

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT  
APPELLATE DIVISION

GEORGIA ADOIAN )

)

VS. )

W.C.C. 2008-04090

)

WARWICK SCHOOL DEPARTMENT )

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's appeal from the denial of her petition to review seeking permission for major surgery, specifically a posterior L4/5 lumbar interbody fusion with decompression from L4 to S1 and instrumentation, as recommended by Dr. Deus Cielo. After a thorough review of the record and consideration of the arguments of the respective parties, we deny the employee's appeal and affirm the decision and decree of the trial judge.

The employee was first injured on September 14, 1994 while working as a teacher's assistant in special education classes. She suffered low back pain while assisting a child with special needs at her job and was paid weekly benefits for partial incapacity from June 5, 1997 and continuing pursuant to a Memorandum of Agreement dated June 23, 1997. Benefits were discontinued as of April 29, 1998 pursuant to a decree entered in W.C.C. No. 1998-01816, which found that the employee had returned to work earning wages in excess of her average weekly wage as of February 23, 1998. Benefits were resumed on June 10, 1998, pursuant to a Memorandum of Agreement dated June 22, 1998 documenting a return of partial incapacity.

On May 21, 2001, a pretrial order was entered in W.C.C. No. 2001-00368, discontinuing benefits that date based upon a finding that the employee had again returned to work earning wages in excess of her average weekly wage. A decree entered in W.C.C. No. 2004-04748 found that the employee sustained a return of partial incapacity for a closed period from May 25, 2004 to September 21, 2004. Benefits for partial incapacity were resumed on January 4, 2008, pursuant to a pretrial order entered in W.C.C. No. 2008-01132. The employee has been receiving weekly benefits since that time and has not returned to work in any capacity.

The first back surgery stemming from the employee's work injury was performed by Dr. Mark Palumbo on June 25, 1998. She developed complications as a result of the surgery, which was done through her abdomen. In March 1999, she suffered a hernia at the incision site which required a surgical repair with mesh. Ms. Adoian underwent a hysterectomy in June 2001 due to adhesions resulting from the back surgery. In September 2004, surgery was performed on her shoulder which was found not to be related to her back injury. Two (2) more surgeries were done in January 2006 and January 2008 to repair and then replace the mesh used to correct the hernia. After the second of these surgeries, the employee developed a severe infection.

On June 11, 2008, Ms. Adoian underwent a second surgery on her back, which is the subject of this petition. She then had an additional surgery in January 2009 to remove a piece of metal which the doctor discovered was left in her back in error during the 2008 back surgery.

The employee testified at trial that since the injury in 1994 her back symptoms have worsened. She described her symptoms as pain across and up her back, radiating down her left leg along the sciatic nerve. She also testified that she is only able to stand for a certain amount of time and cannot walk for long periods of time without a walker. Despite all of the surgeries and her worsening condition, Ms. Adoian has returned to work for various periods of time, most

recently from October 20, 2007 through January 3, 2008 and for two weeks in January 2009. She has not worked since and does not feel capable of returning to work at this time.

The employee offered the medical testimony and reports of Dr. Deus J. C. Cielo, a board eligible neurosurgeon and the employee's current treating physician. Dr. Cielo first treated the employee on March 27, 2008. Following a physical examination and review of the employee's MRI films, Dr. Cielo opined that the employee was suffering with progressively worsening lumbar radiculopathy secondary to spondylitic disease. The doctor testified that the diagnosis and the back surgery he performed on June 11, 2008 were causally related to the employee's 1994 work injury. He explained that the degenerative disc disease demonstrated in the MRI study of the employee's lumbar spine is related to her initial work injury because she developed the disease at L4/5, which is a level above her 1998 fusion at L5/S1. He testified that this is a common complication of fusion surgery known as adjacent segment disease.

On cross-examination, Dr. Cielo admitted that spondylitic disease is essentially arthritis that develops within the joints in the lumbar spine and that some of this arthritis was due to the natural aging process. (Ms. Adoian was almost sixty (60) years old at the time of the surgery in June 2008.) He did not know whether the employee had spondylitic disease at any level above L3.

The employer offered the medical testimony and records of Dr. A. Louis Mariorenzi, a board certified orthopedic surgeon and its examining physician. The employee saw Dr. Mariorenzi on several occasions at the employer's request. The doctor most recently examined Ms. Adoian on May 29, 2008, having previously evaluated her in December of 2006. In addition to the physical examination, he also reviewed the history of the employee's back injury and abdominal surgery in 2007. Dr. Mariorenzi reviewed the MRI study done in 2007 which

revealed a stable appearing fusion at L5-S1, mild to moderate left neuroforaminal stenosis and multiple levels of degenerative disc disease. He opined that the results of the MRI were essentially the same as a previous MRI from October of 2004 which he was asked to review. Dr. Mariorenzi opined that the surgery recommended by Dr. Cielo would not, in his opinion, increase the employee's level of function at all and that he would not have recommended it. He testified that his opinion was confirmed by Dr. Cielo's operative report.

Dr. Mariorenzi concluded that the employee's current symptoms and limitations were not related to the 1994 work injury. The basis of his opinion was that the MRI results were consistent with multiple levels of progressive degenerative changes throughout the entire lumbar spine. He further opined that "the first operation was for a ruptured disc. She had a satisfactory fusion. From that she's made a recovery. I think the second operation . . . was due to degenerative advanced arthritis in her lower back, and I cannot causally relate the two." (Resp. Ex. 2 at 34.)

The employer also presented the deposition and reports of Dr. William F. Garrahan, a board certified orthopedic surgeon. Dr. Garrahan performed an impartial medical evaluation of the employee on October 22, 2008 at the request of the court. The doctor was provided with voluminous medical records regarding the employee's medical treatment since 1994. Subsequent to his examination, the doctor was provided with the operative note regarding the June 2008 surgery by Dr. Cielo. Dr. Garrahan opined that the June 2008 surgery was not necessary to cure, rehabilitate or relieve the employee from the effects of her 1994 work related injury. He stated if there was any reason for the surgery to be done it was due to the "natural degenerative changes that occurred." (Resp. Ex. 1 at 13.)

In explaining the basis of his opinion, Dr. Garrahan noted that he had reviewed the evaluations of numerous surgeons who had indicated that Ms. Adoian was not disabled as a result of her original injury after the first surgery. He testified that the injury was successfully resolved with the fusion surgery in 1998 at the L5-S1 level and the operation in 2008 was not at the same level in the spine. He also emphasized that the second surgery was fourteen (14) years after the original injury and the employee had returned to work during that period. Dr. Garrahan acknowledged that when the bottom space of the spine is stabilized or fused, that space does not move again, so the pressure is then shifted up the spine causing more stress than usual. He did point out that this process does not happen immediately, but rather with aging and the natural degenerative process. He also noted that the employee had evidence of arthritis throughout her spine, not just at the level above the first surgery. Dr. Garrahan testified that it is not possible to separate the natural process from the process as a result of the fusion.

Under cross-examination, it became clear that Dr. Garrahan was under the mistaken impression that the employee was asymptomatic and had worked almost continuously following her initial back surgery until shortly before the second back surgery. The doctor, through his review of the extensive medical records he received from the court, was aware of the multiple surgeries Ms. Adoian underwent from 1998 to 2008. However, in an addendum to his report dated January 12, 2009 in which he explains the basis for his opinion that the surgery was not necessary to treat the effects of the work injury, Dr. Garrahan specifically notes that the employee returned to work for ten (10) years or more after the first back surgery in 1998.

The trial judge concluded that the back surgery in 2008 was not necessary to cure, rehabilitate or relieve the employee from the effects of the September 14, 1994 injury. In making that determination, she relied upon the opinions of Drs. Garrahan and Mariorenzi over

the opinion expressed by Dr. Cielo because both of the board certified orthopedic surgeons found that the employee's degenerative disc disease which necessitated the surgery was related to her age rather than her previous back surgery. The trial judge noted that it did not give the court confidence to know that following Dr. Cielo's 2008 surgery, a piece of metal was erroneously left in the employee's back, requiring yet another surgery. Dr. Garrahan, despite never having performed that type of surgery, felt a piece of metal in the employee's back which he thought may have been a foreign object left in her. Lastly, the trial judge noted that the employee's level of function was unchanged after the 2008 surgery and that she was still in severe pain and incapable of working in any capacity. The employee filed a timely claim of appeal from the denial of her petition.

The trial judge's findings are accorded great deference when the appellate panel reviews a trial decision. Pursuant to R.I.G.L. § 28-35-28(b), the trial judge's findings on factual matters are final unless found to be clearly erroneous. *See Diocese of Providence v. Vaz*, 679 A.2d 879, 881 (R.I. 1996). Only after determining that the trial judge was clearly wrong may the appellate panel conduct its own *de novo* review of the record.

The employee has filed nine (9) reasons of appeal, the majority of which argue that the decree and decision upon which it is based are clearly erroneous due to the trial judge's reliance on the opinions of Drs. Garrahan and Mariorenzi. When conflicting expert medical opinions are offered that are both competent and of probative value, it is the prerogative of the trial court to accept the expert opinion of one (1) healthcare provider over the opinion of another. *Parenteau v. Zimmerman Eng'g, Inc.*, 111 R.I. 68, 299 A.2d 168 (1973). The employee argues that the opinions of both physicians were inherently unreliable and incompetent and, therefore, cannot form the basis for the trial judge's conclusions. We find no merit in these contentions.

In the second reason of appeal, the employee asserts that the opinions rendered by Dr. Garrahan are incompetent and unreliable because the doctor relied upon the false assumption that after the first surgery in 1998, the employee was asymptomatic and worked continuously until 2008. Under questioning by employee's counsel, Dr. Garrahan stated that it was his understanding that the employee had returned to work after the first surgery and had been asymptomatic until shortly before the 2008 surgery. (Resp. Ex. 1 at 23.) In his letter to the trial judge dated January 12, 2009, the doctor also cited as one of several factors that the employee had returned to work for at least ten (10) years. Considering the doctor's testimony and records as a whole, we find that his misstatements as to the employee's work history are not so detrimental as to render his opinions incompetent.

Dr. Garrahan referred in his testimony and his reports to the voluminous medical records he was provided which documented the numerous surgeries Ms. Adoian underwent from 1998 to 2008. He noted that after the 1998 surgery, she returned to work after a long period of rehabilitation. In addition, it is obvious that she would have missed periods of time from work after each of the surgeries. Dr. Garrahan pointed out that by all accounts the first surgery was successful as far as resolving her low back complaints. The subsequent surgeries, until the 2008 operation, addressed issues other than low back symptoms. In rendering his opinion that the 2008 surgery was not necessary to treat the effects of the 1994 work injury, Dr. Garrahan cited several factors, not solely his assumption that she had returned to work for a lengthy period of time. Those factors included that fourteen (14) years had elapsed since the original injury, that a number of physicians who had evaluated the employee over the years concluded that she had a successful first surgery, that diagnostic testing revealed degenerative changes throughout her spine which was an indication that the degeneration at L4-5 was part of a natural progression,

and that the 2008 surgery was performed at a different level than the site of the original injury. Whether or not the employee worked continuously after the 1998 surgery was not the critical factor in the doctor's opinion regarding the 2008 surgery.

The employee cites our decision in Clapprood v. R.N. Koch, Inc., W.C.C. No. 92-04823 (App. Div. 10/3/96), in support of her argument. In Clapprood, the Appellate Division held that the trial judge correctly rejected medical evidence that was based upon an untrue or inaccurate history of an employee's injury because the history was replete with inaccuracies. In that case, there were several conflicting pieces of information given by the employee and by the doctor. Id. The doctor also failed to consider a prior injury when ultimately opining that the employee's pain was causally related to a work injury. Id. We find that the Clapprood decision is distinguishable from the matter presently before the panel.

Dr. Garrahan was mistaken as to the amount of time the employee spent out of work, but his opinion was not based upon a history "replete with inaccuracies." *See id.* As noted above, the doctor based his opinion on a number of factors other than Ms. Adoian's work history. In fact, in his initial report to the trial judge dated October 22, 2008, the doctor does not even mention her return to work when he comments on the 2008 surgery.

As I read all of the material that was given to me, and there were 22 separate packets of records for me to review regarding this case, I came to the conclusion that the pathology which occurred after the primary fusion of L4-S1[sic] has no relationship to the original injury in 1994. This appears to be secondary to degenerative disc disease, as mentioned by some of the impartial examinations performed. Her complaint was probably due to foraminal narrowing, which is due to the natural degenerative disc disease.

(Resp. Ex. 1, 10/22/08 report.) Because Dr. Garrahan based his opinion on many facts other than his mistaken belief that the employee had been working continuously, we find that his testimony and opinions are competent. Therefore, the trial judge was free to exercise her discretion to



accept Dr. Garrahan's medical opinion, along with that of Dr. Mariorenzi, over Dr. Cielo's opinion. See Parenteau, 111 R.I. 68, 299 A.2d 168.

The employee next contends that the trial judge erred in relying on Dr. Garrahan's opinion because it was based, in part, on Dr. Mariorenzi's report which was inherently unreliable. The employee asserts that the trial judge overlooked pertinent evidence which showed Dr. Mariorenzi was biased in favor of insurance companies and therefore his opinions are unreliable. We find no merit in the employee's argument on this issue.

On cross-examination of Dr. Mariorenzi, the employee inquired as to the volume of medical examinations that he completed for insurance companies, specifically for The Beacon Mutual Insurance Company (Beacon). Dr. Mariorenzi was unable to estimate how many examinations he did for Beacon, and stated he never knew who he was doing any examination for until he dictated the report. The doctor estimated he did about forty (40) independent medical examinations per month at a charge of roughly Five Hundred Fifty and 00/100 (\$550.00) Dollars each. This is the evidence the employee relies upon to demonstrate bias.

We would first note that the employee did not raise any objection to the introduction of Dr. Mariorenzi's deposition and records into evidence. This argument as to bias was never mentioned to the trial judge at any time during the course of the proceedings. Although we consider this failure to raise the argument at the trial level as dispositive, we will address the merits of the employee's contention.

Dr. Mariorenzi evaluated the employee at the request of Beacon, the employer's workers' compensation insurance carrier. Because Dr. Mariorenzi is not a court-appointed impartial medical examiner in this case, any evidence of bias would go toward his credibility as a witness and does not affect the admissibility of his opinion testimony. The issue of credibility should be

determined by the trial commissioner and her findings will be given great weight on review. Laganiere v. Bonte Spinning Co., 103 R.I. 191, 195, 236 A.2d 256, 258 (1967) (citing Lonardo v. Palmisciano, 97 R.I. 234, 197 A.2d 274 (1964)). The trial judge was aware of who hired Dr. Mariorenzi and could factor that knowledge into her assessment of the weight to be accorded his opinion.

The employee claims that the trial judge overlooked this material evidence which, she alleges, showed Dr. Mariorenzi's bias. The employee cites New England Electric Co. v. Freeman, 453 A.2d 756 (R.I. 1982), in support of her allegation of bias. That case involved the impartiality of a court-appointed medical examiner appointed pursuant to R.I.G.L. §28-35-24. The statute specifically requires that the physician cannot be "under contract with or regularly employed or regularly retained by a compensation insurer or self-insured employer." Id. Consequently, that decision has no application to this case. Ultimately, the trial judge found Dr. Mariorenzi's medical opinion and testimony credible and probative, and we do not find any evidence that she was clearly wrong in that determination. Our review of the trial decision reveals that the judge thoroughly read and thoughtfully considered all of the evidence, including Dr. Mariorenzi's testimony, in rendering her decision and chose to give his opinion great weight. We find no reason to disturb that determination.

Because we find that Dr. Mariorenzi's opinions are not inherently unreliable, it follows that Dr. Garrahan's opinions are not incompetent or unreliable because he relied, in part, upon the reports of Dr. Mariorenzi. Consequently, the trial judge was free to rely upon those opinions in making her decision. *See* Parenteau, 111 R.I. 68, 299 A.2d 168.

Reasons of appeal number five (5) and eight (8) contend the trial judge overlooked specific pieces of factual evidence in relying on Drs. Mariorenzi and Garrahan. As stated above,

R.I.G.L. § 28-35-28(b) states that “[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous.” The employee contends that the trial judge overlooked Dr. Mariorenzi’s statement that after spine surgery, the adjacent area of the spine can degenerate more quickly than normal. Later in his testimony, the doctor explained that the fact that the employee’s diagnostic studies revealed degenerative disc disease at multiple levels of her spine led him to conclude that the 2008 surgery was not related to the 1994 work injury, but simply to address the effects of the normal degenerative process.

It is clear that the trial judge reviewed the testimony of Dr. Mariorenzi and did not give this comment much weight. Dr. Mariorenzi merely conceded that in some cases arthritis can develop more quickly at the level adjacent to the surgery site. He did not state that he believed this happened in Ms. Adoian’s case. On the contrary, the doctor opined that in this case he could not causally relate the need for the 2008 surgery to the 1994 injury, noting that the employee had arthritis throughout the spine, not just at the level adjacent to the initial surgery site.

The employee also contends that the trial judge failed to note that Dr. Cielo is a board-eligible neurosurgeon who had performed over 500 disc fusions. The trial judge specifically mentions Dr. Cielo’s status as a board-eligible neurosurgeon in her decision, and the failure to mention the amount of surgeries he has performed does not constitute clear error. The trial judge reviewed all of the evidence, including Dr. Cielo’s testimony which set out his experience, and chose to reject his opinion in favor of those of Drs. Garrahan and Mariorenzi.

Lastly, the employee contends that the trial judge erred as a matter of law because she denied the employee’s petition based on her perception of the outcome of the surgery. The trial judge relied on Dr. Mariorenzi’s report in which he opined that not only was the degenerative disc disease related to the employee’s age and not the previous surgery, he personally would not

have even recommended the 2008 surgery because it would not have increased the employee's functionability. The trial judge's comment that in fact the 2008 surgery had not increased her functionability was merely to make note that Dr. Mariorenzi was apparently correct in his assessment of the outcome. The trial judge's comments as to the employee's condition post-surgery did not form the basis for her decision. The issue was whether the surgery was necessary to treat the effects of the work injury rather than the effects of the natural degenerative disease process. Consequently, we find no error in the trial judge's decision as to the issue presented by the petition.

Based upon the foregoing discussion, the employee's appeal is denied and dismissed and the decision and decree of the trial judge are affirmed. 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

Hardman and Ferrieri, JJ. concur.

ENTER:

---

Olsson, J.

---

Hardman, J.

---

Ferrieri, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT  
APPELLATE DIVISION

GEORGIA ADOIAN

)

)

VS.

)

W.C.C. 2008-04090

)

WARWICK SCHOOL DEPARTMENT

)

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 August 31, 2009 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 Stephen J. Dennis, Esq. and Francis T. Connor, Esq., on

---