STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
JOSHUA BECKER	)	
	)	
VS.	)	W.C.C. 01-05489
	)	
SALVATION ARMY	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter came on to be heard before the Appellate Division on the petitioner/employee's claim of appeal from the denial of his petition to enforce. The employee requested a recalculation of his spendable base wage so as to take into account that he was married and had a dependent child at the time of his return of incapacity. The trial judge denied the petition on the grounds that the employee had not returned to work for twenty-six (26) weeks or more and therefore, his benefits must be calculated based upon his spendable base wage on the date of his injury. We grant the appeal and reverse the trial judge.

The parties submitted the following stipulation of facts to the trial judge:

> "1. The employee sustained an injury in the course of his employment with The Salvation Army on October 20, 1998, said injury being recognized by pre-trial order in WCC #99-4541.
>
> "2. The employee's injury was described as being to his right ankle.
>
> "3. The employee's benefits were discontinued as of May 16, 2000 by pre-trial order entered on that date.
>
> "4. The employee sustained a return of incapacity from June 22, 2000 through December 4, 2000, a period of less than 26 weeks, said incapacity being

recognized by Decree WCC #00-7481.

> “5. At the time of the employee’s injury he was not married and had no dependent children.
>
> “6. Subsequent to his date of injury but prior to the incapacity found in WCC #00-7481, the employee became married and the father of one dependent child.
>
> “7. The employee was paid for the period June 22, 2000 through December 4, 2000, based upon his spendable base wage as determined at the time of his injury, i.e. single with one exemption.
>
> “8. If the employee is entitled to a recalculation of compensation benefits based upon the employee’s status from June 22, 2000 to December 4, 2000, i.e. married with 3 exemptions, then there would be an underpayment in the amount of $598.37.
>
> “The sole issue presented to this Honorable Court is the proper calculation of exemptions in order to determine the employee’s spendable base wage according to the State of Rhode Island, Department of Labor and Training, Gross Wage to Spendable Earnings table.”

The trial judge denied the employee’s petition on the ground that he had not returned to work for at least twenty-six (26) weeks before his second incapacity and, therefore, was not entitled to any recalculation. In support of his decision, he cited two (2) Appellate Division decisions – Della Selva v. Narragansett Electric Co., W.C.C. No. 97-03871 (App.Div. 2/19/01) and Ritarossi v. MacDonald & Watson, W.C.C. No. 94-01291 (App.Div. 5/19/97).

The employee claimed an appeal from this decision and filed four (4) reasons of appeal basically alleging that the trial judge committed clear error in equating “spendable base wage” with “average weekly wage” and requiring that the employee work for twenty-six (26) weeks in order to have the amount of his benefits recalculated. We agree and reverse the trial judge.

The amount of an employee’s weekly workers’ compensation benefit is determined through a series of calculations. First, his average weekly wage is arrived at pursuant to the terms of R.I.G.L. § 28-33-20. In general terms, this figure is the average of the last thirteen (13) weeks of wages earned prior to the first date of incapacity. Utilizing this average weekly wage figure, the employee's spendable base wages are determined using a table promulgated by the Rhode Island Department of Labor and Training. Section 28-33-17(a)(3)(i) of the Rhode Island General Laws explains this concept as follows:

> "Spendable earnings shall be the employee's gross average weekly wages, earnings, or salary, including any gratuities reported as income, reduced by an amount determined to reflect amounts which would be withheld from the wages, earnings, or salary under federal and state income tax laws, and under the Federal Insurance Contributions Act (FICA), 26 U.S.C. § 3101 et seq., relating to social security and Medicare taxes. In all cases, it is to be assumed that the amount withheld would be determined on the basis of expected liability of the employee for tax for the taxable year in which the payments are made without regard to any itemized deductions but taking into account the maximum number of personal exemptions allowable."

While the employee is totally disabled, or partially disabled and unemployed, the employer shall pay weekly workers' compensation benefits equal to seventy-five percent (75%) of his spendable base wage.

The circumstances of the present matter have not been previously addressed by the Appellate Division or the Rhode Island Supreme Court and are not specifically addressed by the Workers' Compensation Act. The trial judge and the employer both cite the Della Selva and Ritarossi cases as controlling, however, both cases are distinguishable from the present matter.

Section 28-33-17(a)(1) of the Rhode Island General Laws provides for a maximum weekly compensation benefit rate which is based upon the state average weekly wage and is promulgated annually. The Ritarossi case involved an employee who was disabled for a period immediately following his work injury, returned to work for over twenty-six (26) weeks, and then became disabled again as a result of the work injury. Pursuant to R.I.G.L. § 28-33-20.1(a), the employee was entitled to have his average weekly wage recalculated based upon his more recent earnings, rather than utilizing the average weekly wage at the time of his injury. The

Appellate Division held that the employee was also subject to the maximum weekly compensation rate in effect at the time of the subsequent incapacity, rather than being locked into the maximum at the time of his injury. Although the Act did not specifically address this issue, the Appellate Division reasoned that the recalculation of the average weekly wage based on the more recent wages would be rendered meaningless without allowing the increase in the maximum compensation rate.

Ritarossi stated that the employee is eligible for the increased maximum compensation rate only if he qualifies for recalculation of his average weekly wage by working for twenty-six (26) weeks prior to the subsequent incapacity. However, in the matter presently before the panel, Mr. Becker, the employee, is not seeking to apply a higher maximum weekly compensation rate, nor is he asking for recalculation of his average weekly wage under R.I.G.L. § 28-33-20.1(a). That statute has no bearing on this matter. He is requesting revision of his spendable base wage due to an increase in the number of his exemptions since his first period of incapacity.

The Della Selva matter involved an employee who was injured and then returned to work while still partially disabled, at times earning less than his pre-injury average weekly wage. The employer, in calculating the varying partial disability payments, utilized the most recent spendable base wage table rather than the table in effect at the time of the injury. The Appellate Division concluded that using the later tables violated the employee's rights which vested at the time of his injury, in particular because he remained continually disabled. This was not a case involving a return of incapacity. However, the case currently before the panel does involve a return of incapacity and a change in the employee's circumstances.

At the time of his first period of incapacity, the employee, Mr. Becker, was single. His spendable base wage was arrived at using his average weekly wage and applying one (1) exemption. As stated in R.I.G.L. § 28-33-17(a)(3)(i), this formula would take into account the projected taxes and FICA contributions the employee would be liable to pay as a single person during the period of disability. Sometime after his first period of disability but before the beginning of his second period of incapacity, the employee married and fathered a child. Under the tax laws, he would then be entitled to three (3) exemptions, thereby receiving more money in his net pay to accommodate his added responsibilities. It seems logical that the calculation of his workers' compensation benefits should also reflect this change.

The Workers' Compensation Act provides for additional benefits for dependents of an injured worker who is totally disabled. R.I.G.L. § 28-33-17(c)(1). The Rhode Island Supreme Court has stated that the purpose of dependency benefits is to assist an employee in supporting his minor children who are unable to care for themselves. *See* Marshall v. Kaiser Aluminum & Chemical Corp., 121 R.I. 624, 402 A.2d 575 (1979). The Act states that the amount of the dependency allowance shall be increased if the number of persons dependent upon the employee increases during the time he is receiving weekly benefits. R.I.G.L. § 28-33-17(c)(2). An insurer may unilaterally stop the payment of dependency benefits when the child reaches eighteen (18) years of age, or a spouse becomes employed.

These provisions demonstrate that the statute recognizes that an increase in the number of persons for whom the employee is responsible requires some increase in the amount of weekly benefits to assist in the additional obligations. This underlying theme should logically be carried over to Mr. Becker's situation, thereby requiring the increase in the number of exemptions to be used in determining his spendable base wages for a second period of incapacity. As stated in R.I.G.L. § 28-33-17(a)(3)(i), the spendable base wages shall be calculated by "taking into account the maximum number of personal exemptions allowable."

The employer argues that the number of exemptions is "locked in" on the date of injury and there is nothing in the statute to permit a change. There is also nothing in the statute which would prohibit a change. Furthermore, such a strict interpretation of the Act would lead to an absurd result. It is doubtful that the employer/insurer would take such a strong position in the opposite situation. For example, an employee who is married with a dependent child is injured and paid benefits based upon three (3) exemptions (the employee, his spouse and his child). He returns to work only briefly (less than twenty-six (26) weeks) and suffers a return of incapacity. Prior to this second incapacity, he is divorced and the child turns eighteen (18) years old. Should the employee's spendable base wages for this second period of incapacity continue to be based upon <u>three (3) exemptions</u>, even though under the tax laws he is only eligible for <u>one</u>? His spendable base wages would be artificially inflated because of the additional exemptions to which he is not entitled.

Considering the social welfare policies underlying the enactment of the Workers' Compensation Act and reconciling the various statutory provisions, the only logical and sensible conclusion is that the employee is entitled to have his spendable base wage recalculated for a second period of incapacity when the number of exemptions for which he is eligible has changed since the time of the prior period of incapacity. It should be noted that we are only addressing the situation presented by Mr. Becker's case in which there is a second period of incapacity.

The dissent raises the issue of whether the matter was presented to the court via the appropriate vehicle. The petition filed by the employee is a form promulgated by the court entitled "Employee's Petition to Review and/or Amend Agreement or Decree Concerning Compensation." There are nine (9) pre-printed allegations which may be checked off by the petitioner and then a catch-all "Other reason for review." None of the nine (9) pre-printed allegations fits the scenario presented by Mr. Becker's case. His attorney checked off the "Other reason for review" box and typed in "Seeking an order for relief pursuant to section 28-35-43." Directly above this sentence, the handwritten word "Enforce" appears, apparently written by the trial judge based upon other notations made on the petition.

Rhode Island General Laws § 28-35-43 provides the procedure to compel the payment of benefits which have been ordered by the court. Admittedly, the petition as filed may not have been the most appropriate vehicle for addressing the issue presented, but we do not believe that dismissal of the petition is required. It is clear from the record that the parties and the trial judge were well aware of the issue presented. We do not believe that this situation calls for such a strict adherence to form over substance.

Although R.I.G.L. § 28-35-43 allows for the imposition of penalties of monies past due, we find that the employer should not be penalized in this situation. The matter presented an issue which had never been addressed by the court and was not clearly addressed in the statute. We cannot fault the employer for adopting the generally applicable doctrine that an employee's compensation is set at the time of his injury. The court has the discretion under these circumstances to not assess any penalty against the employer for what we have only now determined is the incorrect amount of weekly compensation benefits.

Based upon the foregoing, we grant the employee's appeal and reverse the trial judge. A new decree shall enter containing the following findings:

1. That the employee suffered a return of partial incapacity from June 22, 2000 through December 4, 2000 due to the effects of a work-related injury he sustained on October 20, 1998.

2. That at the time of his initial incapacity, he was single with no dependent children.

3. That at the time of this second period of incapacity, he was married with one (1) dependent child.

4. That the employee had not returned to work for twenty-six (26) weeks at the time of the second incapacity.

5. That the employer/insurer incorrectly paid weekly benefits for the second period of incapacity based upon the employee's spendable base wage at the time of his first incapacity, which was calculated using his status as single with one (1) exemption.

6. That the employee is entitled to a recalculation of his spendable base wage for the second period of incapacity using his status as married with one (1) dependent child which would warrant three (3) exemptions.

It is, therefore, ordered:

1. That the employer/insurer shall pay the sum of Five Hundred Ninety-eight and 37/100 ($598.37) Dollars to the employee, which represents the underpayment of benefits resulting from the recalculation of the spendable base wage.

2. That no penalty is assessed because the correct spendable base wage calculation posed a legal issue not specifically addressed by the prior decree ordering payment of benefits.

3. That the employer/insurer shall reimburse employee's counsel the sum of Seventy and 00/100 ($70.00) Dollars for the cost of the filing fee for the petition and the appeal and the cost of the transcript on appeal.

4. That the employer/insurer shall pay a counsel fee in the sum of Two Thousand Eight Hundred and 00/100 ($2,800.00) Dollars to John Harnett, Esq., counsel for the employee, for services rendered throughout this matter, from pretrial conference to appellate argument.

We have prepared and submit herewith a new decree in accordance with our decision.

The parties may appear on at 10:00 AM to show cause, if any they have, why said decree shall not be entered.

Connor, J. concurs. Healy, C.J. dissents.

ENTER:

____
Olsson, J.

____
Connor, J.

DISSENTING OPINION

HEALY, C.J. I must respectfully dissent from my colleagues in connection with this matter. I do so for several reasons. Initially, my review of R.I.G.L. § 28-33-17 does not reveal any provision which would allow for a recalculation of the spendable base wage based upon a change in the employee's tax status. Section 28-33-17(3)(i) defines "spendable earnings" and does not contain any provision for the recalculation of spendable earnings based upon the employee's change in tax status. By comparison R.I.G.L. § 28-33-17(c)(2) specifically allows for an increase in the employee's dependency benefits if the number of persons dependent upon the employee for support increased during the time total disability benefits are being paid. Further, R.I.G.L. § 28-33-20.1 authorizes an amendment to the average weekly wage if the employee returns to employment for a period of twenty-six (26) weeks and thereafter suffers a recurrence of incapacity. Clearly, the legislature envisioned the recalculation of the employee's benefits where several different scenarios arise and did not mention the change in the spendable base wage where the employee's tax status has changed. Such an omission is, in my mind, intentional. In addition, the reason appears obvious. If the employer were required to constantly check the employee's tax status and amend each agreement whenever the employee's tax status changed, it would require constant revision of every memorandum of agreement. The process of review and revision would impose a serious burden on the system and would seem to work an absurd result.

More significantly, the utilization of a petition to enforce to obtain this review seems inappropriate. R.I.G.L. §§ 28-35-42 and 28-35-43 provide the procedural underpinnings for petitions to enforce agreements or decrees. In each provision, the employee is authorized to pursue an expedited procedure in those cases where the employer has failed to make payments in accordance with an outstanding agreement or decree. Where such payments are in default, these sections allow for the addition of penalties on all delinquent amounts of ten percent (10%) if payments are due under a memorandum of agreement; twenty percent (20%) if under an order or decree of the Court. In the present situation, the employer is in compliance with the order or decree as it was originally drafted. Thus, the utilization of the petition to enforce to amend the spendable wage is completely inapposite. Additionally, it seems inequitable to impose penalties on an employer where payments are, in fact, being made in complete compliance with the appropriate memorandum of agreement or decree.

For these reasons, I must reluctantly and respectfully, dissent.

____

Healy, C. J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

JOSHUA BECKER	)	
	)	
VS.	)	W.C.C. 01-05489
	)	
SALVATION ARMY	)	

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the appeal of the employee from a decree entered on December 10, 2001.

Upon consideration thereof, the appeal of the employee is sustained, and in accordance with the decision of the Appellate Division, the following findings of fact are made:

1. That the employee suffered a return of partial incapacity from June 22, 2000 through December 4, 2000 due to the effects of a work-related injury he sustained on October 20, 1998.

2. That at the time of his initial incapacity, he was single with no dependent children.

3. That at the time of this second period of incapacity, he was married with one (1) dependent child.

4. That the employee had not returned to work for twenty-six (26) weeks at the time of the second incapacity.

5. That the employer/insurer incorrectly paid weekly benefits for the second period of incapacity based upon the employee's spendable base wage at the time of his first incapacity, which was calculated using his status as single with one (1) exemption.

6. That the employee is entitled to a recalculation of his spendable base wage for the second period of incapacity using his status as married with one (1) dependent child which would warrant three (3) exemptions.

It is, therefore, ordered:

1. That the employer/insurer shall pay the sum of Five Hundred Ninety-eight and 37/100 ($598.37) Dollars to the employee, which represents the underpayment of benefits resulting from the recalculation of the spendable base wage.

2. That no penalty is assessed because the correct spendable base wage calculation posed a legal issue not specifically addressed by the prior decree ordering payment of benefits.

3. That the employer/insurer shall reimburse employee's counsel the sum of Seventy and 00/100 ($70.00) Dollars for the cost of the filing fee for the petition and the appeal and the cost of the transcript on appeal.

4. That the employer/insurer shall pay a counsel fee in the sum of Two Thousand Eight Hundred and 00/100 ($2,800.00) Dollars to John Harnett, Esq., counsel for the employee, for services rendered throughout this matter, from pretrial conference to appellate argument.

Entered as the final decree of this Court this day of

BY ORDER:

____

John A. Sabatini, Administrator

ENTER:

Olsson, J.

Connor, J.

I hereby certify that copies were mailed to John M. Harnett, Esq., and Tedford B. Radway, Esq., on