STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

BRIAN CASEY	)	
	)	
VS.	)	W.C.C. 07-07898
	)	
SURFACE COATINGS DIVISION	)	
BRIAN CASEY	)	
	)	
VS.	)	W.C.C. 07-05942
	)	
SURFACE COATINGS DIVISION	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. These two (2) matters were consolidated for trial and remain consolidated at the appellate level. The parties were directed to appear and show cause why these matters should not be summarily disposed of on the grounds that the trial judge's decision is based upon her reliance upon one (1) conflicting expert medical opinion over another. *See* Parenteau v. Zimmerman Eng'g, Inc., 111 R.I. 68, 299 A.2d 168 (1973). The trial judge denied the employee's request for payment of medical expenses, specifically the charges for services rendered by Dr. Christopher P. Herzig, a licensed chiropractic physician, from July to October of 2007, after concluding that those services were not medically necessary to cure, relieve or

rehabilitate the employee from the effects of the work-related injury he sustained on October 13, 1983. After thoroughly reviewing the record and considering the arguments of the parties, we find that cause has not been shown and we deny the employee's appeals.

W.C.C. No. 07-05942 is an employee's petition to review alleging that the employer refused to pay for necessary medical services, specifically the bill of Dr. Christopher P. Herzig in the amount of One Hundred Fourteen and 00/100 ($114.00) Dollars for treatment on July 10, 2007 and August 7, 2007. At the pretrial conference, the trial judge ordered the employer to pay for the treatments in accordance with the medical fee schedule. The employer claimed a trial.

W.C.C. No. 07-07898 is an employee's petition to review alleging that the employer refused to pay for necessary medical services, specifically the bill of Dr. Christopher P. Herzig in the amount of One Hundred Eighty-two and 00/100 ($182.00) Dollars for treatment on September 7, 2007, September 24, 2007 and October 15, 2007. The petition was denied at the pretrial conference and the employee claimed a trial.

The employee, who was fifty-five (55) years old at the time of the trial, sustained cervical and lumbar strains on October 13, 1983 resulting in total incapacity beginning October 19, 1983. On January 10, 1984, he returned to work but became totally disabled again on March 6, 1984. He was found partially disabled as of April 22, 1985 and has remained out of work, receiving weekly compensation benefits, since that date.

Mr. Casey has been receiving chiropractic treatment continuously since 1983. He indicated that during the year 2007, he saw Dr. Herzig once or twice a month for treatments which straighten out his spine and relieve pressure. The employee explained that before he sees Dr. Herzig he has a lot of pain in his lower back which causes problems walking, sitting and standing. He stated that the treatments from Dr. Herzig make him feel better and provide him

some temporary relief from the pain so that he can stand to wash dishes and do some household chores. The employee testified that he was generally able to drive for about a half hour before he has to stop to get out and stretch. He indicated that he usually has a regularly scheduled appointment once a month, but if his back pain flares up, he will call for an extra appointment.

The medical evidence in these cases consisted of the deposition, affidavit, reports and bills of Dr. Christopher P. Herzig and the deposition and report of Dr. William S. Buonanno. Dr. Herzig, a chiropractic physician, began treating Mr. Casey in 1985; the employee had treated with Dr. Herzig's father, also a chiropractic physician, immediately following his injury in 1983. It should be noted that the employee lives in Dayville, Connecticut, and travels almost twenty-eight (28) miles to see the doctor in Pawtucket, Rhode Island. The doctor testified that he has provided ultrasound, manual mobilization and manipulation of the spine, and myofascial therapy to the employee since 1985 and his treatments have basically been the same since 1985. He explained that the purpose of the treatment modalities is to improve range of motion, increase function, and decrease pain.

Dr. Herzig noted that in 1995, he concluded that the employee's condition had reached maximum medical improvement. He related that the employee generally presents with a mild limp because he walks with a cane, significant tenderness in the lumbar musculature, restricted range of motion of the lumbar spine, and spasm, which may vary from mild to severe. The employee's current diagnosis is lumbar disc syndrome, which the doctor described as "pain derived from either degenerative disc disease or disc protrusion of the lumbar spine." (Ee's Ex. 14 at 12.) The diagnosis is based upon MRI studies done several years after the initial injury.

Dr. Herzig explained that his treatment is supportive in nature and designed to maintain Mr. Casey's present level of function. He acknowledged that the employee only experiences

temporary relief from his symptoms with the treatment. With regard to the need for ongoing treatment, the doctor testified:

> I think from time to time he will need some kind of therapy whether it's chiropractic therapy or the physical therapy that he has been prescribed by Dr. Kim at this time to keep his functionable level intact. I believe that the treatment in the future will be chronic in nature because if he doesn't undergo some type of physical therapy or some physical modalities to keep him comfortable, I think the condition would worsen from a functional standpoint.

(Ee's Ex. 14 at 13-14.) Dr. Herzig indicated that whatever treatment the employee feels benefits him the most would be the appropriate course of treatment for the future.

Dr. Buonanno, an orthopedic surgeon, examined the employee on April 9, 2007 at the request of the insurer. When asked his opinion as to whether the chiropractic treatment was necessary to cure, rehabilitate or relieve the employee from the effects of this injury, the doctor explained:

> I believe that he could do some stretching and some exercises at home that he actually learned at the Donnelly [sic] Center also and that would give him as much benefit as going to a chiropractor. I just don't think going to a chiro once a month is going to benefit him. It's not going to make any major difference. It would be so minimal that it's not needed.

(Er's Ex. B at 13.) Dr. Buonanno specifically stated that in his opinion the chiropractic treatment was not necessary, but an exercise program was necessary to cure, rehabilitate or relieve Mr. Casey from the effects of his injury.

The trial judge noted the extraordinarily lengthy period of chiropractic treatment which has resulted in very minor short-term relief for the employee. She also pointed out Dr. Herzig's testimony that a physical therapy/home exercise program may be appropriate long-term. Faced with conflicting expert opinions rendered by Dr. Herzig and Dr. Buonanno, the trial judge found

the opinions expressed by Dr. Buonanno to be more persuasive and probative as to the need for chiropractic treatment. Consequently, she denied both of the petitions. The employee then filed appeals in both matters.

The standard utilized in reviewing the decision of a trial judge is found 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." In a case involving conflicting medical testimony, the appellate panel may only undertake a *de novo* review of the evidence after making an initial finding that the trial judge was clearly wrong. *See* Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996); Grimes Box Co. v. Miguel, 509 A.2d 1002, 1004 (R.I. 1986). In the matters presently before the panel, we find that the conclusions reached by the trial judge are not clearly erroneous.

The employee has filed eight (8) reasons of appeal which present three (3) basic issues. First, the employee contends that the trial judge erroneously classified the testimony of Drs. Buonanno and Herzig as presenting conflicting opinions when both physicians stated that some type of ongoing treatment was appropriate and the chiropractic treatment provided the same benefit as would be obtained from a home exercise or physical therapy program. Our review of the doctors' testimony does not reveal such a clear picture.

In a petition alleging the non-payment of medical expenses, the employee bears the burden of establishing by a preponderance of the evidence the reasonableness of the charges for the services in question and the necessity for providing those services. *See* Merlino v. Beecroft Chevrolet Co., 488 A.2d 695, 696 (R.I. 1985); Mastronardi v. Zayre Corp., 120 R.I. 859, 865-866, 391 A.2d 112, 116 (1978). Section 28-33-5 of the Rhode Island General Laws provides that the employer shall provide "any reasonable medical, surgical, dental, optical, or other attendance

or treatment, . . . for such period as is necessary, in order to cure, rehabilitate or relieve the employee from the effects of his injury; . . . ." R.I.G.L. § 28-33-5. It is clear that the chiropractic treatment will not cure Mr. Casey's condition; nor will it rehabilitate or restore his health. Therefore, the employee's burden in the case before the panel was to prove, by a fair preponderance of the evidence, that the chiropractic care rendered by Dr. Herzig on six (6) occasions from July to November of 2007 was both reasonable and necessary to relieve Mr. Casey from the effects of an injury he sustained in 1983, almost twenty-four (24) years earlier.

Dr. Herzig testified that the employee needs "some kind of therapy" to maintain his current level of functioning; he did not state that the chiropractic treatment he has been providing is the treatment that is required to accomplish that objective. (Ee's Ex. 14 at 13-14.) At best, the doctor indicated that chiropractic care was one of several options for treatment that would achieve the same results for Mr. Casey.

Dr. Buonanno testified that the employee did not need the chiropractic treatment and that he believed that it was not necessary to maintain his functional level. (Er's Ex. B at 13.) It was his opinion that doing exercises and stretching at home would be sufficient. Counsel for the employee focused on the doctor's comment that the home exercises and stretching "would give him as much benefit as going to a chiropractor." Id. The attorney pulled that comment out of context and attempted to apply a type of reverse logic in an exchange with the doctor.

> Q: Said another way, doctor, the chiropractic treatments might provide him as much relief as the exercise program would, wouldn't they?
>
> A: I don't think he needed formal chiropractic treatment. I think he could, in the confines of his house, just do some exercises.
>
> Q: Well, that's not what I asked you, though. What you said was that the exercises would provide as much relief as chiropractic

treatment; so conversely, chiropractic treatment would provide as much relief as the exercise program, right?

A: The way you're putting it, logically, your statement is correct.

(Er's Ex. B at 17.) On re-direct examination, Dr. Buonanno reiterated his opinion that the chiropractic treatment was not necessary. On re-cross examination, he stated that a home exercise program was necessary to cure, rehabilitate or relieve the employee from the effects of the injury.

The employee argues that the opinions of Dr. Herzig and Dr. Buonanno are not in conflict and that they both agree that the chiropractic treatment would provide as much relief to Mr. Casey as physical therapy or a home exercise program. Even assuming that Dr. Buonanno adopted that reverse logic statement by counsel, the doctor still maintained that the chiropractic treatment was not reasonable or necessary. Dr. Herzig, on the other hand, stated that some type of treatment was needed, but not necessarily his chiropractic treatment. In this regard, there is some degree of conflict in their expert opinions. The trial judge was therefore correct in citing Parenteau v. Zimmerman Eng'g, Inc., 299 A.2d 168, 111 R.I. 68 (1973), in support of exercising her discretion in choosing between conflicting expert medical opinions.

The second issue raised by the employee in three (3) of his reasons of appeal is whether the trial judge improperly prevented the employee from choosing the course of treatment he found most beneficial in violation of R.I.G.L. § 28-33-5. The statute provides that the employer shall promptly provide, "subject to the choice of the employee as provided in § 28-33-8," any reasonable medical treatment necessary to treat the work injury. R.I.G.L. § 28-33-5. Section 28-33-8(a)(1) states that "[a]n injured employee shall have freedom of choice to obtain health care, diagnosis, and treatment from any qualified health care provider initially" (emphasis added). This language refers to the ability of the employee to choose the physician he wishes to treat

with immediately after suffering the injury, rather than being forced to treat with a physician selected by the employer. It does not afford the employee a blanket approval to obtain whatever form of treatment he wants with whomever he chooses at any point in time. We believe that the employee's reliance on the wording of a particular phrase in these statutes is misplaced.

The employee argues that the trial judge erred in refusing to allow him to choose the treatment he found most beneficial. In fact, we do not know if Mr. Casey found the treatment he received from Dr. Herzig to be the most beneficial. The employee was never asked to comment on attempts he had made to engage in a physical therapy or home exercise program or whether he derived any benefit from such programs. The focus of the inquiry in a case challenging the payment for a medical service is whether the treatment is reasonable and necessary, not the employee's preference for a particular type of treatment.

In his seventh reason of appeal, the employee points out that only a few months earlier, a different trial judge ordered the employer to pay for chiropractic treatment rendered by Dr. Herzig in May and June of 2007, and therefore, the trial judge in the present matters erred in denying the request for payment for treatment rendered from July to November of 2007. Although the nature of the treatment at issue may be the same, the time period encompassed by the bills in question is different and apparently the evidence presented to the respective judges was different. There is no indication in the previous matter, W.C.C. No. 2007-05150, that the employer presented any medical evidence in defense of the petition. (The matter was decided at a pretrial conference with no claim for trial and consequently the record is sparse.) Under the circumstances, the doctrine of res judicata does not apply and the decision in W.C.C. No. 2007-05150 is not binding on the trial judge in the two (2) matters before the panel.

Based upon the foregoing discussion, the employee's appeals are denied and dismissed and the decision and decrees of the trial judge are affirmed. 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

Hardman and Ferrieri, JJ. concur.

ENTER:

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Olsson, J.

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Hardman, J.

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Ferrieri, 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 April 18, 2008 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Hardman, J.

_____
Ferrieri, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Gregory L. Boyer, Esq., and James A. Forcier, Esq., on

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