STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
MANUEL GOMEZ	)	
	)	
VS.	)	W.C.C. 97-02369
	)	
THE TALENT TREE	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter came to be heard by the Appellate Division on the petitioner/employee's claim of appeal from the decision of the trial court denying and dismissing his original petition. After review of the record and consideration of the arguments of counsel, we affirm the trial judge and deny the employee's appeal.

The employee filed this Original Petition alleging that he aggravated a pre-existing condition involving his right shoulder while working for Talent Tree from September to November of 1996. He alleged that he became disabled due to the right shoulder problem as of January 10, 1997. The matter was consolidated for trial with W.C.C. No. 97-00643, an Employee's Petition to Review alleging a return of incapacity beginning January 10, 1997 due to the effects of a right shoulder injury sustained on April 14, 1994 while employed by Clark and Coombs. After completion of the trial in both matters, W.C.C. No. 97-00643 was

settled with approval of a commutation which absolved Clark and Coombs of any future liability with regard to the 1994 right shoulder injury.

The employee testified that for about five (5) weeks from September to November of 1996, he was working for Talent Tree, a temporary agency, at International Packaging. His job involved assembling jewelry display cases of various sizes. He would assemble the cases while sitting at a table using several small tools. He estimated that the cases weighed from five (5) to fifteen (15) pounds and sometimes he was required to put them in boxes and then lift and stack the boxes.

Mr. Gomez stated that he gradually began to experience pain and cracking in his right shoulder during this time. He asserted that he informed his supervisor that he was having problems with his shoulder which interfered with his sleep and caused him to be late for work. He indicated that he stopped working just before Thanksgiving because of the pain. The employee went to see Dr. Michael Feldman, with whom he had previously treated for the 1994 right shoulder injury, and he recommended further surgery. The surgery was done in January 1997. Mr. Gomez testified that he felt worse after the surgery and has not returned to work in any capacity. In 1997, he began treating with Dr. Stanley J. Stutz and attended the Donley Center for several months for physical therapy and work hardening.

The employee acknowledged that the shoulder has bothered him continuously since 1994 and he continued to have pain after the first surgery by Dr. Feldman in May 1995.

Records from Talent Tree establish that the employee worked for the company at International Packaging from September 30, 1996 to November 14, 1996. At the time of his application for work, it was noted that he was restricted to lifting no more than twenty-five (25) pounds and only up to ten (10) pounds frequently. The employee was terminated by International Packaging for excessive and unreported or unauthorized absenteeism. He was also terminated from Talent Tree when he never reported back for work or contacted the office.

The medical evidence consists of the records and two (2) depositions of Dr. Michael D. Feldman, the records and two (2) depositions of Dr. Stanley J. Stutz, and the deposition and records of Dr. Robert S. Almeida. In addition, records from the Donley Center and Occupational Health and Rehabilitation were introduced into evidence.

Dr. Feldman, an orthopedic surgeon, treated the employee for the right shoulder injury he sustained in 1994. On May 4, 1995, the doctor performed surgery to repair a rotator cuff tear. The employee underwent a course of physical therapy which resulted in slow improvement in his condition. However, in October 1995, the employee complained of continued and increasing pain in the shoulder. An arthrogram revealed a recurrent right rotator cuff tear. Dr. Feldman recommended further surgery. Mr. Gomez initially declined surgery,

stating that he wanted to settle his workers' compensation case with Clark and Coombs, return to the Dominican Republic and have the surgery there. As of May 28, 1996, the employee was still considering his options. He apparently worked for a period of time delivering pizza for Domino's, but left that job when they asked him to clean the store at night, including mopping the floor. In September, he began working for Talent Tree.

Dr. Feldman did not see the employee again until December 31, 1996. The content of the report indicates that it was a pre-operative report and that the employee was scheduled for surgery on his right shoulder. The surgery was done on January 2, 1997.

Dr. Feldman was unaware that the employee had been working for Talent Tree or that he claimed to aggravate his shoulder at that job until he was advised of those facts by the employee's attorney. Even armed with that knowledge, the doctor stated that the recurrent tear and surgery in 1997 was most likely a complication of the first surgery done in 1995. He asserted that the job duties at Talent Tree had no significant impact upon the condition of the employee's shoulder. He pointed out that the tear was already present prior to the employee's employment at Talent Tree, as revealed on the arthrogram in November 1995.

Dr. Stutz, an orthopedic surgeon, first saw the employee in April 1997 and continued to see him until May 1998 for continued complaints of pain in the shoulder area. The employee never mentioned his employment at Talent Tree to

the doctor. Dr. Stutz testified that he could not render an opinion as to the cause of the right shoulder condition because he did not begin treating the employee until after the two (2) surgeries and almost three (3) years after the initial injury in 1994. He stated that Dr. Feldman was in the best position to render such an opinion.

Dr. Almeida, a chiropractor, evaluated the employee for the first time on August 11, 1999. The history he recorded is quite different than the employee's testimony and the history provided to Drs. Feldman and Stutz. Mr. Gomez related widespread complaints of pain involving the neck, both shoulders and both arms. The employee also stated that the pain began when he lifted a heavy bag of jewelry in November 1996 while working for Talent Tree. His diagnosis was a cervical sprain/strain and cervical radiculitis. Based upon the history provided by the employee, Dr. Almeida concluded that the lifting incident in November 1996 was the cause of the employee's condition.

The trial judge found that the employee failed to establish that he sustained a work-related injury to his right shoulder in September or November of 1996 while employed by Talent Tree. The trial judge pointed to the lack of supporting medical evidence and the inconsistent histories and testimony provided by the employee as the basis for his negative finding.

The standard of review of the Appellate Division is strictly circumscribed by R.I.G.L. § 28-35-28(b) which states that; "the findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly

erroneous." After reviewing the record in this matter, we find ample evidence to support the conclusions of the trial judge and, therefore, deny the employee's appeal.

The employee has filed six (6) reasons of appeal. The first three (3) are merely general recitations that the decision and decree are against the law and the evidence and are, therefore, denied and dismissed. Bissonnette v. Federal Dairy Co., 472 A.2d 1223, 1226 (R.I. 1984).

In his fourth and fifth reasons of appeal, the employee argues that the facts and the history as testified to by the employee, as well as the medical evidence, establish that he injured his right shoulder and neck while working from September to November 1996. We find no merit in these arguments.

The employee testified initially that he experienced gradually increasing pain in his right shoulder in November of 1996. He never mentioned any specific incident as the trigger for this pain. However, he stated under cross-examination that he had continuous pain in his right shoulder since 1994 when he first injured it, despite having undergone surgery in 1995. The employee never mentioned a specific incident or his work activities in November 1996 to Drs. Feldman or Stutz. When he saw Dr. Almeida in 1999, the doctor recorded that there was a specific lifting incident in November 1996 which caused the onset of the pain. The trial judge found these inconsistencies to be detrimental to the employee's case. We agree with that assessment.

In further contradiction to the employee's initial version of events, the records of Dr. Feldman establish that a recurrent rotator cuff tear was present in late 1995 (prior to the employee's employment with Talent Tree) and that the employee had continued complaints of pain in the shoulder area and arm.

The only physician to causally relate the employee's shoulder condition to his employment in November 1996 based his opinion on the history provided to him by the employee that there was a specific lifting incident at work after which he experienced immediate pain. However, the only place in the entire record that this "incident" is mentioned is in Dr. Almeida's initial report from August 1999, almost three (3) years after the alleged injury. During his testimony in court, Mr. Gomez never attributed his shoulder and/or neck problems to a specific incident. There is a very significant difference between attributing a condition to a specific incident rather than a gradual onset, particularly in this case where the employee has a history of continuing problems with the shoulder since 1994. Consequently, the trial judge acted well within his discretion in rejecting the opinions of Dr. Almeida.

As noted above, Dr. Stutz would not render an opinion regarding the cause of the employee's problems. Therefore, the only medical opinion remaining was that of Dr. Feldman, the physician, Dr. Stutz pinpointed as being in the best position to determine causation. Dr. Feldman clearly and emphatically attributed the employee's condition in 1996 to the prior injury and surgery which had led to

a recurrent rotator cuff tear. His testimony was probative and persuasive. We find no error on the part of the trial judge in relying upon his opinions.

In his sixth reason of appeal, the employee contends that the trial judge committed error in failing to appoint an impartial medical examiner. Sections 28-33-35 and 28-35-24 of the Rhode Island General Laws provide that a judge may appoint an impartial medical examiner on his own motion or at the request of either party. The decision to make such an appointment is clearly discretionary. Dart Ind., Inc. Etc. v. Andrade, 108 R.I. 474, 276 A.2d 460 (1971). The present case did not involve a situation where two (2) physicians rendered opposite opinions based upon the same facts and findings. As noted above, the foundation for Dr. Almeida's opinion was significantly different than the basis for Dr. Feldman's opinion. Consequently, we find that the trial judge did not abuse his discretion in failing to appoint an impartial medical examiner.

Based upon the foregoing, the employee's appeal is denied and dismissed and the decision and decree of the trial judge are affirmed.

In accordance with Sec. 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

Bertness and Sowa, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Bertness, J.

_____
Sowa, 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 August 14, 2002 be, and they hereby are affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Olsson, J.

_____
Bertness, J.

_____
Sowa, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq., and Peter S. Haydon, Esq. on _____