STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

JAMES CANTRELL	)	
	)	
VS.	)	W.C.C. 02-08658
	)	
ANTAYA TECHNOLOGIES CORP.	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the petitioner/employee's appeal from a decision and decree of the trial judge in which he granted the employee's petition for specific compensation, but rejected the testimony of the employee's expert witness regarding the degree of permanent impairment. The employee has also appealed from the entry of an order sanctioning the employee's attorney and requiring the payment of Five Hundred and 00/100 ($500.00) Dollars to counsel for the respondent. After thorough review of the record and careful consideration of the parties' respective arguments, we deny the employee's appeal from the decree entered in this matter, and grant the employee's appeal from the sanction order.

The employee sustained a laceration to his right thumb on December 17, 2001 at his place of employment. He did receive some medical treatment, but did not lose any time from work. The present petition was filed on December 13, 2002, requesting specific compensation for disfigurement and loss of use resulting from the injury. The petition was granted at the pretrial conference and awards were made for scarring to the right thumb and for a five percent

(5%) loss of use of the right upper extremity. The employee claimed a trial in a timely manner. Thereafter, the parties agreed to the amount awarded for scarring and advised the trial judge that the only issue remaining was the amount of the award for loss of use.

The only evidence submitted during the trial regarding the loss of use award was the deposition and records of Dr. Jonathan Sisskind and the deposition, affidavit and records of Dr. Arnold-Peter Weiss. Dr. Sisskind, a chiropractor practicing in Massachusetts, saw the employee on one (1) occasion on July 30, 2002 for the purpose of evaluating the degree of impairment in his right upper extremity. The doctor noted a loss of grip strength in the right hand and based upon that measurement he arrived at a ten percent (10%) loss of use utilizing the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition.

Dr. Sisskind testified that he was trained in the use of the Guides during a thirty-six (36) hour course he took a few years ago. He passed a six (6) hour exam at the end of the course. The doctor explained that he referred to a chart of average grip strength values for males working in manual employment in making his calculations, rather than comparing the involved right hand to the unaffected left hand. The chart utilized by Dr. Sisskind did not account for the age of the subjects.

Dr. Weiss, an orthopedic surgeon specializing in hand and wrist surgery, evaluated the employee on November 19, 2002 at the request of the insurer. The doctor stated that he conducted various tests to measure grip strength in both the right and left hands. He explained that comparing the normal left side to the injured right side provides the most accurate assessment of grip strength for the particular individual, rather than using the table of average grip strengths in the Guides. He did note that he would use the charts in the Guides in the event that both hands had been injured. Dr. Weiss arrived at a five percent (5%) impairment of the

right upper extremity based upon the employee's actual grip strength loss deduced from testing including "both static grip strength, rapid exchange, five position grip strength and comparing it to his opposite normal left hand." Resp. Exh. B, p. 14.

The trial judge reviewed the methodology utilized by each of the physicians and concluded that the process by which Dr. Weiss arrived at his loss of use rating was more accurate and reliable. He, therefore, awarded specific compensation for a five percent (5%) loss of use of the right upper extremity.

The employee filed a claim of appeal and has put forth six (6) reasons of appeal regarding the trial judge's decision finding the opinion of Dr. Weiss to be more probative and reliable. Generally, the employee contends that the trial judge erred in relying upon the opinion of Dr. Weiss because the methodology he utilized was not in conformance with the Guides. In fact, the Guides specifically recommend comparing the injured extremity to the unaffected extremity in arriving at an impairment rating.

> "The three readings each for grip and pinch strength are averaged and compared to those of the opposite extremity, which usually is normal. If both extremities are involved, the strength measurements are compared to the average normal strengths listed in Tables 16-31 through 16-33."

Guides to the Evaluation of Permanent Impairment, Fifth Edition, Ch. 16, § 16.8b, p. 508.

The Guides also states that ". . . wide variations exist in strength, even among persons doing the same kind of work." Id. at 509. Therefore, as stated by Dr. Weiss, comparison to the unaffected extremity provides the more accurate impairment rating and is the methodology recommended by the Guides.

Dr. Sisskind utilized the Tables provided in the Guides which represent average values for groups of 100 subjects. The table he referred to, Table 16-31, provided average grip

strengths by occupation. Mr. Cantrell, the employee in this matter, was sixty-four (64) years old at the time of the impairment evaluation. The average grip strength in Table 16-31 for manual laborers obviously incorporated individuals of all ages. Use of this information in calculating a particular individual's grip strength would obviously yield a less accurate rating than comparing the person's injured hand to his normal hand.

It is clear from the recommendations contained in the Guides that the methodology employed by Dr. Weiss was in conformance with the Guides and provided a reliable and valid impairment rating. As such, the trial judge's reliance on the opinion of Dr. Weiss is not clearly erroneous and we will not disturb his findings based upon that opinion. Consequently, the employee's appeal of the trial judge's decision and decree regarding the award of specific compensation for loss of use is denied and dismissed.

The employee has also appealed the trial judge's order entered on June 24, 2003 which found that counsel's motion to recuse was frivolous, without reasonable grounds, and violative of R.I.G.L. § 28-33-17.3 and ordered the attorney to pay, as a sanction, the sum of Five Hundred and 00/100 ($500.00) Dollars to opposing counsel. Although the employee has filed five (5) reasons of appeal regarding this order, we need only address his final reason alleging that the sanction order must be vacated because the trial judge did not afford counsel notice and an opportunity to be heard prior to imposing the sanction. After review of the relevant case law and statute, we grant the employee's appeal, vacate the sanction order, and remand the matter to the trial judge for further proceedings in accordance with our decision.

This matter came before the trial judge on a petition for specific compensation, both for disfigurement and for loss of use. On January 8, 2003, a pretrial order was entered granting the petition and making awards for scarring and loss of use. The employee claimed a trial from this

order and, pursuant to R.I.G.L. § 28-35-20(e), the matter was assigned for trial before the same judge who conducted the pretrial conference. On March 17, 2003, counsel for the employee, Stephen J. Dennis, filed a motion to recuse on the grounds that the trial judge ". . . was one of the promulgators of the AMA Guide of Permanent Impairment, 5th Edition and would, therefore, have an inherent bias."

On June 16, 2003, a hearing on the motion was conducted. Attorney Dennis indicated that he became aware that the trial judge was listed as a reviewer in the Guides and he was concerned that whatever that position might involve would improperly influence the trial judge. The trial judge then explained his participation in the promulgation of the Guides and stated that he would forward to Mr. Dennis a copy of an article he co-authored regarding use of the Guides in litigation. The trial judge denied the motion, but he also referred to a recent decision by Justice Ronald R. Lagueux, Obert v. Republic Western Insurance Co., 264 F. Supp. 2d 106 (D.R.I. 2002), in which Judge Lagueux found a motion to recuse to be frivolous and imposed sanctions on the moving attorney. The trial judge stated that in addition to sending Mr. Dennis the article regarding the Guides, he would also include a copy of the Obert decision for his perusal.

The case was continued to June 19, 2003 for the judge's decision on the admissibility of the deposition of Dr. Sisskind. During the time between hearing dates, Mr. Dennis received the article regarding the Guides and a copy of the Obert decision from the trial judge with a handwritten note signed by the judge:

> "To Stephen Dennis Esq.
>
> Best of luck and good health!
>
> Keep on Truckin'"

At the hearing on June 19, 2003, Attorney Dennis renewed his motion to recuse on the grounds that this note was mocking in nature and demonstrated prejudice towards him on the part of the trial judge. After some discussion of the motion by the attorneys and the trial judge, the judge concluded by stating that the renewal of the motion was frivolous and he ordered Attorney Dennis to pay opposing counsel the sum of Five Hundred and 00/100 ($500.00) Dollars. On June 24, 2003, an order was entered finding that the renewal of the motion was without reasonable grounds, was frivolous, and violative of R.I.G.L. § 28-33-17.3, and ordering the payment of the fee to opposing counsel as a sanction. The order further stated that it would become effective upon entry of a final decree in the matter.

Rhode Island General Laws § 28-33-17.3(a)(3) and (4) provide as follows:

> "(3) If any judge determines that any proceedings have been brought or defended by an employee or his or her counsel without reasonable grounds, the whole cost of the proceedings shall be assessed against the employee or counsel, whoever is responsible.
>
> "(4) The court shall determine whether an action or defense is frivolous or conduct giving rise to the action or defense was unreasonable."

Although we acknowledge the authority of the trial judge to raise the issue of sanctions *sua sponte*, we find that the trial judge erred in not providing to counsel notice and an opportunity to be heard before sanctions were imposed.

At the time this matter came to trial, the Workers' Compensation Court Rules of Practice did not contain any provision regarding the procedure for assessing costs of delay or sanctions for filing frivolous pleadings and motions. Other courts have had rules on this subject for many years. *See* Superior Court Rules Civ. Proc., Rule 11; Dom. Rel. Proc. Rules, Rule 11. The Rhode Island Supreme Court has addressed due process concerns in the imposition of sanctions

in both the Superior and Family Courts. In Heal v. Heal, 762 A.2d 463 (R.I. 2000), the Court set forth the proper procedure to be followed when considering the imposition of sanctions.

> "Absent extraordinary circumstances, due process requires that an offender be given notice and an opportunity to be heard before sanctions are imposed." Id. at 469 (citing Boddie v. Connecticut, 401 U.S. 371, 377-79, 91 S.Ct. 780, 785-87, 28 L.Ed.2d 113, 118-20 (1971); Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873 (1950).

Subsequently, the Court reaffirmed this stance regarding the imposition of sanctions under Rule 11 in the Superior Court. *See* Michalopoulos v. C & D Restaurant, Inc., 847 A.2d 294, 302 (R.I. 2004).

On February 23, 2004, the Rhode Island Supreme Court approved amendments to the Workers' Compensation Court Rules of Practice, including extensive changes to Rule 2.28 which followed generally the wording of Rule 11 of the Superior Court Rules of Civil Procedure. Rule 2.28 now provides in pertinent part:

> "All proceedings for costs, expenses, reasonable attorney's fees and/or penalties to be assessed for delay or inaction without just cause pursuant to § 28-35-17.1 or for sanctions pursuant to section (A) of this rule shall be heard by the Trial Judge at such time as he or she shall determine."

The reporter's notes provide further insight into the application of the rule.

> "This rule has been extensively revised and follows generally the most recent amendment to Superior Court Rules of Civil Procedure Rule 11. It affirms the requirement of good faith in pleading and requires the pleader to assert that there is a good faith basis for the pleading and that it is based in fact and warranted by existing law. The amendments to this rule establish procedures consistent with the provisions of R.I.G.L. § 28-33-17.3." (Emphasis added.)

Although Rule 2.28 was revised subsequent to the trial of the present matter, it does provide some guidance and support for the proposition that the imposition of sanctions under R.I.G.L. § 28-33-17.3(a)(3) is analogous to proceedings under Rule 11 in the Superior Court and

Family Court. Based upon our review of the relevant case law, we find that due process requires that the alleged offender must be provided with notice and an opportunity to be heard before sanctions may be imposed by the trial judge.

In the instant matter, we find no evidence that any type of notice was provided to Mr. Dennis indicating that the trial judge was contemplating the imposition of sanctions. Although Mr. Dennis argued the motion to recuse, this does not constitute an opportunity to be heard on whether he had reasonable grounds for his motion, particularly since he was unaware that sanctions were being considered. Under the circumstances, we find that the trial judge did not comply with due process requirements prior to issuing the order imposing sanctions. Therefore, we will vacate the sanction order entered on June 24, 2003 and remand the matter to the trial judge for the sole purpose of providing counsel notice and an opportunity to be heard on the issue of sanctions.

Consistent with the foregoing discussion, we deny and dismiss the employee's appeal of the decision and decree entered on July 16, 2003. We also grant the employee's appeal from the order imposing sanctions which was entered on June 24, 2003, and remand the matter to the trial judge for further proceedings in conformance with our decision. No counsel fee or costs are awarded at this time as the matter is not final and the successful appeal involved the interests only of the employee's attorney, not the employee.

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

Sowa and Connor, JJ., concur.

ENTER:

Olsson, J.

Sowa, J.

Connor, J.

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FINAL DECREE AND ORDER OF REMAND OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeals of the petitioner/employee and upon consideration thereof, the employee's appeal from the decree entered on July 16, 2003 is denied and dismissed. With regard to the employee's appeal of the order of the trial judge entered on June 24, 2003, the following findings of fact are made:

1. That counsel for the employee was not provided with notice and an opportunity to be heard prior to the imposition of sanctions pursuant to R.I.G.L. § 28-33-17.3.

2. That due process requires notice and an opportunity to be heard prior to the imposition of such sanctions.

It is, therefore,

ORDERED, ADJUDGED, AND DECREED:

1. That the findings and orders contained in a decree of this Court entered on July 16, 2003 be, and they hereby are, affirmed.

2. That the order of the trial judge entered on June 24, 2003 imposing sanctions is hereby vacated.

3. That the matter is remanded to the trial judge for further proceedings regarding the imposition of sanctions under R.I.G.L. § 28-33-17.3 in accordance with our decision.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Sowa, J.

_____
Connor, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq., Lauren E. Jones, Esq., and Berndt W. Anderson, Esq., on

_____