STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
LINDA LAVIGNE	)	
	)	
VS.	)	W.C.C. 98-04812
	)	
FOSTER COUNTRY CLUB, INC.	)	
LINDA LAVIGNE	)	
	)	
VS.	)	W.C.C. 98-03869
	)	
BROWN UNIVERSITY	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. These two (2) matters were consolidated for trial and remain consolidated on appeal. W.C.C. No. 98-03869 is an employee's Original Petition alleging that she sustained injuries to both knees on January 28, 1997 while working for Brown University, resulting in incapacity from June 9, 1998 and continuing. The trial judge granted the petition and awarded weekly benefits for partial incapacity from June 9, 1998 and continuing. Brown University filed a claim of appeal from this decision.

W.C.C. No. 98-04812 is an employee's Original Petition for workers' compensation benefits in which she alleges that she aggravated a pre-existing condition in both of her knees on June 4, 1998 while employed by Foster Country Club resulting in incapacity beginning that date and continuing. The trial judge denied this petition and the employee filed a so-called "precautionary appeal," to be considered in the event that the appellate panel reversed the trial judge in the companion case.

After review of the record and the arguments of counsel, we deny the appeals of Brown University and the employee and affirm the decisions and decrees of the trial judge in these matters.

The employee testified that she had been employed by Brown University for about five (5) months prior to January 1997. She was working as a waitress in the dining room and for banquets at the Brown Faculty Club approximately 25 to 30 hours a week. Her duties included taking orders, carrying trays of food, serving cocktails, and setting up rooms with tables and chairs for banquets. She explained that a dolly would be used to move chairs to the banquet room and the tables would be lifted or rolled with a co-worker. She estimated that trays of food could weigh up to fifty (50) pounds.

On January 25, 1997, while cleaning up after a banquet, the employee tripped on a mat in the kitchen while carrying a rack full of coffee cups. She fell forward and struck both of her knees on the floor. She reported the injury to her supervisor, Candace Shuman, that evening. The next day she applied ice and

tried to stay off of her feet. On January 30, 1997, Ms. Lavigne went to the Pawtuxet Valley Medical Center where x-rays were taken of both knees. The diagnosis was sprains of the left and right knees and she was advised to rest, apply ice and take medication.

The employee continued to work at Brown Faculty Club although she was not required to climb the stairs to the upper dining rooms and she did not carry tables. At the end of March 1997, she had unrelated surgery and stopped working. Prior to her departure, she had resumed all of her regular duties as a waitress, although she stated that her knees never felt the same and she would experience pain and swelling if she was on her feet too long.

On April 30, 1997, Ms. Lavigne returned to Pawtuxet Valley Medical Center complaining of persistent right knee pain and a lump on the knee. She apparently reported at that time that her left knee was not bothering her. The diagnosis was tendonitis/bursitis of the right knee. She was advised to rest, use an ace bandage and take Motrin or Advil. The employee had intended to return to work at Brown Faculty Club, but she found a job as a part-time waitress at Foster Country Club. She began working there in late April or early May. Initially, she only worked between fifteen (15) and twenty (20) hours a week, but as the number of people playing golf increased as the weather got warmer, her hours increased to thirty (30) to thirty-five (35) hours a week. She explained that this job was less physically demanding than her job at Brown Faculty Club in that she did not have to move and carry tables and chairs and there were no stairs.

The employee was laid off for the winter and returned to Foster in May 1998. She testified that her knees bothered her continuously and particularly her left knee would crack and pop. She felt that her knees were getting worse rather than better and so she saw Dr. Michael Infantolino, an orthopedic surgeon, on May 5, 1998. The doctor referred her for physical therapy and prescribed a brace and medication. The therapy made her feel worse. On June 9, 1998, the doctor advised her to stay out of work. When there was no improvement, Dr. Infantolino recommended surgery on the left knee, which was done on April 16, 1999. According to the employee, the surgery had little impact on the condition of her knee and she continues to have pain and swelling in both knees when she is on her feet too much.

Ms. Lavigne was very active physically prior to the fall in January 1997. She water-skied since childhood, had recently started jogging, utilized a trampoline, and had taken up knee boarding in recent years. She stated that she never had any prior problems with her knees despite all of her activities. She indicated that she has given up these activities since January 1997. The employee also acknowledged that she and her husband had applied to be foster parents around May 1998 and were licensed in July 1998 when they took in their first foster children. However, she denied telling her supervisor at Foster Country Club that she had to stop working so that she could stay at home to take care of these children.

The medical evidence consists of the depositions and reports of Dr. Michael Infantolino and Dr. Stanley J. Stutz. Dr. Infantolino testified that when he performed the surgery on the left knee in April 1999, he found significant chondromalacia in several areas. He explained that this can be caused by early arthritis and degenerative changes and it can also be caused by trauma or damage to the cartilage. The doctor acknowledged that due to the passage of time since the fall in January 1997 and when he first examined her in May 1998, it was impossible to state with any certainty just by looking at the knee what caused the chondromalacia. However, based upon the history of the fall in 1997 and her ongoing problems, the doctor opined that the employee suffered from traumatic chondromalacia on top of a degenerative process in both knees and that this condition was caused by the fall at Brown in January 1997. He concluded that she was partially disabled and should avoid kneeling, stooping, crawling, climbing, and carrying more than five (5) to ten (10) pounds.

Dr. Infantolino was questioned regarding various other potential causes of chondromalacia. He indicated that waterskiing and jogging would not cause it. However, a lateral tracking patella, which the employee had in both knees, was an abnormality that could cause the development of chondromalacia.

Dr. Stanley J. Stutz, an orthopedic surgeon, evaluated the employee on June 1, 1998 at the request of the insurer for Brown University. His diagnosis was chondromalacia of the left patella. He found the employee to be partially disabled and advised restrictions of no kneeling, squatting, or repetitive stair

climbing. He further stated that, based upon the history provided of no previous knee problems, the fall on her knees in 1997, and continuous symptoms since that time, his diagnosis was causally related to the fall at Brown in January 1997.

He testified that Ms. Lavigne was capable of working as a waitress so long as her duties fell within the restrictions he stated. However, the doctor stated that if the employee was experiencing swelling and pain in her knees while working at Foster Country Club, he would change his opinion as to her ability to continue working as a waitress.

The trial judge concluded that the employee sustained an aggravation of underlying chondromalacia in both knees when she fell while working for Brown University on January 28, 1997. He found that the employee was partially disabled from June 9, 1998 and continuing due to the condition of her left knee, but had no disability flowing from the right knee injury.

Brown University has filed two (2) reasons of appeal alleging that the trial judge's findings are clearly erroneous because there was no competent expert medical evidence establishing that the employee's knee problems were the result of the fall at work in January 1997 or that she was disabled from her job at Foster Country Club as a result of that condition. Findings of fact made by a trial judge are final unless the appellate panel finds them to be clearly erroneous; R.I.G.L. § 28-35-28(b). In order to undertake a de novo review of the evidence, we must first conclude that there is no competent evidence to support the findings of fact made by the trial court. After reviewing the record in this matter, we are unable

to state that the trial judge was clearly wrong in arriving at his conclusions and we therefore deny and dismiss the appeal of Brown University.

The Rhode Island Supreme Court has emphasized that an expert medical witness is not required to use "magic words" or "precisely constructed talismanic incantations" to meet the standard for admissibility. Gallucci v. Humbyrd, 709 A.2d 1059, 1060 (R.I. 1998). If the expert is able to state his opinions with "some degree of positiveness," his testimony is admissible and any issues as to the weight to be attributed to his statements are left to the trial judge. Sweet v. Hemingway Transport, 114 R.I. 348, 355, 333 A.2d 411, 415 (1975).

In this case, both Dr. Infantolino and Dr. Stutz testified to a reasonable degree of medical certainty that they attributed the employee's condition to the fall at work in 1997. During the course of both of their depositions, various other activities or physical abnormalities were brought up as possible causes, but neither physician retracted their initial opinion in favor of one of these other causes. The confusion seems to arise primarily from Dr. Infantolino's testimony in which he indicated that it was almost impossible to state with any degree of certainty what caused the chondromalacia. However, this answer came in response to a line of questioning asking the doctor to consider each potential cause in a vacuum, disregarding the history of injury provided by the employee. The doctor acknowledged early in his testimony that it was not possible to definitively state the cause of the condition simply by looking at the knee and

examining it, but that he based his opinion on the history provided by the employee.

The history is compelling. The employee never had any prior problems with her knees and had never sought any medical treatment for her knees prior to January 1997, despite her active participation in a number of athletic activities for many years. After the fall in 1997, she had ongoing problems of varying severity and frequency. Then, in 1998, the problems were more continuous and she sought further medical treatment. There were no intervening accidents or traumas of any kind. It seems clear from the history that the 1997 fall was a triggering event and the condition of her knees never returned to their pre-injury state.

The two (2) physicians relied on this history in arriving at their opinions as to causation. In viewing their testimony in its totality, we conclude that it provided a legally competent basis for the trial judge's finding as to the cause of the employee's condition.

The respondent's argument that the work at Foster Country Club aggravated the condition and therefore, absolves Brown University of responsibility is without merit. The employee testified that the work at Foster was less strenuous than the work at Brown. Ms. Lavigne was performing activities that she would perform in her everyday life. She also stated that even performing her everyday activities would cause pain and swelling in her knees. It

is clear that the work at Foster was not a separate intervening cause of her injury or disability.

The respondent also contends that there was no legally competent evidence to establish that the employee was disabled from performing her job at Foster Country Club and therefore, she is not entitled to the payment of weekly benefits. Although the doctors did not have specific details as to the employee's job duties at Foster, the employee testified that the job was less strenuous in that she was not required to move and set up chairs and tables and she did not have to climb stairs. However, she did state that the trays she had to carry sometimes weighed up to fifty (50) pounds. (Tr. p. 73) The restrictions imposed by Dr. Stutz (no kneeling, squatting or repetitive stair climbing) would not have prevented Ms. Lavigne from working as a waitress at Foster. However, the records and testimony of Dr. Infantolino do establish provide a basis for a finding that she could not work in that position.

On June 9, 1998, the employee complained that working at Foster was making her knees feel worse. Dr. Infantolino stated that he would keep her out of work until the next office visit in a few weeks. In his report a year later, he noted that the employee should change her occupation to a sedentary type of employment. As of July 8, 1999, he advised that she avoid a lot of walking or pounding activities and discharged her to be seen as needed. An accompanying work status slip indicated that she should not work as a waitress. In his deposition, Dr. Infantolino stated that he would restrict the employee from

kneeling, stooping, crawling, climbing and carrying more than five (5) to ten (10) pounds. Based upon the employee's testimony that the trays she carried at Foster would exceed this weight at times, this restriction would render her disabled from performing her job as a waitress at Foster Country Club.

In addition, Dr. Stutz indicated that he would reconsider his statement that the employee could work as a waitress if in fact she was experiencing pain and swelling as a direct result of her employment. It should be noted that Dr. Stutz examined the employee on June 1, 1998, prior to the time she was advised to stay out of work by Dr. Infantolino. Dr. Stutz was aware at the time of his examination that Ms. Lavigne was still working up to that point despite her complaints.

Considering the records and testimony of the two (2) doctors as a whole, we find that there was legally competent evidence to support the trial judge's finding as to the partial disability of the employee.

Based upon the foregoing, the appeal of Brown University is denied and dismissed and the decision and decree of the trial judge is affirmed in W.C.C. No. 98-03869. In light of our denial of the appeal of Brown University, the employee's appeal in W.C.C. No. 98-04812 is denied and dismissed.

A counsel fee in the sum of One Thousand and 00/100 ($1,000.00) Dollars is awarded to John Harnett, Esq. attorney for the employer, for his successful defense in W.C.C. 98-03869.

In accordance with Sec. 2.20 of the Rules of Practice of the Workers' Compensation Court, final decrees, copies of which are enclosed, shall be entered on

Healy and Connor, JJ. concur.

ENTER:

_____
Healy, J.

_____
Olsson, J.

_____
Connor, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

LINDA LAVIGNE)
)
VS.) W.C.C. 98-04812
)
FOSTER COUNTRY CLUB, INC.)

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:

That the findings of fact and the orders contained in a decree of this Court entered on October 22, 2001 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Healy, J.

_____
Olsson, J.

_____
Connor, J.

I hereby certify that copies were mailed to John Harnett, Esq., and Michael T. Wallor, Esq., on _____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

LINDA LAVIGNE	)	
	)	
VS.	)	W.C.C. 98-03869
	)	
BROWN UNIVERSITY	)	

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the respondent/employer and upon consideration thereof, the appeal is denied and dismissed, and it is

ORDERED, ADJUDGED AND DECREED:

1. That the findings of fact and the orders contained in a decree of this Court entered on October 22, 2001 be, and they hereby are, affirmed.

2. That the respondent/employer shall pay a counsel fee in the sum of One Thousand and 00/100 ($1,000.00) Dollars to John Harnett, Esq., attorney for the employee, for the successful defense of the employer's appeal

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Healy, J.

_____
Olsson, J.

_____
Connor, J.

I hereby certify that copies were mailed to John Harnett, Esq., and Michael T. Wallor, Esq., on

_____