STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

JOSE S. RODRIGUES	)	
	)	
VS.	)	W.C.C. 02-04607
	)	
TPI, INC./TPI COMPOSITES, INC.	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter came before the Appellate Division pursuant to an order issued to the employee to show cause why his appeal should not be summarily decided in accordance with the principle enunciated in Parenteau v. Zimmerman Eng., Inc., 111 R.I. 68, 299 A.2d 168 (1973), regarding a trial judge's discretion in choosing between conflicting expert medical opinions. After reviewing the record and considering the arguments of the parties, we find that cause has not been shown and we will proceed to summarily decide the matter.

The employee had been receiving weekly benefits for partial incapacity since April 4, 2001 pursuant to a Memorandum of Agreement dated April 11, 2001. The memorandum indicates that he sustained a left knee injury on July 20, 1998 and became disabled due to this injury for the first time on April 4, 2001. In early 2002, the employer filed a petition alleging that the employee's incapacity for work had ended. At the pretrial conference on this petition, the

employee's weekly benefits were discontinued as of May 16, 2002. The employee filed a timely claim for trial.

On June 27, 2002, the employee filed an Original Petition seeking specific compensation for loss of use of his left lower extremity as a result of his work-related injury. The petition was granted at the pretrial conference and the trial judge awarded a five percent (5%) loss of use, or One Thousand Four Hundred Four and 00/100 ($1,404.00) Dollars. The employee filed a claim for trial in a timely manner. The employee's petition for specific compensation and the employer's petition to discontinue benefits were consolidated for trial.

The employee testified that he struck his left knee on something at work on July 20, 1998. He was seen at a local clinic and then treated for a few months with Dr. Brad Green, an osteopath. When he continued to experience problems, he was referred to Dr. John A. Froehlich, an orthopedic surgeon specializing in sports reconstructive surgery. Dr. Froehlich saw Mr. Rodrigues on a regular basis from November 1998 to April 1999. He undertook a course of conservative treatment, including physical therapy and a cortisone injection. During this time, the employee continued to work in his regular job. In April 1999, Dr. Froehlich indicated that the condition of the knee had stabilized and he would see the employee as needed.

Mr. Rodrigues did not return to see Dr. Froehlich until August 11, 2000, when the doctor gave him another cortisone injection. He continued to have pain and eventually Dr. Froehlich performed arthroscopic surgery on April 4, 2001. A

small spur and some accompanying inflammation was discovered and addressed. The employee was out of work for about two (2) months and then returned to work part-time, gradually increasing his hours back to forty (40) hours per week. Mr. Rodrigues continued to complain of pain in the knee, but the doctor indicated that he was capable of performing his regular job duties.

Dr. Froehlich referred the employee to the Donley Center for a functional capacity evaluation. The Donley Center personnel noted that the employee displayed some pain magnification and self-limiting type behavior during their examination. In response to a request from the insurer, Dr. Froehlich stated that the employee had a five percent (5%) loss of use of the left lower extremity. The doctor testified that he utilized Table 17.31 of the AMA Guide to the Evaluation of Permanent Impairment, Fifth Edition, in arriving at his rating. He noted that this table was used because the employee had patellofemoral pain without cartilage loss or arthritis and he had a history of trauma to the knee. He further stated that the use of manual muscle testing to determine impairment was not appropriate in the employee's case because it was subjective and the employee had demonstrated pain behaviors which would not lead to an accurate evaluation.

The employee was also evaluated by Dr. A. Louis Mariorenzi, an orthopedic surgeon, on March 25, 2002, at the request of the insurer. The examination was normal with no crepitation, no localized tenderness and no measurable atrophy. Dr. Mariorenzi's impression was that the employee had sustained a left knee contusion in July 1998 and had made a satisfactory recovery from the injury. In

response to a request from the insurer, the doctor stated that he found zero percent (0%) impairment or loss of use.

The employee's attorney referred him to Dr. Jonathan Sisskind, a chiropractor licensed in Massachusetts and New York, to determine if he had any loss of use. The evaluation took place on May 7, 2002. In a one (1) page report, the doctor stated that he found decreased muscle strength with flexion and extension. Based upon this finding and using Table 17-8 of the AMA Guide, he concluded that the employee had a twenty-three percent (23%) loss of use of the left lower extremity.

The trial judge found the opinion of Dr. Froehlich to be the most probative with regard to the rating for loss of use, citing his knowledge of the employee derived from the number of visits over the course of three (3) years, the employee's history, reports of other medical providers, and the arthroscopic surgery which he performed. He therefore confirmed the award he had made at the pretrial conference, of five percent (5%) loss of use.

The scope of review of the Appellate Division is constrained by statute. Section 28-35-28(b) of the Rhode Island General Laws states that findings of fact made by a trial judge are final unless the appellate panel determines that they are clearly erroneous. After reviewing the decision and findings of the trial judge in this matter, we find no error and, therefore, deny the employee's appeal.

The employee has filed three (3) reasons of appeal. In his first reason, the employee contends that the trial judge was wrong to reject the opinion and

analysis of Dr. Sisskind as "contradictory and unworthy of belief." We have thoroughly read the trial judge's decision and decree and we are unable to find this characterization of Dr. Sisskind's opinion contained anywhere in those documents. It is true that the doctor's opinion was rejected, but certainly not in such harsh terms.

The methodology utilized by Dr. Sisskind was discredited by Dr. Froehlich and Dr. Mariorenzi, two (2) orthopedic surgeons with significant expertise and experience treating knee injuries and rating impairments. First, they pointed out that manual muscle testing to evaluate impairment was only used as a last resort because the results were so dependent upon the patient's subjective response and cooperation. In particular, this type of testing should be avoided when the patient has demonstrated symptom magnification and pain behaviors. Both the Donley Center and Dr. Froehlich agreed that Mr. Rodrigues had shown both of these characteristics.

Second, Dr. Froehlich and Dr. Mariorenzi noted that in order to have any validity at all, the manual muscle testing would have to be done on at least two (2) occasions by the same physician or on separate occasions by two (2) different physicians. Dr. Sisskind did the testing on one (1) occasion. Dr. Sisskind never addressed the fact that this process was actually not in conformance with the procedure recommended by the AMA Guides for this type of testing.

Based upon the foregoing, the trial judge had sufficient grounds to reject the analysis and opinion of Dr. Sisskind with regard to the degree of impairment,

if any. He chose to rely on the opinion of Dr. Froehlich, the orthopedic surgeon who treated the employee for over a year and performed surgery on his knee. In arriving at his opinion, Dr. Froehlich also had the benefit of the diagnostic testing and the functional capacity evaluation done by the Donley Center. The trial judge consequently found his opinion to be more probative and persuasive than Dr. Sisskind or Dr. Mariorenzi. We find no error in this exercise of judicial discretion in accordance with the principles stated in Parenteau v. Zimmerman Eng., Inc., 111 R.I. 68, 299 A.2d 168 (1973).

In the employee's second reason of appeal, he argues that the trial judge improperly applied the standards set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), to reject Dr. Sisskind's opinion. Although the trial judge did use the Daubert standard to conduct an analysis of the methodology utilized by Dr. Sisskind, he specifically stated that he was not rejecting the doctor's opinion outright on that basis. Rather, he exercised his discretion in accordance with Parenteau and chose to rely on the opinion of Dr. Froehlich. The trial judge's comments regarding the Daubert analysis are more in the form of dicta in response to the employer raising the issue in its trial memorandum than discussion of the basis of his ultimate decision.

The foregoing discussion actually disposes of the third reason of appeal which is simply a general statement to the effect that the methodology employed by Dr. Sisskind warranted a finding of a twenty-three percent (23%) loss of use.

As noted above, criticism of this methodology was elicited from two (2) orthopedic surgeons familiar with the use of the AMA Guides and the trial judge was persuaded by those opinions. His conclusions are well-supported by competent and probative evidence in the record and we find no reason to disturb his findings.

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 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

Connor and Salem, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Connor, J.

_____
Salem, 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 25, 2003 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Olsson, J.

_____
Connor, J.

_____
Salem, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq., and Mark P. McKenney, Esq., on _____