STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
GEORGE McCARTHY AND NANCY McCARTHY, Co-Administrators of the Estate of JOHN M. McCARTHY	)	
	)	
VS.	)	W.C.C. 00-01895
	)	
ENVIRONMENTAL TRANSPORTATION SERVICES, INC.	)	

AMENDED DECISION OF THE APPELLATE DIVISION

OLSSON, J. In accordance with Section 1.5 of the Rules of Practice of the Workers' Compensation Court, an amended decision is hereby rendered in order to substitute the proper party petitioner.

This matter came on to be heard by the Appellate Division on the petitioner/employee's appeal from the decision and decree of the trial judge denying his petition in which he alleged that the employer had incorrectly calculated the period of suspension of benefits resulting from his recovery of damages from a third party. After consideration of the employee's reasons of appeal and the written and oral arguments of counsel, we find that the employee's appeal must be denied.

This case was initiated by the filing of an Employee's Petition to Review alleging that the suspension period resulting from credit for damages recovered

from a third party had ended and that the employee was entitled to the payment of weekly benefits. The employer calculated the suspension period as a longer amount of time than the employee because it did not deduct any portion of the counsel fees or costs involved in the third party litigation. The petition was denied at the pretrial conference and the employee claimed a trial in a timely manner.

The case was presented to the trial judge on the following stipulation of facts:

> "1. The employee was injured on September 14, 1988, which injury was to his right shoulder, back and ribs. The injury has been established by memorandum of agreement dated March 13, 1989.
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> "2. By decree in 91-06200 it was determined that the employee had made a recovery from a negligent third party, and benefits were ordered suspended in accordance with R.I.G.L. § 28-35-58 on June 19, 1991.
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> "3. On or about April 21, 1993, the employee was awarded benefits for loss of use in the amount of 26 percent, which benefits totaled $7,300.80, in addition to the money he received from the negligent third party by way of settlement.
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> "4. By final decree of the Appellate Division in 91-11115, the period of suspension was increased to take into account the $7,300.80 award made for the loss of use benefits, which were paid subsequent to the original settlement.
>
> "5. The total gross recovery of damages by the employee was $226,495.50. From that he paid an attorney's fee of $73,165.00, costs of suit of $9,740.80, and the workers' compensation lien which was repaid to Aetna/Travelers was $49,034.00. Mr. McCarthy's net recovery from the lawsuit was $87,555.70.
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> "6. The employee's compensation rate was $360.00 per week, plus one dependency benefit of $9.00 per week."

The trial judge, relying upon the decision of the Appellate Division in Harris Nursing Home, Inc. v. Harris, W.C.C. No. 91-09743 (App. Div. July 7, 1995), concluded that the suspension period must be calculated using the gross amount of proceeds received by the employee in excess of the workers' compensation lien divided by the employee's weekly compensation rate. He rejected the employee's argument that the excess proceeds should be reduced by the counsel fee and costs before dividing the amount by the compensation rate, which would have resulted in a much shorter period of suspension.

The employee filed a claim of appeal from this decision and submitted four (4) reasons of appeal to the court. The reasons all contend that the trial judge erred in calculating the suspension period based upon the gross proceeds rather than the net recovery, after deducting the counsel fee and costs resulting from the third party litigation. The employee argues that utilizing the gross recovery amount is unfair to the employee as his weekly workers' compensation benefits will be suspended for a period of time for which he did not receive any funds as a result of the payment of his attorney's fee and costs from the third party settlement. We agree that this method of calculation causes a harsh result; however, we are bound by previous precedent and the wording of the statute setting forth the procedure for handling third party settlements. Consequently, we are constrained to deny the employee's appeal.

Rhode Island General Laws § 28-35-58 establishes that the employee may receive both workers' compensation benefits from the employer and damages

from a negligent third party with regard to a work-related injury. Previously, the employee was forced to elect which remedy he wished to seek and any funds he received were considered full compensation for his injuries. The current statute sets forth the rights of the parties with regard to the proceeds of the third party litigation and states in pertinent part:

> "An insurer is entitled to suspend the payment of compensation benefits payable to the employee when the damages recovered by judgment or settlement from the person liable to pay damages exceeds the compensation paid as of the date of the judgment or settlement; the suspension paid is that number of weeks which are equal to the excess damages paid divided by the employee's weekly compensation rate; . . ."

The focus of this appeal is the definition of "excess damages" as used in the statute. The remainder of the statutory language addressing the calculation of the amount to be reimbursed to the insurer/employer which has already paid weekly benefits to the employee during the pendency of the third party litigation is instructive. That language states:

> "When money has been recovered either by judgment or by settlement by an employee from the person so liable to pay damages, by suit or settlement, and the employee is required to reimburse the person by whom the compensation was paid, the employee or his or her attorney are entitled to withhold from the amount to be reimbursed that proportion of the costs, witness expenses and other out-of-pocket expenses and attorney fees which the amount which the employee is required to reimburse the person by whom compensation was paid bears to the amount recovered from the third party."

The Legislature specifically provided for the deduction of counsel fees and costs in calculating the amount to be reimbursed to the insurer/employer, and yet did not include this language in explaining the calculation for the suspension

period. We must conclude that the Legislature purposely omitted the language and intended that the gross amount received by the employee after reimbursement of the lien be utilized in determining the suspension period. The decision of the Appellate Division in Harris Nursing Home, Inc. v. Harris, W.C.C. No. 91-09743 (App. Div. July 7, 1995), is directly on point and contains a more in depth analysis of this issue. We do not see the need to expound upon it further.

While we acknowledge the rather harsh result of this interpretation, we feel constrained to abide by precedent and the plain language of the statute. In this case, it is the function of the Legislature to remedy this situation if it sees fit.

Accordingly, the employee's reasons of appeal are 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

Arrigan, C.J. and Connor, J. concur.

ENTER:

_____
Arrigan, C.J.

_____
Olsson, J.

_____
Connor, 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 January 31, 2001 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Arrigan, C.J.

_____
Olsson, J.

_____
Connor, J.

I hereby certify that copies were mailed to John J. Flanagan, Esq., and Gregory L. Boyer, Esq., on

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