

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

ARAMARK CORP.)

)

VS.)

W.C.C. 04-01633

)

JOAN SOUZA)

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter came to be heard at oral argument before the Appellate Division on the respondent/employee's appeal from a decision of the trial judge which discontinued her weekly workers' compensation benefits based upon a finding that her incapacity had ended. After thorough review of the record in this case and consideration of the arguments of the parties, we deny the employee's appeal and affirm the findings and orders of the trial judge.

The employee had been receiving weekly benefits for partial incapacity pursuant to a pretrial order entered in W.C.C. No. 04-00757. That pretrial order indicates that Ms. Souza sustained a left knee strain on May 12, 2003 which resulted in partial incapacity from November 2, 2003 and continuing.

The employee, a sixty-five (65) year old female, testified that she worked for Aramark Corporation on site at the Roger Williams Park Zoo, in Alice's, one (1) of the two (2) restaurants at the zoo. She stated that her responsibilities included cooking, making sandwiches, and serving food. The employee related that this position required her to lift, bend, and remain on her feet

during the course of her shift. She testified that she had a fairly lengthy walk over hills from the parking lot to the restaurant. In addition, the employee stated that she had to climb stairs in order to punch her time card. She indicated that she worked between sixteen (16) to twenty-five (25) hours a week.

The employee testified that she sustained an injury to her left leg on May 12, 2003. She initially treated with Dr. Buonanno, who eventually performed arthroscopic surgery on her left knee in December 2003. The employee fell on her left knee again at home in February of 2004. She related that subsequent to the fall she treated first with Dr. Buonanno and then with Dr. Coppes. The employee explained that she sought treatment with Dr. Coppes because she wanted another opinion regarding her status following the surgery. She denied that her left knee had improved prior to the fall at home. She stated that she continued to experience pain and that she used a cane, prescribed by Dr. Buonanno, when her leg feels unsteady.

Ms. Souza testified that she would like to return to her position if her employer provided certain accommodations, including a ride from the parking lot to the restaurant, someone to punch her time card for her because it required climbing stairs to the office, and permission to sit during her shift when her leg bothered her.

The employee admitted that a few days after the fall at home, she called Dr. Buonanno and he saw her shortly thereafter. She acknowledged that she had an abrasion on the knee and the doctor gave her an injection to alleviate the pain. She denied that she told him her knee had greatly improved prior to the fall at home and asserted that she continually had pain. However, she conceded that this appointment took place just before the doctor was about to discharge and release her from physical therapy for her initial injury.

The medical evidence consists of the affidavit and reports of Dr. A. Robert Buonanno,

the deposition and records of Dr. Mark A. Coppes, and the deposition and report of Dr. Paul D. Fadale.

Dr. Buonanno, an orthopedic surgeon, began treating the employee in July 2003. A course of conservative treatment, including medication and physical therapy, was undertaken, but failed to result in any improvement. Dr. Buonanno performed surgery on the left knee on December 9, 2003. The post-operative diagnosis was “osteochondritic lesion, medial femoral condyle.” At a follow-up visit on January 8, 2004, the employee noted continued pain in the left knee from the osteolytic lesion. The doctor prescribed an anti-inflammatory and indicated that if the medication did not help, he would inject her knee at the next visit.

Ms. Souza saw Dr. Buonanno again on February 19, 2004. He recorded a history as follows:

“Joan fell at home five days ago and sustained blunt trauma to her knee. Prior to falling, she said she was doing extremely well. Now, she presents for definitive care and treatment in regards to her fall.” Pet. Exh. 3, attach. note 2/19/04.

The doctor’s diagnosis was a contusion to the left knee, and degenerative osteoarthritis. He injected her knee and recommended that she complete her physical therapy program which was ending within the week. He also advised Ms. Souza that she could return to see him as needed.

On February 26, 2004, Dr. Buonanno completed a form for the firm handling the employer’s workers’ compensation claims in which he stated that he discharged the employee to return to work full duty as of February 19, 2004.

Dr. Coppes, an orthopedic surgeon, evaluated the employee for the first time on March 26, 2004. The doctor testified regarding his diagnosis as follows:

“I had felt she had some medial compartmental symptoms and was either consistent with scar, the osteochondral lesion as a residual as

Dr. Buonanno's scoped and/or a meniscal lesion." Res. Exh. B, p. 5.

He further stated that he "would probably" restrict the amount of time she spent standing, carrying, and pushing or pulling any objects. The doctor opined that the employee's condition "seemed consistent with her history of injury as she reported it to me and by the documentation that I have." Id. at 6.

In his report, Dr. Coppes recommended that the employee undergo a repeat MRI of the left knee in order to evaluate whether there had been any healing generated by the "osteochondral drilling" done by Dr. Buonanno. He remarked that she may be a potential candidate for artificial knee replacement if there is no improvement. In the report, Dr. Coppes also refers to the osteochondral fracture as being caused by the incident at work.

Dr. Coppes admitted that the employee did not advise him that she had fallen at home in February 2004, although he had been provided with the office notes of Dr. Buonanno which contained that information. However, Dr. Coppes maintained that a subsequent injury would not alter his opinion regarding disability or causation, particularly since Dr. Buonanno in his January 2004 note indicated that the employee was still suffering from symptoms related to the osteochondral lesion. The doctor also explained that he used the terms "fracture" and "lesion" in this context interchangeably.

Dr. Fadale, an orthopedic surgeon, examined the employee on May 18, 2004 at the request of the trial judge. His diagnosis was "degenerative joint disease of the medial femoral condyle of the left knee." Court's Exh. I. Regarding causation, the doctor opined that the employee probably had an underlying degenerative process which was accelerated by the work-related injury. He concluded that Ms. Souza was not capable of returning to her former employment.

Dr. Fadale testified that the employee did not inform him that she fell at home in February 2004, subsequent to the surgery on her knee. Furthermore, based upon information from the employee, the doctor was under the impression that she remained symptomatic since the incident at work on May 12, 2003. Upon reviewing Dr. Buonanno's office note of February 19, 2004 which contains the history that the employee was doing very well until she fell at home five (5) days earlier, Dr. Fadale acknowledged that he could not say which injury was causing the symptoms he noted in May 2004.

The doctor agreed that neither the MRI study nor the operative report of Dr. Buonanno indicated that there was a fracture of any type of the left knee. Dr. Fadale provided the following explanation of the surgical procedure performed by Dr. Buonanno based upon his reading of the operative report.

“The knee was placed at 90 degrees of flexion and there was an osteochondritic lesion of the medial femoral condyle, Grade III. What that means is that this lady has arthritis and arthritis arthroscopically is graded from Level I or very low line to Level IV which is exposed bone. The most common thing we see in surgery is osteochondritis, lesion Level III, which still has the articular surface intact but very rough, uneven, crabmeat-like formation.

“So that's a pretty standard finding for a patient with an early arthritic lesion and you can call it arthritic or you can call it osteochondritic. Now, that would be different than an osteochondral fracture where there is no grading involved, it's a normal articular surface, and was broken through. So I don't know of any fracture that this lady had.” Court's Exh. II, p. 17.

Dr. Fadale further explained that, according to the operative report, Dr. Buonanno performed a chondroplasty, which smoothed off the uneven degenerative tissue, a standard procedure when treating medial femoral condyle arthritis which did not involve any drilling. He

also testified that if there had been an osteochondral fracture, it would have been visible during the arthroscopic surgery.

At the conclusion of the evidence, the trial judge concluded that Dr. Buonanno had essentially rendered the only probative opinion as to the employee's ability to work. He noted that when faced with the fact that the employee had sustained a second injury to the knee at home of which he was unaware, Dr. Fadale stated that he could not provide an opinion as to the cause of her current condition. The trial judge rejected the testimony of Dr. Coppes because he failed to render a definitive opinion regarding diagnosis or disability and instead delivered testimony which was ambiguous and, at times, argumentative. Consequently, the trial judge granted the employer's request to discontinue benefits based upon the documents authored by Dr. Buonanno.

The Workers' Compensation Act clearly sets forth a standard of review on appeal which gives great deference to the factual determinations made by a trial judge. Rhode Island General Laws § 28-35-28(b), provides 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 appellate panel may not substitute its own judgment as to the weight of the evidence or the credibility of witnesses absent an initial finding of clear error. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). Only after specifically finding that the trial judge was clearly wrong may the Appellate Division embark upon a *de novo* review of the record. Id. (citing R.I.G.L. § 28-35-28(b); Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986)).

The employee has filed two (2) reasons for appeal. First, the employee contends that the trial judge committed error by relying upon the opinion of Dr. Buonanno because it was incomplete and incompetent. The employee avers that Dr. Buonanno's opinion lacks reliability

because he noted an osteolytic lesion on January 8, 2004, but made no further comment. In addition, the employee finds fault with Dr. Buonanno because he did not mention the employee's ability to work in his February 19, 2004 office note and yet he indicated on a form one (1) week later that she was capable of returning to full duty, without the benefits of a follow-up examination.

We have scoured the record in this matter and cannot find any indication that the employee objected to the affidavit and reports of Dr. Buonanno. On the contrary, when the exhibit was offered into evidence by counsel for the employer, the employee's attorney stated that he had no objection. Consequently, the employee failed to preserve this issue for appeal and cannot now raise it for the first time.

In any case, we find no merit in the employee's contention as to the competency of Dr. Buonanno's statement on disability. Contrary to the employee's assertions, Dr. Buonanno first noted the osteochondral lesion in his initial report of July 15, 2003. His operative report of December 9, 2003 records the postoperative diagnosis as "osteochondral lesion, medial femoral condyle." Dr. Fadale explained in his deposition how Dr. Buonanno addressed the osteochondral lesion during the surgery. In the office visit notation dated January 8, 2004, Dr. Buonanno simply noted that the employee was still having some pain due to the lesion. It is clear from these documents that the doctor was well aware of the lesion and its effect on the employee's condition.

Ms. Souza then fell at home on or about February 14, 2004 and called the doctor's office within a few days because she was in pain. Dr. Buonanno saw her on February 19, 2004 for "definitive care and treatment in regards to her fall." Based upon her statement to the doctor that she had been doing very well prior to the fall, he was obviously of the opinion that her current

condition was due to the most recent fall, and not the osteolytic lesion which had been caused by the work-related injury. Contrary to the employee's statement, Dr. Buonanno did not "continue" physical therapy; he simply noted that she would be finished with her course of physical therapy in a week and recommended she focus on quad strengthening.

The form completed by the doctor on February 26, 2004 states that he discharged the employee on February 19, 2004. Obviously, it was his opinion that, with regard to the work injury, she was capable of returning to her regular job. As noted above, his office note supports that statement in that it was his understanding that the employee was doing extremely well until she fell on the knee at home. No one has attributed the fall to the effects of the work injury.

Accordingly, we find that the opinion rendered by Dr. Buonanno regarding the employee's ability to work was competent and probative.

In her second reason of appeal, the employee argues that the trial judge misconstrued Dr. Coppes' statements regarding the osteolytic lesion and his concern that it was an ongoing problem. Our review of the record reveals that there is no merit to this contention.

First, none of the doctors attributed the osteolytic lesion to the fall at home in February 2004. The condition was duly noted as early as July 2003 by Dr. Buonanno and he performed a chondroplasty, as described by Dr. Fadale in his testimony, in an attempt to address the problem. The trial judge simply noted that Dr. Coppes was entirely unwilling to consider the possibility that the fall at home had a significant impact on the condition of the employee's knee, particularly if she was in fact doing well before the fall as noted in Dr. Buonanno's report.

Also, Dr. Coppes did deliver rather bewildering testimony. The doctor stated that the employee suffered from an osteochondral fracture, though neither Dr. Buonanno nor Dr. Fadale reported, or even mentioned, the possibility of a fracture. Dr. Coppes also testified that

osteocondrotic lesion and fracture carry the same meanings. Dr. Fadale disagreed and explained the difference between the terms. In addition, Dr. Coppes mentioned that Dr. Buonanno performed some drilling during surgery; however, Dr. Buonanno's operative report makes no mention of doing any drilling and Dr. Fadale testified that such a procedure was not appropriate treatment for the osteochondral lesion described by Dr. Buonanno during the arthroscopic surgery. Based upon the inconsistencies and unsupported statements in his testimony, we cannot say that the trial judge misconstrued the statements of Dr. Coppes or erred in rejecting his testimony in its entirety.

Based on the foregoing, we find no error on the part of the trial judge in finding that the employee is no longer disabled due to the effects of her work-related injury and any incapacity experienced after February 19, 2004 is not related to the injury of May 12, 2003. Consequently, the employee's appeal is denied and dismissed and the decision and decree of the trial judge is 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

Sowa and Hardman, JJ. concur.

ENTER:

Olsson, J.

Sowa, J.

Hardman, 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 respondent/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 May 2, 2005 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

John A. Sabatini, Administrator

ENTER:

Olsson, J.

Sowa, J.

Hardman, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq., and Tedford
B. Radway, Esq., on
