

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

GIANI TEDESCHI

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VS.

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W.C.C. 02-04061

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BOYDCO, INC.

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DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter came on to be heard before the Appellate Division upon the petitioner/employee's appeal from the denial of his petition for specific compensation for loss of use. After careful review of the record and consideration of the arguments of counsel, we deny and dismiss the employee's appeal.

The employee, Giani Tedeschi, sustained a right shoulder strain while at work on August 2, 2001. He received benefits for partial incapacity pursuant to a Memorandum of Agreement issued on September 13, 2001. On March 1, 2002, his benefits were suspended pursuant to a pretrial order entered in W.C.C. No. 02-00979.

The present petition was filed on June 7, 2002, requesting the award of specific compensation for loss of use of the right upper extremity. The petition was denied at the pretrial conference and the employee filed a timely claim for trial.

The employee, Giani Tedeschi, testified that after his injury he treated with Dr. Jonathan Gastel until late 2002. After his weekly benefits were discontinued on March 1, 2002, he consulted his attorney for referral for a second opinion regarding the condition of his shoulder. His attorney referred him to Dr. Jonathan Sisskind, a chiropractor in Massachusetts.

Dr. Sisskind evaluated the employee for the first time on March 6, 2002. The employee testified that the doctor spent about thirty (30) to forty-five (45) minutes examining him. As part of his examination, Dr. Sisskind used instruments to measure how hard he could squeeze, how high he could raise his right arm and how far he could bring his arm across his body. Dr. Sisskind also took x-rays of his right arm. The employee stated that his examinations with Dr. Gastel and the evaluation done by Dr. Ira Singer at the request of the insurer took about fifteen (15) to twenty (20) minutes and neither doctor ever used any instruments in their examination of him.

The medical evidence in this matter consisted of the depositions and records of Dr. Jonathan Sisskind and Dr. Ira Singer. Dr. Sisskind is a chiropractic physician licensed to practice in Massachusetts and New York. He testified that in late 2001, he took a thirty-six (36) hour course in the interpretation and use of the AMA Guides to the Evaluation of Permanent Impairment taught by Dr. Stanley Kaplan, a chiropractor, and sponsored by the Massachusetts Chiropractic Association.

Dr. Sisskind described in detail how he conducted his examination and measured grip strength and range of motion using certain instruments. Utilizing those measurements and the charts in the Guides, the doctor calculated a forty-five percent (45%) impairment of the employee's right upper extremity. He indicated that he found no reason to conclude that the employee was not giving maximum effort during the course of the impairment evaluation.

Dr. Sisskind noted that he did see the employee four (4) times after the initial evaluation for chiropractic manipulations. However, the employee did not get any relief from these treatments and discontinued treatment in May 2002.

Dr. Ira Singer, an orthopedic surgeon, evaluated the employee on January 17, 2002 at the request of the insurer. In his report, the doctor noted that he found "significant non-physiological pain behavior." He could not identify any specific abnormal findings to diagnose a specific anatomic injury. He concluded that the employee had no disability.

Dr. Singer testified that he found no specific loss of use during his examination because the employee had full range of motion. He acknowledged that he did not use any instruments to measure range of motion or grip strength and he did not refer to the Guides in his report.

During the course of Dr. Singer's deposition, the report of a functional capacity evaluation performed at the Donley Center on February 27, 2002 was admitted into evidence. That evaluation also noted the employee's poor perception of his physical abilities as well as self-limiting and exaggerated pain

behaviors. During the deposition of Dr. Sisskind, a letter authored by Dr. Gastel dated January 30, 2002 was admitted as an exhibit. Dr. Gastel noted that he had difficulty isolating the site of pathology in the employee's right shoulder as his examination was always "nonfocal." He stated that injections in two (2) different sites did not provide relief and an arthrogram of the shoulder was unremarkable. Based upon the "lack of anatomic findings and reproducible objective physical signs," Dr. Gastel agreed with Dr. Singer that no further treatment was warranted and the employee was capable of returning to work.

After reviewing the medical evidence in detail, the trial judge found the opinions of Dr. Singer to be more probative than those rendered by Dr. Sisskind and he denied the employee's petition. The employee filed a claim of appeal contending that the trial judge was clearly wrong in relying on Dr. Singer's opinions because he did not utilize the Guides to determine the employee's loss of use and therefore, his opinions are not competent evidence. We find that the trial judge was not clearly wrong in his determination and we, therefore, deny the employee's appeal.

The role of the Appellate Division in reviewing factual findings is sharply circumscribed by statute and case law. Rhode Island General Laws §28-35-28(b) states, "The findings of the trial judge on factual matters are final unless an appellate panel finds them to be clearly erroneous." The Appellate Division is entitled to conduct a *de novo* review of the record only after a finding is made that

the trial judge was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996); Grimes Box Co., Inc. v. Miguel, 509 A.2d 1002 (R.I. 1986).

On appeal, the employee alleges that the trial judge's reliance on Dr. Singer's testimony constituted an error of law because the doctor failed to use the AMA Guides for his loss of use determination. The employee contends that the failure to refer to or utilize the Guides in any manner renders the doctor's opinions incompetent. We find no merit in this argument.

Dr. Singer explained that he found no decrease in range of motion of the employee's shoulder during his examination and therefore, there was nothing to measure and no need to refer to the Guides. (Resp. Exh. 1, p.16-17) In addition, Dr. Singer's examination revealed that the employee was engaging in "persistent nonanatomic or nonphysiologic pain behavior." (Id. at 14) The testing for range of motion and grip strength are both dependent upon the effort put forth by the patient. Based upon his observations, Dr. Singer obviously did not believe that the employee was being truthful about his physical condition. Dr. Singer's opinions were stated to a reasonable degree of medical certainty and as such, they were competent evidence upon which the trial judge could rely. See State v. Lima, 546 A.2d 770, 773-774 (R.I. 1988).

When there are conflicting medical opinions of competent and probative value, it is the prerogative of the trial court to accept the medical opinions of one health care provider over the opinions of another. Parenteau v. Zimmerman Eng., Inc., 111 R.I. 68, 299 A.2d 168 (1973). In the present case, the trial judge

discussed in great detail all the medical evidence as well as the qualifications of the doctors. After carefully considering all of this evidence, the trial judge concluded that the opinions of Dr. Singer, as supported by the reports of Dr. Gastel and the Donley Center, were more probative and persuasive as to whether the employee had any loss of use. All of those providers were consistent in their observations that the employee exhibited exaggerated pain behaviors and inconsistent examinations. Therefore, this panel finds that the trial judge was not clearly wrong in his assessment as there is ample evidence in the record to support his findings. Accordingly, we deny and dismiss the employee's reasons of appeal and affirm the decision and decree of the trial court.

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

Healy, and Connor, JJ. concur.

ENTER:

Healy, J.

Olsson, J.

Connor, 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 March 5, 2003 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

ENTER:

Healy, J.

Olsson, J.

Connor, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq., and
Bruce Balon, Esq., on
