STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

JOHN McILMAIL, as Executor of the Estate of CHRISTINE McILMAIL	)	
	)	
VS.	)	W.C.C. 2009 - 05481
	)	
RHODE ISLAND HOSPITAL	)	

AMENDED DECISION OF THE APPELLATE DIVISION

OLSSON, J. In accordance with Rule 1.10 of the Rules of Practice of the Workers' Compensation Court, an amended decision is hereby rendered in order to substitute John McIlmail, the executor of the employee's estate, as the petitioner/appellant in this matter.

This matter is before the Appellate Division on the employee's claim of appeal from the decision and decree of the trial judge in which he found that the employee failed to prove by a fair preponderance of the evidence that she sustained a return of incapacity due to the effects of a previous work injury. The issue before the trial judge was whether the employee's incapacity beginning June 14, 2009 was due to the effects of her compensable June 26, 2007 work injury or the result of the progression of preexisting degenerative joint disease. After a thorough review of the record and consideration of the arguments of the respective parties, we deny the employee's appeal and sustain the decision and decree of the trial judge.

The employee did not testify in this matter and so we have gleaned the following history and facts from the documentary evidence and depositions which were submitted into evidence by the parties. Christine McIlmail, the employee, sustained an injury on June 26, 2007 in the course

of her employment as a nurse in the Emergency Department of Rhode Island Hospital when a stretcher hit the outside of her left knee and the knee buckled. She was immediately provided with medical treatment at the hospital by Dr. John Parziale. When her condition did not respond to conservative treatment, the employee underwent an MRI of her left knee and, after reviewing the results of that study, Dr. Parziale referred her to Dr. Paul D. Fadale.

Ms. McIlmail initially received weekly benefits pursuant to a non-prejudicial agreement. On September 13, 2007, a pretrial order was entered in W.C.C. No. 2007-05221 memorializing that she sustained a work-related injury on June 26, 2007 described as a left knee sprain and awarding partial incapacity benefits from June 27, 2007 and continuing, subject to her earnings from the suitable alternative employment she began performing on September 4, 2007. A mutual agreement signed by the parties documented that the employee had returned to a suitable alternative employment position with an earning capacity of $1,393.20 per week.

A few months later, the employer filed a petition to review, W.C.C. No. 2007-06692, alleging that Ms. McIlmail was no longer disabled as a result of the effects of the work-related injury. Shortly thereafter, the employee filed a petition to review, W.C.C. No. 2008-00596, requesting permission to undergo surgery, a left knee arthroscopy, which was recommended by Dr. Fadale. While the trial of these matters was pending, the employee filed a second petition to review, W.C.C. No. 2008-04082, requesting that the mutual agreement be amended to state that the employee returned to a suitable alternative employment position with an average weekly wage of $1,393.20 per week, and delete the reference to an earning capacity.

The three (3) matters were consolidated for trial and decision. On August 19, 2008, decrees were entered in which the trial judge denied the employer's petition alleging that the employee was no longer disabled, granted the employee's petition requesting permission for

surgery, and granted the employee's petition to amend the mutual agreement. The primary issue at trial was whether Ms. McIlmail's symptoms and the need for surgery were due to preexisting degenerative arthritis in her knee, rather than the effects of the work injury. Evidence had been presented that shortly before her injury, Ms. McIlmail had made an appointment to see Dr. Thomas Bliss, an orthopedic surgeon, for complaints regarding her left knee. After considering this evidence, the trial judge in the three (3) consolidated matters concluded that the employee's disability and need for surgery were due to the continuing effects of the work-related injury which had aggravated her underlying condition.

On September 12, 2008, Ms. McIlmail underwent a left knee arthroscopy by Dr. Fadale, including chondroplasty, or debridement, to address Grade III chondrosis in all three (3) compartments of her knee. After participating in physical therapy, the employee informed the doctor that she would like to return to her regular job on December 1, 2008, which she did. On December 16, 2008, a pretrial order was entered awarding the employee weekly benefits for total incapacity from September 12, 2008 to November 30, 2008. All weekly benefits were discontinued as of that date due to the employee's return to her regular job.

A Report of Payment of Scarring dated March 9, 2009 was introduced into evidence and indicates that the employer paid specific compensation for the scars resulting from the arthroscopic surgery after Dr. Fadale reported that they had reached an end result. On June 9, 2009, a pretrial order was entered in W.C.C. No. 2009-03055, finding that the employee's condition had reached an end result and awarding specific compensation for a fifteen percent (15%) loss of use of the left lower extremity.

Ms. McIlmail worked full-time in her regular job as a nurse in the Emergency Department without any further treatment for her left knee until June 14, 2009. She returned to

Dr. Fadale on June 24, 2009 and informed the doctor that she continued to have significant pain in her left knee and felt that she could no longer perform the duties of her job. On September 15, 2009, Ms. McIlmail filed the present petition in which she asserts that she suffered a recurrence of total and/or partial incapacity beginning June 14, 2009 due to the left knee sprain she sustained at work on June 26, 2007. After reviewing the report of Dr. Jonathan A. Gastel, the impartial medical examiner appointed by the court, the trial judge entered a pretrial order on January 27, 2010 finding Ms. McIlmail to be partially incapacitated from June 14, 2009 and continuing as a result of her work-related injury sustained on June 26, 2007. The employer filed a timely claim for trial.

The employee did not testify during the trial. The medical evidence consisted of the deposition and records of Dr. Fadale, and the deposition and report of Dr. Gastel. The parties also presented a letter dated February 10, 2010 from Dr. Thomas F. Bliss in which he stated that on June 25, 2007 (one day before her injury), Ms. McIlmail called his office and scheduled an appointment for July 3, 2007. When the doctor discovered that her situation had turned into a workers' compensation case due to the incident on June 26, 2007, he cancelled the appointment.

Dr. Fadale's records indicate that he first evaluated the employee on August 22, 2007 on referral from Dr. John Parziale to determine whether arthroscopic surgery was appropriate because conservative treatment had failed to relieve the employee's symptoms. After discussion of various treatment alternatives, the employee opted for arthroscopic surgery which was performed by Dr. Fadale on September 12, 2008. At the first post-op visit, the doctor recorded in his report that Ms. McIlmail informed him that she was "extremely happy with the progress of [her] left knee," and that her physical therapy was going well. Jt. Ex. 3, report dated 9/22/08. In his office note dated November 26, 2008, Dr. Fadale quotes the employee as stating, "I am pretty

happy with the results of my surgery and I would like to return to work and [sic] December 1, 2008." Jt. Ex. 3, report dated 11/26/08. Consequently, the doctor released the employee to return to full duty.

On June 24, 2009, Ms. McIlmail returned to Dr. Fadale complaining of significant pain in her left knee and stating that she did not feel that she could continue to work. After reviewing X-rays taken on that date and conducting a physical examination, the doctor's diagnosis was worsening degenerative joint disease of the left knee. Dr. Fadale noted in his report that he had discussed with the employee the relationship between her overweight condition and arthritis. He indicated that she likely needed a total knee replacement and he referred her to Dr. John Froelich for a consultation regarding that type of surgery.

Dr. Fadale testified that he was under the impression that the employee had no symptoms or complaints regarding her left knee prior to the work-related injury. He was not aware that she had scheduled an appointment to see Dr. Bliss prior to the date she was injured. He explained that a note he had written to the employee's attorney stating that the injury at work had caused an exacerbation of her preexisting asymptomatic arthritic condition and that the referral to Dr. Froehlich was therefore causally related to the work injury was based upon his assumption that Ms. McIlmail had been working without any difficulty or symptoms prior to that injury. Dr. Fadale did state that after the surgery in September 2008, the employee's condition was better than her baseline condition prior to the work injury. He also agreed that the employee's presentation to him in June 2009 was consistent with a progressively worsening arthritic condition in the knee.

Dr. Gastel, an orthopedic surgeon, examined Ms. McIlmail at the request of the court and authored a report dated December 29, 2009. The report reflects that the employee advised the

doctor that she had some "on and off symptoms in her left knee prior to the injury," and that after the surgery by Dr. Fadale "she continued to have pain and was not doing particularly well according to her recollection." Jt. Ex. 4, report dated 12/29/09. The doctor was also apparently unaware that Ms. McIlmail had returned to her regular job in November 2008 and had no treatment for her knee until June 2009. The doctor noted that his examination revealed significant obesity, loss of motion causing a limp, and a trace effusion in the knee. Dr. Gastel wrote that Ms. McIlmail "did not really respond well to the arthroscopic debridement of this tricompartmental osteoarthritis." Id.

Based upon this history provided by the employee, Dr. Gastel opined as follows: "I believe that the exacerbation of her pain is due to the direct trauma to the knee, with the underlying arthritic condition being the main reason that she developed this pain." Id. When presented with the facts that after the surgery by Dr. Fadale the employee was discharged to return to full duty and had no treatment for her knee until approximately seven (7) months later, Dr. Gastel responded that the ongoing symptoms were related to the osteoarthritis in the knee, which he acknowledged worsens over time. Jt. Ex. 4 at 8:17-8:21.

After reviewing the evidence presented before the court, the trial judge found the employee failed to prove that she sustained a return of incapacity on June 14, 2009 due to the effects of her June 26, 2007 injury. The trial judge indicated that neither Dr. Fadale, nor Dr. Gastel rendered a specific opinion stating that Ms. McIlmail's most recent period of incapacity was due to the ongoing effects of her work-related injury. Rather, after each physician was presented with additional facts, they both indicated that the employee's current condition was caused by the progressive worsening of her underlying degenerative joint disease. The trial judge consequently denied the petition and the employee filed a claim of appeal.

The appellate standard of review is very limited and is clearly delineated in R.I.G.L. §28-35-28(b), which 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." Pursuant to this standard, we are precluded from engaging in a *de novo* review of the evidence and substituting 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 a thorough review of the record in the present matter, we find no error on the part of the trial judge in his assessment of the medical evidence and deny the employee's appeal.

Ms. McIlmail has filed four (4) reasons of appeal. In the first and second reasons of appeal she alleges the trial judge erred in failing to address objections to hypothetical questions in the depositions of Drs. Fadale and Gastel regarding the employee's preexisting arthritic condition in her knee and the appointment she had scheduled with Dr. Bliss prior to her work injury. The employee contends that a decision rendered by the court during previous litigation found that she remained disabled and required arthroscopic surgery on her knee due to the effects of the work injury, despite evidence of some symptoms in her knee prior to the injury and evidence of preexisting degenerative joint disease. She argues that based upon this prior decision, the issue of the effect of the preexisting arthritis as a cause of her current disability is res judicata. We find no merit in this contention.

The doctrine of res judicata is well-established in this state.

> When the parties and the cause of action are the same a judgment rendered on the merits in a former proceeding is a finality as to every issue that might have been raised therein as well as to those that were actually raised and decided.

Coates v. Coleman, 72 R.I. 304, 312-313, 51 A.2d 81, 85 (R.I. 1947), *citing* Randall v. Carpenter, 25 R.I. 641, 57 A.2d 865 (R.I. 1904). The Rhode Island Supreme Court has long

held, however, that the doctrine cannot be strictly applied in workers' compensation cases. *See* DiVona v. Haverhill Shoe Novelty Co., 85 R.I. 122, 127 A.2d 503 (1956). With the adoption of R.I.G.L. § 28-35-45, the General Assembly mandated that any memorandum of agreement or decree providing for the payment of compensation benefits may be reviewed at any time while compensation is being paid and up to ten (10) years after the last payment. Acknowledging the legislative intent of this statute in recognizing the fluid nature of workers' compensation cases, and consistent with its liberal construction of the Workers' Compensation Act, the Court in DiVona held that res judicata would be applied in workers' compensation cases "only with respect to such issues as were actually raised and decided in the prior action." Id. at 125, 127 A.2d at 505.

The Court further expounded upon the limited application of the doctrine of res judicata in workers' compensation cases in Molony & Rubien Construction Co. v. Segrella, 118 R.I. 340, 373 A.2d 816 (1977). In that matter, the employee suffered a fractured right wrist at work, among other injuries, on August 21, 1970. On December 7, 1971, the parties entered a consent decree in which the employer agreed to pay specific compensation for a "21% permanent impairment of his right upper extremity." Id. at 342, 373 A.2d at 818. In April 1974, the employer filed a petition to review alleging the employee's period of incapacity had ended based on the opinion of an orthopedist who opined that the degree of the employee's loss of use had been reduced and he could work full-time in his former employment as a carpenter. Id. at 343, 373 A.2d at 818. The employee asserted the finding of loss of use of 21% embodied in the 1971 consent decree was res judicata and that any medical opinion based upon a finding of a lesser impairment was not entitled to any weight.

The Rhode Island Supreme Court disagreed with this argument and cited its decision in DiVona in stating that "the petition to review is a vehicle by which a comprehensive right is given to both the employee and the employer to litigate from time to time questions involving a decrease or an increase in an employee's incapacity." Segrella, 118 R.I. at 345, 373 A.2d at 819. The Court noted that the specific compensation for loss of use is in the nature of "damages" and is not a measure of loss of earning capacity. Therefore, the finding of 21% loss of use that was agreed to in 1971 "was totally irrelevant in measuring the extent of Segrella's incapacity in the spring of 1974." Id. at 345-346, 373 A.2d at 819-820. As the Segrella Court noted, "[i]t follows, therefore, that the 21% decree of 1971 in no way precluded a finding in 1974 of a lesser percentage of loss of use in Segrella's right upper extremity." Id. at 347, 373 A.2d at 819.

In the present matter, Ms. McIlmail asserts that the questions presented by employer's counsel at the depositions of Drs. Fadale and Gastel regarding the cause of her current incapacity should be barred by the doctrine of res judicata because the court had ruled her previous period of incapacity and need for surgery was causally related to her June 26, 2007 work injury, not any preexisting condition. Specifically, she asserts the trial judge erred in allowing the employer to question Dr. Fadale and Dr. Gastel about her preexisting discomfort and underlying degenerative condition. Ms. McIlmail fails to recognize the long established modification of the doctrine of res judicata applied in workers' compensation cases. As noted in DiVona, the test to determine whether res judicata should be applied is one of fact: "Was the questioned issue of fact raised and decided in the prior case? If it was, it is barred by the doctrine." DiVona, 85 R.I. at 126, 127 A.2d at 506.

The question is then whether there was a determination in the earlier proceeding that the June 14, 2009 period of incapacity was due to the effects of the June 26, 2007 work injury or the

natural progression of the preexisting degenerative condition in the employee's knee. The trial judge in the earlier proceeding concluded that the employee continued to be disabled due to the effects of the work-related injury and that arthroscopic surgery was necessary to treat the effects of the injury. He rejected the employer's argument at that time that any ongoing disability and need for surgery was related to the employee's preexisting degenerative condition.

Ms. McIlmail's petition to review in the present matter involves a separate determination as to the cause of a later period of disability beginning June 14, 2009, after surgery and a return to work. These intervening circumstances and events present an entirely different factual scenario. Consequently, in determining whether this most recent period of incapacity was causally related to the work injury, the court's previous determinations are "totally irrelevant." Segrella, 118 R.I. at 347, 373 A.2d at 819. The limited application of the doctrine of res judicata in workers' compensation cases does not preclude the employer from questioning Drs. Fadale and Gastel as to the effect of the employee's preexisting discomfort and degenerative condition of her knee on the issue of the cause of the employee's present disability. Accordingly, we conclude the trial judge did not err in considering the deposition testimony of Drs. Fadale and Gastel over the objections of the employee.

In her third reason of appeal, the employee argues that the trial judge overlooked Dr. Fadale's testimony regarding the causal relationship between her current period of incapacity and her work-related injury of June 26, 2007. On June 6, 2009, the court entered a pretrial order in W.C.C. No. 2009-03055 awarding Ms. McIlmail specific compensation for a fifteen percent (15%) loss of function of her left knee based upon a report of Dr. Fadale. When questioned regarding the impairment rating, Dr. Fadale responded:

> I believe the impairment rating was the cartilage loss inside her knee, which is consistent with the degenerative changes within her

> knee. Impairment ratings are anatomic ratings, not etiology ratings.

Jt. Ex. 3, 15:20-15:23. Ms. McIlmail contends that the loss of function established by the pretrial order was therefore based upon degenerative changes in her knee and consequently, the degenerative condition of her knee and any disability flowing therefrom are causally related to the work injury as a matter of law. We find the employee's reasoning in arriving at this conclusion to be flawed.

As discussed above, the Rhode Island Supreme Court in Segrella has stated that the previous finding of a specific degree of impairment has no bearing upon the determination of the degree of incapacity at a later date. Ms. McIlmail's work injury was originally described as a left knee sprain. This description was never modified by agreement or decree. The pretrial order awarding specific compensation for loss of use makes no mention of degenerative changes. As Dr. Fadale indicated, his determination of the impairment rating was based upon anatomical findings and has nothing to do with the etiology or cause of those findings. We cannot extrapolate from the wording of the pretrial order that the trial judge made a determination that the employee's degenerative condition was causally related to the incident at work, and thereby effectively amended the description of the work injury to include the degenerative condition. There is simply no basis for such a conclusion.

The trial judge stated in his decision that Dr. Fadale did not causally link Ms. McIlmail's June 14, 2009 period of incapacity to her original June 26, 2007 injury. Dr. Fadale testified that at the June 24, 2009 office visit with Ms. McIlmail, there was no indication she had suffered a traumatic injury to her knee and the pain Ms. McIlmail was complaining of was consistent with that of someone who had a worsening arthritic condition in the knee. Jt. Ex. 3, at 8:18-8:24, 11:21-12:10. He also acknowledged that he incorrectly assumed that the employee had made an

appointment to see Dr. Bliss after she suffered the work-related injury, rather than before that incident. Id. at 10:1-10:4. He stated that he was under the impression that Ms. McIlmail was not experiencing any pain prior to the incident at work and his statements in a note dated September 9, 2009 that she suffered an exacerbation of her underlying arthritis as a result of the injury and his referral to Dr. Froehlich for possible total knee replacement was based upon that assumption. The doctor conceded that changing that assumption would alter his conclusions. He also agreed that Ms. McIlmail had returned to at least her pre-injury condition after the surgery and her complaints in June 2009 were consistent with a worsening degenerative condition.

It is clear that the trial judge did not overlook the testimony of Dr. Fadale, but rather determined that he did not causally relate Ms. McIlmail's most recent period of incapacity to her June 26, 2007 injury. As noted above, the doctor qualified his opinions after learning that he had incorrectly assumed that the employee had no complaints regarding her knee prior to the work injury. He also stated that Ms. McIlmail's condition in December 2008 when she was discharged to return to work was actually better than her baseline condition prior to the injury. Consequently, we find no error in the trial judge's determination that Dr. Fadale did not clearly link Ms. McIlmail's current disability to the work related injury on June 26, 2007.

Ms. McIlmail's last reason of appeal alleges the trial judge erred in not accepting Dr. Gastel's opinion that she had an aggravation of her underlying condition and an exacerbation of pain due to the direct trauma to her knee. The trial judge found Dr. Gastel did not causally relate Ms. McIlmail's complaints in 2009 to the trauma she suffered on June 26, 2007. After reviewing the doctor's deposition, we find no error in the trial judge's conclusion.

In his report, Dr. Gastel states his impression as "[l]eft knee osteoarthritis, status post direct injury to the knee 2 ½ years ago resulting in a contusion, capsular sprain, and aggravation

of the underlying arthritic condition." Jt. Ex. 4, report dated 12/29/09. The doctor testified that according to the oral history she provided to him, Ms. McIlmail continued to have pain and did not do well after her arthroscopic surgery, contrary to her statements to Dr. Fadale in the months after the surgery. He was also unaware Dr. Fadale released the employee to full duty on December 1, 2008, at her request and that she returned to her regular employment from that date until June 14, 2009. After being presented with this information, Dr. Gastel opined that the ongoing symptoms Ms. McIlmail was experiencing were more likely related to the osteoarthritis in the knee than the direct trauma she sustained on June 26, 2007. Jt. Ex. 4 at 8:17-8:18. He further testified that the "ongoing symptoms were due to the underlying arthritis, which was present at the time of the injury." Id. at 10:13-10:15.

It is clear from the deposition testimony of Dr. Gastel that his original opinion as to causation cited by the employee in her reason of appeal was not based on an accurate factual foundation and he altered that opinion when presented with additional information. Furthermore, the doctor's subsequent testimony was, as noted by the trial judge, confusing at best. During the questioning by the employee's attorney, it was not made clear to Dr. Gastel that there were two (2) separate periods of incapacity and the issue to be addressed was the cause of the second period. There is no clear competent opinion that the incapacity beginning June 14, 2009 was due to an aggravation of an underlying condition which was caused by the traumatic incident which occurred on June 26, 2007.

Accordingly, based upon the foregoing discussion, we find no error in the trial judge's determination that the employee failed to prove by a fair preponderance of the evidence that she sustained a return of incapacity on June 14, 2009 due to the effects of her June 26, 2007 injury. Consequently, we deny and dismiss the employee's appeal and affirm the decision and decree of

the trial judge. 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.

_____
Ferrieri, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

JOHN McILMAIL, as Executor of the Estate of CHRISTINE McILMAIL)
)
VS.) W.C.C. 2009-05481
)
RHODE ISLAND HOSPITAL)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the claim of appeal of the petitioner, and upon consideration thereof, the petitioner's 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 July 20, 2011 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

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John A. Sabatini, Administrator

ENTER:

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Olsson, J.

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Ricci, J.

_____
Ferrieri, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to John M. Harnett, Esq., and James T. Hornstein, Esq., on

_____