STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

PATRICIA REYNOLDS	)	
	)	
VS.	)	W.C.C. 2009-04882
	)	
BUTLER HOSPITAL	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's appeal from the decision and decree of the trial judge regarding the employee's petition to review alleging that her incapacity had increased from partial to total as of May 13, 2009 due to surgery. The trial judge found that the employee became totally disabled as of May 13, 2009, when she underwent total knee replacement surgery, and that her condition had improved from total to partial incapacity as of February 11, 2010, based upon the testimony of her treating physician. In her appeal, the employee contends that there was no comparative evidence in the record establishing a change in her condition from total to partial disability as required by our decision in Burnham v. Hasbro, Inc., W.C.C. 04-01070 (App. Div. 10/30/09). After conducting a careful review of the record in this matter and considering the arguments presented by both parties, we deny the employee's appeal and affirm the decision and decree of the trial judge.

The employee suffered an injury at work on August 7, 2008 during the course of her employment as a registered nurse for the employer. A memorandum of agreement dated November 24, 2008 describes the injuries as a left hand contusion, a low back strain/sprain, and

contusions to both knees. The employee was paid weekly benefits for partial incapacity beginning August 8, 2008. In a pretrial order entered in W.C.C. No. 2009-01993 on April 28, 2009, the employee obtained permission to undergo a right total knee replacement as recommended by Dr. John Froehlich. The surgery was performed by Dr. Froehlich on May 13, 2009.

On August 14, 2009, the employee filed a petition to review alleging that her incapacity for work had increased from partial to total as of May 13, 2009. On September 23, 2009, a pretrial order was entered granting the petition and ordering the employer to pay weekly benefits for total incapacity from May 13, 2009 and continuing. Thereafter, the trial judge granted the employer's motion to file a claim for trial out of time.

There is no dispute that the employee was totally disabled as a result of the surgery on May 13, 2009. The only issue was whether her condition improved to partial disability at some point thereafter.

The employee, who was fifty-eight (58) years old at the time of the surgery, testified that immediately following the surgery she had severe pain, which she expected. She participated in a physical therapy program and had some improvement, but then developed "intense burning searing pain that is constant," and affects the surface of her skin to the extent that the touch of her clothing against the knee is unbearable. Tr. 16. She utilizes a cane when walking and her activities are significantly limited.

The primary medical evidence addressing the issue of the degree of disability is the depositions and records of two (2) board certified orthopedic surgeons, Dr. John A. Froehlich and Dr. Jonathan A. Gastel. Dr. Froehlich began treating Ms. Reynolds on December 4, 2008. After an initial evaluation, the employee underwent a series of three (3) injections of Orthovisc, a

type of lubricant, in her right knee. When this treatment failed, the doctor recommended a total knee replacement, which he performed on May 13, 2009. The doctor described the surgery as "uneventful," and indicated that the employee "had an uncomplicated right knee replacement." Ee's Ex. 4 at 12.

Although the employee's surgery was uneventful, the same cannot be said about her recovery. Dr. Froehlich testified that as of June 8, 2009, approximately one (1) month after the surgery, the employee demonstrated improvement in range of motion and a decrease in pain which was consistent with a normal postoperative course. Ms. Reynolds was engaged in a physical therapy program during this time and in July 2009 was able to use a stationary bicycle and walk without the use of a cane or crutches. In retrospect, Dr. Froehlich noted that Ms. Reynolds was progressing at a slower pace than most knee replacement patients.

On September 8, 2009, the employee spoke with Dr. Froehlich by telephone, complaining of more significant pain in the lateral aspect of her knee radiating down to her foot. When the doctor examined Ms. Reynolds in November 2009, he noted deterioration in her gait and she complained of increased pain in the knee, although her physical examination was similar to the last examination in August 2009. At an office visit on December 11, 2009, the employee continued to complain of debilitating pain in the knee despite an objectively benign examination. Dr. Froehlich was unable to determine the etiology of the pain as x-rays and bloodwork revealed no abnormality. He referred Ms. Reynolds to Southern New England Anesthesia and Pain Associates (SNAPA) for evaluation and pain management in the hope of increasing her level of comfort and function.

Ms. Reynolds was evaluated by Dr. Stuart Schneiderman at SNAPA on February 9, 2010. He suggested three (3) possible diagnoses for the cause of her pain: reflex sympathetic dystrophy

of the right knee, complex regional pain syndrome, and neuropathic pain. Dr. Schneiderman prescribed a trial of medication. The employee returned to Dr. Froehlich on February 11, 2010 for a follow-up visit, during which they engaged in a lengthy discussion about various options for treatment. During his deposition, Dr. Froehlich testified that as of February 11, 2010, it was his opinion that Ms. Reynolds was capable of performing light duty, sedentary work. He maintained that opinion through the date of his last evaluation on September 13, 2010.

Dr. Gastel evaluated the employee on November 10, 2009 at the request of the employer, about six (6) months after the surgery. He noted that the employee walked with a mild limp on the right side and that there was significant sensitivity to light touch on the knee. Dr. Gastel stated that her ongoing symptoms may be attributable to a neuroma or nerve injury. He opined that the employee was partially disabled and could perform sedentary work that did not require more than occasional walking on flat surfaces. Dr. Gastel also offered his opinion that total disability would probably run about three (3) months for a typical patient following knee replacement surgery.

Dr. Gastel re-evaluated Ms. Reynolds on June 22, 2010. She continued to complain of significant pain and a burning sensation in the knee radiating down her leg to the ankle. The physical examination was limited due to the employee's inability to tolerate even light touching of her knee. Dr. Gastel noted that the pain did not appear to be related to the knee joint or the knee replacement itself, but was somewhat characteristic of complex regional pain syndrome or reflect sympathetic dystrophy. He recommended pursuing further pain management intervention. The doctor indicated that the employee "could presumably work a sit-down type job," which did not involve walking or pressure on her right leg. Jt. Ex. 1 at 3.

The trial judge relied upon the opinions of Dr. Froehlich rather than the opinions expressed by Dr. Gastel to find that the employee was totally disabled from May 13, 2009, the date of knee replacement surgery, through February 11, 2010, after which time she became partially disabled. She found Dr. Froehlich's opinions more persuasive as he had frequently treated the employee following surgery and had a better foundation to gauge the employee's functional status. The employee filed a timely claim of appeal from the trial judge's decision.

When the Appellate Division reviews a trial decision, the trial judge's findings on factual matters are final unless found to be clearly erroneous. *See* R.I.G.L. § 28-35-28(b); Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). The appellate panel cannot conduct a *de novo* review of the evidence and arrive at its own determination absent a finding that the trial judge committed clear error. Id.

The employee has filed two (2) reasons of appeal contending that the appellate panel should reverse the trial judge's decree and decision because she misapplied the law as stated in Burnham v. Hasbro, Inc., W.C.C. 2004-01070 (App. Div. 10/30/09) when she found that the employee became partially disabled as of February 11, 2010. In support of her contention, the employee argues that the deposition testimony of Dr. Froehlich is "totally devoid" of any competent comparative medical evidence establishing a change in condition as mandated by Burnham. After a thorough review of the record in this matter, we find no error on the part of the trial judge and deny the employee's appeal.

Although the employee's first reason of appeal accurately identifies the correct case and the appropriate standard to be used when deciding whether an employee's disability status can be changed from total to partial incapacity, her contention that the trial judge misapplied the law is unfounded. As stated by this Court in Burnham, "[i]t is a well-established principle in workers'

compensation law that in order to establish a change from total to partial incapacity, the employer must present comparative medical evidence establishing the improvement in the employee's condition since the date she was found totally disabled." Id. (*citing* C.D. Burnes Co. v. Guilbault, 559 A.2d 637, 640 (R.I. 1989)). The comparative evidence must be provided by an expert medical witness who has knowledge, either firsthand or through an appropriate hypothetical question, of the employee's condition at the time she was deemed totally disabled as well as her present condition. The trial judge may find a change from total to partial disability only when "[t]he expert medical witness [is] familiar with the employee's condition at the time she was deemed totally disabled and also familiar with the employee's condition at the time she was deemed partially disabled." Id.

In the present matter, the testimony of Dr. Froehlich, particularly during cross-examination, provides the necessary foundation and comparison of the employee's condition as of the date of total disability and the date the doctor opined that the employee was capable of light work. Dr. Froehlich began treating Ms. Reynolds in December 2008. He performed the total knee replacement surgery on May 13, 2009 and examined the employee on a multitude of occasions over the next sixteen (16) months. During his deposition, Dr. Froehlich was repeatedly asked about objective improvement in her physical examination from one office visit to the next. At the first post-surgery office visit on May 22, 2009, the employee was already showing improvement.

> Q: And at that point, you indicated that she had made progress even from the point of the surgery in that she had near full extension, and she was able to tolerate about 60 degrees of flexion?
> A: That's correct.

Ee's Ex. 4 at 40.

Cross-examination continued in the same vein, with Dr. Froehlich acknowledging that the employee's condition was objectively improving when comparing specific objective findings, such as range of motion, fluidity of her gait, and stability of the joint replacement, from each office visit to the next during the period from May through August 2009. *See* id. at 40-45. He did state that the employee was not achieving a level of function typical of someone three (3) months removed from knee replacement surgery, but he agreed that her condition was improving.

In a telephone call in September and during the next office visit with the doctor in November 2009, Ms. Reynolds began to complain of increasing pain on the lateral side of her knee with radiation down to her ankle. There was some suggestion of iliotibial band tendinitis. X-rays of the knee revealed that the alignment of the knee replacement was good and an examination demonstrated that the knee was stable and the patella was tracking appropriately. Dr. Froehlich stated that he was at a loss to explain the etiology of the pain the employee complained of, which was out of proportion to what would be expected for a patient more than six (6) months after surgery. He acknowledged that her physical examination did not provide any explanation.

> Q: But suffice it to say that there was nothing orthopedically wrong – actually, strike that. Suffice it to say there was nothing in her orthopedic exam that would explain why her complaints are significantly different between August 31, 2009 and November 9, 2009?
> A: That is correct.

Id. at 52.

Dr. Froehlich testified on direct examination that as of February 11, 2010, based upon his review of the report of Dr. Schneiderman and his own examination on that date, Ms. Reynolds was capable of returning to some type of sedentary desk work with the typical comfort-driven

restrictions he would recommend for any knee replacement patient. The doctor indicated that there was nothing mechanically wrong with her knee and there was no infection or inflammatory process revealed by her bloodwork. At that point, he recommended that she pursue further treatment for her chronic pain syndrome with a pain management specialist such as Dr. Schneiderman or another physician of her choice.

Dr. Gastel, who examined the employee on November 10, 2009, found the employee was partially disabled on that date. He reviewed the records of Dr. Froehlich, including the operative note, and testified that the employee's condition had improved from the date of the surgery to the date of his examination. *See* Er's Ex. B at 12-14. He specifically referred to improvements in gait and range of motion. The trial judge found the opinion of Dr. Froehlich regarding the period of total disability more persuasive than that of Dr. Gastel because "he has treated the employee on numerous occasions following surgery." Dec. at 13.

Despite acknowledging that Dr. Gastel and the treating physician, Dr. Froehlich, both agree that the employee is capable of sedentary work, the employee argues that the trial judge's finding of partial disability as of February 12, 2010 is clearly wrong because Dr. Froehlich was not asked to compare specific physical findings from his examination on the date of surgery and his examination on February 11, 2010 to demonstrate an improvement in the employee's condition. The employee's contention that Burnham imposes this overly technical requirement that specific questions be asked of the expert medical witness is a position which this Court cannot adopt or endorse as a proper interpretation of that decision.

In Burnham, the trial judge relied upon the opinion of Dr. Froehlich, who had examined the employee at the request of the employer about four (4) years after she was found totally disabled. Based upon his examination, the doctor concluded that the employee was partially

disabled. We found that Dr. Froehlich's testimony was not competent to support a finding of an improvement in the employee's status from total to partial disability.

> "The doctor did not have firsthand knowledge of the employee's condition at the time she became totally disabled in January 2000. Neither attorney presented Dr. Froehlich with an appropriate hypothetical to compare the employee's condition on January 14, 2000 to her condition when he examined her four (4) years later. Although the doctor did review most, if not all, of the voluminous medical records regarding Ms. Burnham's treatment, he was never asked to compare physical findings or indicate how the employee's condition had improved."

W.C.C. 04-01070 (App. Div. 10/30/09).

Burnham simply reiterated the long-standing principle that in rendering an opinion that an employee's incapacity has increased or decreased, an expert medical witness must lay the necessary foundation for his opinion that there is a change in the employee's condition. *See* Ryan v. Grinnell Corp., 117 R.I. 14, 17, 362 A.2d 127, 129 (1976). In order to render a competent opinion, the expert medical witness must have knowledge of the employee's prior and present condition, which may have been gained firsthand through personal examination, or "from the records of another doctor, the results of x-rays and other tests, or in response to properly posed hypothetical questions." Id. at 18, 362 A.2d at 130.

It is evident that the Burnham court did not intend to impose precise requirements as to the language of expert medical testimony. It merely applied the evidentiary rule that an expert must provide an adequate foundation for his opinion for that opinion to be competent. In the case of establishing a change from total to partial disability, the reports and/or testimony of the physician must demonstrate that the doctor had knowledge of the employee's condition at the time s/he was totally disabled and is able to compare that condition to her or his present condition to show an improvement. As the Rhode Island Supreme Court has explicitly stated,

". . . the admissibility of expert testimony does not require the use of 'magic words' or 'precisely constructed talismanic incantations' to achieve its objective." Morra v. Harrop, 791 A.2d 472, 477 (R.I. 2002) (*quoting* Gallucci v. Humbyrd, 709 A.2d 1059, 1066 (R.I. 1998)).

Our review of the testimony of Dr. Froehlich in the present matter reveals that he clearly had a more than adequate foundation for his opinion as to the change in the employee's disability status. Dr. Froehlich saw the employee on several occasions prior to her surgery; he performed the knee replacement surgery on the employee; and he examined Ms. Reynolds on numerous occasions following the surgery. He obviously had firsthand knowledge of the progression of the employee's condition from the date of surgery, when he declared her to be totally disabled, to his examination on February 11, 2010, when the doctor concluded that Ms. Reynolds was capable of sedentary work. Furthermore, on cross-examination, Dr. Froehlich was asked repeatedly to compare physical findings made during his examinations over the course of the nine (9) months following surgery which demonstrated improvement in the employee's condition. Consequently, we find that the testimony of Dr. Froehlich satisfies the foundational requirements for competent comparative medical evidence necessary to establish a change in condition.

The fact that Dr. Froehlich was the employee's treating physician does not, on its own, render his opinions competent in accordance with Burnham. A physician cannot simply state that an employee's status changed from total to partial disability as of a certain date without some explanation as to how the employee's condition improved. The expert medical witness must provide sufficient information to demonstrate to the court that s/he possesses knowledge of the employee's prior condition as well as his/her present condition to form an adequate foundation to render a competent opinion that the employee's condition has changed.

Viewing his testimony and all of the evidence together it is apparent that Dr. Froehlich, independent of his status as the employee's treating physician, had the necessary foundational knowledge of her medical history to make informed observations about her condition when she was determined to be totally disabled and to compare that with her condition at the time she was determined to be partially disabled. Dr. Froehlich saw the employee consistently for one (1) year and recorded observable findings from each of those examinations. There was not another expert medical witness available who had more knowledge of the employee's condition at the time of surgery and thereafter than Dr. Froehlich. This level of detailed knowledge of the employee's medical history and the evolving state of her condition renders Dr. Froehlich capable of providing a competent comparative expert medical opinion.

There is no general exception to this foundational requirement for treating physicians. It is the responsibility of the party seeking to establish a change in condition to provide sufficient information to the court through the written reports or testimony of the expert medical witness demonstrating the physician's familiarity with the employee's prior condition such that the expert medical witness can explain how his/her condition has changed.

Based upon the foregoing discussion, we deny and dismiss the employee's claim of 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 Hardman, J.J., concur.

ENTER:

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Olsson, J.

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Ricci, J.

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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 claim of appeal of the petitioner/employee and upon consideration thereof, the appeal is denied and dismissed, and it is

ORDERED, ADJUDGED, AND DECREED:

That the findings of fact and the orders contained in a decree of this Court entered on December 15, 2010 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.

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Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Alfredo T. Conte, Esq., and Jeffrey M. Liptrot, Esq., on

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