney, Mr. Gencarelli never told Dr. Siciliano about the alleged fall at work on June 30, 2006, although he had treated with the chiropractor on a number of occasions since 1997, and Dr. Siciliano was the first medical provider to treat him after the alleged incident. Consequently, Dr. Siciliano does not make any statement indicating that the employee's condition is due to the incident at work on June 30, 2006. On the contrary, the doctor did report on a form for TDI that the condition was not work-related.

We have thoroughly reviewed the reports of Dr. Siciliano and the deposition and report of Dr. Sparhawk and conclude that the trial judge was clearly wrong to find that the employee sustained a work-related injury on June 30, 2006 resulting in partial incapacity. Therefore, we have conducted a *de novo* review of the entire record and find that it is devoid of any legally competent medical evidence which would establish a causal connection between Mr. Gencarelli's back problems and the alleged fall at work on June 30, 2006. Neither of the other two (2) physicians, Dr. Kadian and Dr. Elliott, makes any definitive statement connecting the employee's condition and the alleged fall on June 30, 2006. The employee's testimony alone is not sufficient to meet the burden of proof, particularly in light of his prior back complaints. This

is not a situation of an injury easily observable by a lay person at the time of the incident, *e.g.*, a broken leg, which may not require medical testimony as to the causal relationship. Therefore, the employee's petition must fail.

The appeal of the respondent/employer is granted and the decision and decree of the trial judge is reversed. In accordance with our decision, a new decree shall enter containing the following findings and orders:

1. That the employee has failed to prove by a fair preponderance of the credible evidence that he sustained an injury to his back on or about June 30, 2006, arising out of and in the course of his employment with the respondent.

2. That the employee has failed to prove by a fair preponderance of the credible evidence that he suffered an incapacity for work due to an alleged incident occurring on or about June 30, 2006 at his place of employment.

It is, therefore, ordered:

1. That the employee's original petition is denied and dismissed.

We have prepared and submit herewith a new decree in accordance with our decision. The parties may appear on at 10:00 a.m. to show cause, if any they have, why said decree shall not be entered on that date.

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

ALDO GENCARELLI	)	
	)	
VS.	)	W.C.C. 07-01077
	)	
DARLINGTON FABRICS	)	

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the appeal of the respondent/employer from a decree entered on August 29, 2007.

Upon consideration thereof, the appeal of the respondent is sustained, and in accordance with the Decision of the Appellate Division, the following findings of fact are made:

1. That the employee has failed to prove by a fair preponderance of the credible evidence that he sustained an injury to his back on or about June 30, 2006, arising out of and in the course of his employment with the respondent.

2. That the employee has failed to prove by a fair preponderance of the credible evidence that he suffered an incapacity for work due to an alleged incident occurring on or about June 30, 2006 at his place of employment.

It is, therefore, ordered:

1. That the employee's original petition is denied and dismissed.

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 Conrad M. Cutcliffe, Esq., and Peter A. Schavone, Esq., on

____