STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

LUIS AGUDELO	)	
	)	
VS.	)	W.C.C. 02-08662
	)	
NEPTCO, INC.	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter came to be heard before the Appellate Division on the petitioner/employee's appeal from the denial of his petition for additional specific compensation for loss of use to his right upper extremity. After thorough review of the record and consideration of the parties' arguments, we deny the employee's appeal and affirm the decision and decree of the trial judge.

A Memorandum of Agreement was introduced into evidence which indicates that the employee received weekly benefits for total incapacity beginning July 25, 1999 due to a laceration to his right middle finger which he sustained on July 22, 1999. Pursuant to a pretrial order entered in W.C.C. No. 00-06232 on December 12, 2000, the employee received specific compensation for a two percent (2%) loss of use to his right upper extremity caused by the injury.

On December 13, 2002, the employee filed this petition requesting specific compensation for an increased loss of use since the last award. At the pretrial conference, the petition was denied and the employee claimed a trial.

At trial, the employee presented the live testimony of Dr. Jonathan Sisskind, a chiropractic physician licensed in the State of Massachusetts. The doctor examined the employee on July 25, 2002 for the purpose of evaluating the loss of use to his right upper extremity. The doctor testified that he had attended a thirty-six (36) hour training class on the AMA Guides to the Evaluation of Permanent Impairment, Fifth (5th) Edition (hereinafter "the Guides"). The class was taught by one of the Guides' contributing authors, Dr. Stanley Kaplan, who is also a chiropractic physician in Florida. Dr. Sisskind stated that he uses the Guides for rating certain injuries and applies the normal range of motion limits in his normal day-to-day evaluation process.

Dr. Sisskind acknowledged that it is recommended that evaluations conducted pursuant to the Guides be conducted by physicians. The trial judge denied the employee's motion to accept Dr. Sisskind as an expert witness regarding the use of the Guides, although he allowed him to testify as a chiropractic physician. The doctor was not permitted to testify as to how he conducted the evaluation or his opinion as to the percentage of loss of use as calculated using the Guides.

Following the dismissal of Dr. Sisskind, counsel for the employee moved that the trial judge recuse himself from the case because he had participated in

the promulgation of the Guides which he was now called upon to interpret in rendering a decision on the employee's petition. The trial judge responded to counsel's argument with a detailed explanation of his involvement as a reviewer in the production of the Fifth (5th) Edition of the Guides. He also reiterated that the Guides are to be used by an expert to evaluate impairment and to determine a degree of loss of function. The trial judge stated that he had no expertise in the use of the Guides and was not in a position where he could conduct an evaluation based on the Guides. His contribution to the Guides involved commentary on the use of the Guides in the legal setting. Counsel for the employer added that he believed that the motion was untimely because it was brought only after the trial judge had denied the employee's request to qualify Dr. Sisskind as an expert in the use of the Guides.

The trial judge ultimately denied the motion for recusal and prior to both parties resting, it was called to the court's attention by counsel for the employer that, based on the date the employee's condition reached maximum medical improvement, the Fourth (4th), not the Fifth (5th), edition of the Guides should have been used by Dr. Sisskind in his evaluation of the employee. Counsel argued that the Fourth (4th) Edition of the Guides was the edition in effect on the date the employee reached maximum medical improvement, which is the date his claim for specific compensation vested.

Following the conclusion of the evidence, the trial judge rendered a bench decision in which he denied and dismissed the employee's petition due to a

failure of proof. He noted that Dr. Sisskind, based upon his own testimony, was not qualified as an expert with sufficient skill and training to utilize the Guides for the evaluation of permanent impairment. Consequently, the doctor was not permitted to provide his opinion regarding the percentage of the employee's loss of use. Without that testimony, the employee failed to satisfy the burden of proof.

The trial judge also noted that Dr. Sisskind had relied upon the incorrect edition of the Guides in evaluating the employee. The Fourth (4th) Edition, which was in effect on the date that the employee's condition had reached maximum medical improvement, was the proper version rather than the Fifth (5th) Edition.

Pursuant to Rhode Island General Laws § 28-35-28(b), the role of the Appellate Division in reviewing factual matters is sharply circumscribed. The statute provides that "the findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." The Appellate Division is entitled to conduct a *de novo* review only after a finding is made that the trial judge was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996).

The employee has filed four (4) reasons of appeal. In his first reason, he argues that the trial judge abused his discretion when he refused to allow Dr. Sisskind to testify as to his opinion regarding the employee's loss of use as calculated pursuant to the AMA Guides. The determination as to the admissibility of opinion evidence and the qualification of expert witnesses lies within the sound discretion of the trial judge. State v. Gough, 810 A.2d 783, 785 (R.I. 2002). This

panel will not disturb the trial judge's rulings on those issues absent proof of a clear abuse of discretion. Id.; Leahey v. State, 121 R.I. 200, 397 A.2d 509 (1979).

Rule 702 of the Rhode Island Rules of Evidence governs the admissibility of expert testimony and states as follows:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of fact or opinion."

Although R.I.G.L. § 28-33-19, which provides for specific compensation benefits for loss of use, does not specifically state that the Guides must be used to determine the percentage of loss of function, the Guides have long been accepted as a valid basis for that calculation. In other sections of the Workers' Compensation Act, the Guides are designated as the resource to be used in calculating "functional impairment," essentially the equivalent of "loss of use." See § 28-29-2(3)(ii). Therefore, in order to succeed on a petition for specific compensation for loss of use, the employee must produce a witness with sufficient "knowledge, skill, experience, training or education" that he can provide an expert opinion as to the percentage of loss of use based upon the Guides.

Dr. Sisskind testified that he has been a licensed chiropractic physician since 1996, currently practicing in Massachusetts. His initial exposure to the Guides was a thirty-six (36) hour course he took in 2001 taught by Dr. Stanley Kaplan, a chiropractic physician from Florida. Since that time, he has done

evaluations of his patients using the Guides for arriving at loss of use ratings and he also uses the range of motion calculations in the Guides as standards in his practice. He acknowledged that the preface to the Guides recommends that physicians do any evaluations pursuant to the Guides because they have more familiarity with the terminology and the application of the information contained therein.

Based upon this information, the trial judge concluded that Dr. Sisskind did not have sufficient knowledge, skill, experience, training, or education to qualify as an expert in the use and application of the Guides. Consequently, the doctor was precluded from testifying as to his opinion regarding the percentage of loss of use he calculated based upon the Guides.

The Rhode Island Supreme Court considered a similar scenario in State v. Lee, 502 A.2d 332 (R.I. 1985). In Lee, the defendant proffered a veterans' counselor as an expert on post-traumatic stress disorder (PTSD). During a voir dire proceeding, the counselor testified that he had graduated from high school and had been employed as a veterans' counselor for ten (10) years. However, he only completed a year and a half of a two (2) year associate's program in social services at a junior college and his entire training specifically regarding PTSD consisted of attendance at three (3) or four (4) seminars and reading several articles regarding the condition. Id. at 335. The Supreme Court concluded that, based upon a review of the counselor's credentials, and "taking into account the

complex nature of the PTSD defense," the trial judge did not abuse his discretion in ruling that the counselor was not qualified to testify as an expert. Id.

Taking into consideration the skill required for proper use and application of the Guides in calculating a loss of use rating resulting from a laceration of the right middle finger, we find that the trial judge did not abuse his discretion in finding that Dr. Sisskind was not qualified to testify as an expert regarding his use of the Guides.

In his second reason of appeal, the employee contends that the trial judge abused his discretion in refusing to allow him to make an offer of proof as to Dr. Sisskind's methodology, experience and use of the Guides. However, it is clear from the record that the employee was permitted to conduct a voir dire to attempt to qualify the doctor as an expert in the use and application of the Guides. (See Tr. p. 29.) The employee was precluded from eliciting testimony as to the doctor's actual evaluation of the employee and calculation of his impairment rating using the Guides because Dr. Sisskind was not qualified as an expert. The doctor was either qualified or not based upon his testimony as to his education, knowledge, skill, experience, and training regarding the Guides. Once the trial judge concluded that he did not qualify as an expert, there was no reason to allow an offer of proof as to the actual evaluation of the employee. We find no error on the part of the trial judge in this regard.

The employee's third reason of appeal alleges that the trial judge erred in refusing to consider Dr. Sisskind's evaluation based upon the Fifth (5th) Edition of

the Guides, which was the most recent version available the date of his evaluation, as opposed to the Fourth (4th) Edition, which was in effect at the time the employee's condition reached maximum medical improvement in December 2000. Because Dr. Sisskind was precluded from rendering any opinion regarding his loss of use calculation, this point is really irrelevant. However, we would note that the version of the Guides to be used in this matter would be the most recently published version available at the time the employee's condition reaches maximum medical improvement. See Rainville v. King's Trucking, Co., Inc., 448 A.2d 733, 734-735 (R.I. 1982). In the present matter, this would have been the Fourth (4th) Edition, not the Fifth (5th).

The employee's fourth and final reason of appeal alleges that the trial judge abused his discretion by failing to grant the employee's motion for recusal. The employee argues that the trial judge's involvement as a reviewer of the Guides rendered him unfairly biased with regard to the use of the Guides by medical professionals other than medical doctors.

The standard for recusal of a trial judge is well-established. In State v. Clark, 423 A.2d 1151 (R.I. 1980), the Rhode Island Supreme Court stated:

> "Before a judge is required to recuse in order to avoid the appearance of impropriety, facts must be elicited indicating that it is reasonable for members of the public or a litigant or counsel to question the trial justice's impartiality. However, recusal is not in order by a mere accusation that is totally unsupported by substantial fact." Id. at 1158.

Therefore, "feelings...cannot without more constitute the test for disqualification of the trial judge." Id.

In the present case, the trial judge went into great detail regarding his involvement with the Fifth (5th) Edition of the Guides. The trial judge neither profited from his role as a reviewer nor considered himself an expert on the use of the Guides after his involvement. (Tr. p. 36.) In fact, he explicitly stated that he had no bias regarding the use of the Guides. As the trial judge noted, the Guides are used by an expert to calculate the degree of functional impairment. The trial judge may then base his decision on the expert's opinion. The trial judge does not utilize or interpret the Guides himself.

The employee apparently is arguing that the trial judge is biased against a chiropractor using the Guides as a result of his involvement in their publication. However, the Guides, which were accepted as a learned treatise during the course of the trial, state that it is recommended that a medical doctor utilize the Guides based upon their familiarity and experience with the terminology and examination techniques. This concept was not developed by the trial judge on his own as a result of his involvement with the Guides.

Additionally, we cannot help but note that the employee did not have a problem with the trial judge sitting on the case until after he refused to allow Dr. Sisskind to testify as an expert in the use of the Guides. It is the opinion of this panel that there were no substantial facts presented by the employee to support the accusation of unfair bias or appearance of impropriety which would warrant

recusal of the trial judge. Therefore, we find that the trial judge did not abuse his discretion by failing to recuse himself.

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:

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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:

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ENTER:

_____
Olsson, J.

_____
Connor, J.

_____
Salem, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq., and Michael T. Wallor, Esq., on

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