STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

PAUL GIRAGOSIAN	)	
	)	
VS.	)	W.C.C. 2008-06679
	)	
CITY OF PROVIDENCE	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employer's appeal from the decision and decree of the trial judge granting permission for the employee to undergo back surgery recommended by his treating physician for a work-related injury sustained on June 16, 2004. After conducting a thorough review of the record in this matter and considering the arguments presented by the respective parties, we affirm the trial judge's decision and decree and deny the employer's appeal.

The employee, who is currently thirty-four (34) years old, was employed as a laborer at the city's animal shelter since 1999. His duties included feeding the animals, cleaning their cages, and generally maintaining the facility. On June 16, 2004, he and a co-worker were lifting a fifty (50) gallon drum to empty it into a dumpster when he "heard a snap and a pop." Tr. at 6. He began receiving weekly benefits for partial incapacity as of June 17, 2004 pursuant to a Memorandum of Agreement which described the injury as a back strain.

Mr. Giragosian began treating with Dr. Christopher F. Huntington, a board certified orthopedic surgeon with a subspecialty in spinal surgery, on August 3, 2004. On August 11,

2004, Dr. Huntington performed back surgery, specifically a lumbar hemilaminectomy and discectomy at L3-4, L4-5 and L5-S1. After surgery, the employee experienced some improvement which plateaued after several months. In May 2007, he returned to work for the employer in a light duty position, answering and logging in telephone calls and assisting people coming into the facility. On July 9, 2008, Mr. Giragosian slipped and fell on a wet floor at work, causing an exacerbation of his back pain. He has not worked since this incident.

The employee testified that he suffers from back pain that shoots down his left leg as well as numbness in his foot, similar to how he felt immediately following the initial injury in June 2004. He related that he has difficulty sleeping and remains unable to engage in normal activities with his two (2) children, including playing with them and coaching them in youth sports. Sometime in early 2008, Dr. Huntington first began to discuss performing a second surgery involving multi-level fusion of his spine. Mr. Giragosian testified that he was aware of both the potential rewards and risks of this surgery, but he is confident that it is his best opportunity to improve his quality of life and facilitate his return to work.

The employee submitted the records and deposition testimony of Dr. Huntington. The doctor's reports reflect that after the surgery in August 2004, the employee had some improvement in his back pain, but continued to experience left leg pain and weakness. At an office visit on January 14, 2005, the doctor discussed the possibility of additional surgery to address the leg weakness, but recommended postponing such surgery as long as possible due to the employee's young age. Mr. Giragosian returned to see the doctor on March 17, 2005 after undergoing an EMG study which revealed some S1 radiculopathy and trace L5 radiculopathy on the left. Dr. Huntington also noted that a recent MRI study did not show any nerve compression or recurrent disc herniation.

Although the doctor's report indicates that the employee was to return in six (6) weeks, Mr. Giragosian apparently sought treatment elsewhere for a period of time. He consulted with Dr. James Yue at Yale Orthopedics who eventually proposed multi-level disc replacement surgery. This type of surgery was relatively new at the time and apparently had not yet been approved by the FDA for multiple levels. An employee's petition to review was filed in January 2008 requesting permission for the multi-level disc replacement surgery which was denied by the court. In May 2007, the employee returned to work in a light duty position with the employer.

On April 17, 2008, Mr. Giragosian returned to see Dr. Huntington for complaints of increased back pain over the previous two (2) weeks. The doctor discussed additional surgical options with the employee at this time. A month later, his physical complaints and findings worsened and the doctor recommended an MRI. Before an MRI was done, the employee slipped and fell at work in July 2008, causing him to stop working. The incident also caused a worsening of his back symptoms. After reviewing the results of the MRI study which was done in September 2008, Dr. Huntington recommended a surgical procedure consisting of a revision laminectomy at L3 through L5 and posterior spinal fusion from L3 to S1 with instrumentation. His request for permission for the surgery was denied by the insurer.

In explaining his recommendation for the additional surgery, Dr. Huntington testified:

> Again, at this point his surgical choices were elective. There was not an emergent need for surgery. He had pain that had been in existence for a long enough period of time to know that it was not going to go away with conservative treatment. He had extensive conservative treatment. He had MRI findings that were of the type that have been known to respond in certain cases to surgical intervention, so I felt [sic] was an appropriate candidate for surgery if he wished to pursue it, which he did.

Ee's Ex. 2 at 34. The doctor indicated that the medical literature reported studies showing that the workers' compensation claimants who underwent the recommended surgery had good to

excellent results in seventy-five percent (75%) of the cases and only about two percent (2%) experienced a worsening of their symptoms. Dr. Huntington also estimated that there was a better than fifty percent (50%) likelihood that the employee would be able to return to his previous occupation.

The employer submitted a report and letter from Dr. James E. McLennan along with the deposition testimony and reports of Dr. Mark Palumbo. Dr. McLennan, a neurosurgeon, had evaluated the employee on January 18, 2006 at the request of the employer. The doctor's report was utilized by the employer to defend against the employee's request for permission for disc replacement surgery and in support of the employer's petition requesting a finding of maximum medical improvement in 2006. After reviewing medical records and diagnostic test results and examining the employee, Dr. McLennan concluded that Mr. Giragosian had a fixed nerve injury at the L5 and S1 nerve roots on the left side due to a high grade disc rupture resulting in a foot drop with weakness and numbness. With regard to the proposed surgery, the doctor stated, "I do not see a role here for any interventional spine surgery, either fusion or disc replacement. I do not think it will change his basic disability." Er's Ex. A, McLennan report 1/18/06. He noted that the nerves will not recover and the employee's condition is permanent. Dr. McLennan also expressed concern regarding the amount of narcotic medication used on a daily basis by the employee.

In a letter to the insurer dated February 28, 2006, Dr. McLennan stated that if the employee experienced significant axial back pain after discontinuing the use of the narcotic medication, then additional surgery might be considered to achieve a greater degree of comfort, but it would not result in a return to his former employment.

Dr. Palumbo, a specialist in orthopedic spine surgery, examined the employee on May 28, 2008 and reviewed his medical records as well as diagnostic test results. The doctor was aware of the type of fusion surgery which Dr. Huntington was proposing and stated that in his opinion the surgery was not indicated. In support of his opinion, the doctor cited several factors: (1) it would be a revision lumbar spine surgery; (2) the employee has a chronic pain syndrome which has been going on for five (5) years; (3) the primary purpose of the surgery would be to address back pain, which constitutes only fifty percent (50%) of the employee's symptoms, and would do nothing to address the fixed nerve injury; (4) the employee is a smoker and has anxiety; (5) the condition is a workers' compensation matter; and (6) there are major potential short-term and long-term complications which can arise from this surgery. Considering these factors, Dr. Palumbo concluded that "the potential downsides or risk of going through such a procedure in my opinion far outweigh the very limited potential gains in a case like this." Er's Ex. B at 10.

Dr. Palumbo disputed Dr. Huntington's statement that the medical literature indicated a high percentage of success for the type of surgery he was proposing for Mr. Giragosian. He stated that numerous studies can be found to support surgical intervention for degenerative disc disease and just as many that state the results are not good from surgery and support nonsurgical intervention. He pointed out that the studies demonstrating good results with fusion surgery involved a select group of patients with no other issues that would potentially affect the outcome. Dr. Palumbo explained that he was looking at all of the specific factors involved in Mr. Giragosian's case in determining the likelihood of achieving a good result with surgery, whereas Dr. Huntington was simply applying the results of a general study to this individual.

Subsequent to the employee's fall at work in July 2008, Dr. Palumbo reviewed Dr. Huntington's office note of August 14, 2008 and the repeat MRI study done on September 4, 2008. In a letter to the insurer dated October 1, 2008, he maintained his opinion that the proposed fusion surgery would not result in any substantial improvement in the employee's condition.

After reviewing the evidence, the trial judge chose to rely on the testimony and opinion of Dr. Huntington over the opinions of Drs. McLennan and Palumbo, and granted permission for the employee to undergo the surgery. In doing so, the trial judge cited the fact that Dr. Huntington had treated Mr. Giragosian for an extended period of time. He also noted that Drs. McLennan and Palumbo did not testify that the proposed surgery was inappropriate for this type of condition, but they considered it inappropriate for this employee. The employer promptly filed a claim of appeal from the entry of the decree authorizing the surgery.

The employer filed two (2) reasons of appeal. First, it contends that the trial judge was clearly wrong to authorize the surgery because Dr. Huntington never stated in his reports or deposition testimony that the proposed surgery was necessary to cure, rehabilitate, or relieve the employee from the effects of his work-related injury. In contrast, Dr. Palumbo clearly stated his opinion to a reasonable degree of medical certainty that the surgery was not necessary to cure, rehabilitate or relieve the employee from the effects of his work injury. In the second reason of appeal, the employer argues that the trial judge impermissibly gave greater weight to Dr. Huntington's opinion solely because he was the employee's treating physician.

Our review of the trial judge's decision is limited by the provisions of R.I.G.L. § 28-35-28(b), which mandates that "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." We may not undertake a *de novo*

review of the evidence and substitute our judgment for that of the trial judge without first determining that the trial judge was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). After carefully reviewing the record and considering the parties' respective arguments, we find the trial judge did not err in granting the employee's petition and authorizing the surgical procedure.

Pursuant to R.I.G.L. § 28-33-5, an "employer shall . . . promptly provide for an injured employee 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. . . ." The petitioner bringing an action under the Rhode Island Workers' Compensation Act must produce credible evidence of probative force in support of his allegations in order to successfully prosecute his petition. Delage v. Imperial Knife Co., 121 R.I. 146, 148, 396 A.2d 938, 939 (1979). In the case presently before the appellate panel, the employee carries the burden of presenting evidence sufficient to establish that the surgical procedure recommended by Dr. Huntington is necessary to cure, rehabilitate or relieve the employee from the effects of his work-related back injury. *See* R.I.G.L. § 28-33-5; Delage at 148, 396 A.2d at 939.

The employer contends that Dr. Huntington's testimony was inadequate for this purpose because he failed to explicitly state that the surgery was "necessary to cure, rehabilitate or relieve" the employee from the effects of his injury. *See* R.I.G.L. § 28-33-5. However, the Rhode Island Supreme Court has admonished such emphasis on form over substance. *See* Gallucci v. Humbyrd, 709 A.2d 1059, 1066 (R.I. 1998). Rather, "the admissibility of expert testimony does not require the use of 'magic words' or 'precisely constructed talismanic incantations' to achieve its objective." Morra v. Harrop, 791 A.2d 472, 477 (R.I. 2002) (quoting

Gallucci, *supra*). "If an expert's testimony is given with the requisite degree of certainty, that is, 'some degree of positiveness,' it matters not what words are used to convey that certainty or that the word 'possibility' was uttered." Id. at 477 (quoting Sweet v. Hemingway Transport, Inc., 114 R.I. 348, 355, 333 A.2d 411, 415 (1975)). If the testimony indicates this degree of positiveness, it is admissible and the weight accorded that testimony is left to the fact-finder. Sweet v. Hemingway Transport, Inc., 114 R.I. 348, 355, 333 A.2d 411, 415 (1975).

After treating the employee for nearly four (4) years, Dr. Huntington testified that the employee's "pain had been existence for a long enough period of time . . . that it was not going to go away with conservative treatment." Ee's Ex. 2 at 34. He further opined that the employee was "an appropriate candidate for surgery if he wished to pursue it." Id. This opinion was further supported by the results of studies which Dr. Huntington relied on and summarized for the court. Finally, and most importantly, his opinions were testified to "within a reasonable degree of medical certainty." Id.

Dr. Huntington may not have uttered the "magic words" found in R.I.G.L. § 28-33-5, but the substance of his testimony and reports provided the trial judge with ample evidence to make a legal determination under the provisions of the Workers' Compensation Act as to whether the surgery was an appropriate treatment for the employee's condition. A verbatim recitation by Dr. Huntington of the legal standard set forth in the statute would not have been determinative of the issue before the trial judge, and similarly, the failure to explicitly recite those words does not mandate a determination that the surgery is not reasonable or necessary. It is the trial judge, and not the testifying witness, who determines whether the legal standard has been met. As such, the employer's first reason of appeal is denied and dismissed.

In the alternative, the employer argues that the trial judge impermissibly relied on Dr. Huntington's opinion over those of the other physicians merely because he was the employee's treating physician. In support of its contention, the employer points to the trial judge's statement that he found "Dr. Huntington more reliable because he had treated the employee for an extended period of time." Dec. at 4.

We agree with the employer's interpretation of the case law regarding this issue, but disagree with the application to this case. There is no dispute that a trial judge confronted with conflicting medical opinions of competent and probative value has the discretion to accept the opinion of one medical expert over that of another. Parenteau v. Zimmerman Eng'g, Inc., 111 R.I. 68, 78, 299 A.2d 168, 174 (1973). However, this discretion is not unbridled, and where testifying physicians disagree, the opinion of a treating physician may not inherently be given more weight than the opinion of a non-treating physician. Diocese of Providence v. Vaz, 679 A.2d 879, 882 (R.I. 1996); Grimes Box Co, Inc. v. Miguel, 509 A.2d 1002, 1004 (R.I. 1986). Granting the treating physician's testimony *ipso facto* more weight would conflict with the "rationale underlying § 28-35-24, which allows the [trial judge] to appoint an impartial medical examiner when conflicting medical testimony is present." Miguel, 509 A.2d at 1004. While the employer's understanding of the law is sound, we do not agree that the trial judge's reasoning in this case contravened this principle.

As the trial judge noted, none of the three (3) physicians from whom evidence was presented entirely ruled out the potential that this surgery could help an individual suffering from an injury similar to that of the employee. In fact, Dr. Huntington clearly states that in his opinion the odds are good that the employee will have improvement in his condition, and Dr. McLennan acknowledged that surgery may be beneficial to the employee in the future. *See* Ee's Ex. 2,

McLennan letter 2/28/06. Dr. Palumbo opined that surgery may help a small subset of patients suffering from this type of condition, but that Mr. Giragosian was not among them. According to Dr. Palumbo, surgical intervention has a significant likelihood of success only

> [i]n a very carefully tightly-selected group of patients, typically somebody with one-level disc disease, a normal psychological profile, a normal workers' compensation case, lack of previous surgery, lack of smoking, lack of psychologic [sic] distress . . . in those, that small subset of patients, results can be reasonable.

Er's Ex. B at 18-19. In excluding the employee from this class, Dr. Palumbo noted that Mr. Giragosian suffers from a "well-entrenched pain syndrome that's a difficult issue to deal with." Id. at 9. He further described certain factors present in the employee's case which he felt "mitigate against achieving a good outcome with surgical management," including, the employee's history of smoking and suffering from anxiety. Id. Lastly, Dr. Palumbo testified that a proper recommendation for surgery cannot be made without "tak[ing] into consideration all of the specifics of that patient's past medical history, current symptomatology, [and] their own diagnostic testing." Id. at 12.

Many of the factors cited by Dr. Palumbo as contributing to the likelihood of a good outcome from surgery are subjective in nature and require an evaluation of the patient's circumstances and personality traits, as well as his medical condition, before making a recommendation for surgery. The trial judge's comment that he found Dr. Huntington's opinion more reliable because he had treated the employee for a lengthy period of time reflects his judgment that Dr. Huntington was in the best position to evaluate these subjective factors in determining whether Mr. Giragosian was a good candidate for surgery. In addition, Dr. Huntington had seen the employee several times after the fall at work in July 2008 which caused some worsening of his condition. In these circumstances, we find that the trial judge properly

exercised his discretion in choosing between conflicting expert medical opinions. *See* Parenteau v. Zimmerman Eng'g, Inc., 111 R.I. 68, 78, 299 A.2d 168, 174 (1973).

Based upon the foregoing discussion, the employer'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

Ricci and Ferrieri, JJ., concur.

ENTER:

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Olsson, J.

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Ricci, 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 claim of appeal of the respondent/employer and upon consideration thereof, the appeal is denied and dismissed, and it is

ORDERED, ADJUDGED, AND DECREED:

1. That the findings of fact and the orders contained in a decree of this Court entered on August 13, 2009 be, and they hereby are, affirmed.

2. That the employer shall pay a counsel fee in the sum of One Thousand Five Hundred and 00/100 ($1,500.00) Dollars to Marc B. Gursky, Esq., attorney for the employee, for the successful defense of the employer's appeal.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Ricci, J.

_____
Ferrieri, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to George E. Furtado, Esq., and Marc B. Gursky, Esq., on

_____