STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.	WORKERS' COMPENSATION COURT APPELLATE DIVISION
ANNETTE M. SALVAS)	
)	
VS.)	W.C.C. 2001-06396
)	
HEALTH CARE SERVICES)	

DECISION OF THE APPELLATE DIVISION

SOWA, J. This matter comes before the Appellate Division upon the respondent/employer's appeal from the decision and decree of the trial judge entered on June 7, 2002.

This matter was filed as an employee's original petition alleging that she sustained a work-related injury to her low back on July 31, 2001. At a pre-trial conference on October 12, 2001, the petition was denied. A timely claim for a trial de novo was filed by petitioner's counsel. At the conclusion of the proceeding, the trial judge rendered a bench decision and entered a decree containing, *inter alia*, the following findings and order:

> "1. That the petitioner has proved by a fair preponderance of the credible evidence that she sustained a work-related injury on July 31, 2001, which arose out of and in the course of her employment with the respondent, connected therewith and referable thereto, of which injury the respondent had notice.
>
> "2. That the employee sustained an injury to her low back.

"3. That the petitioner's average weekly wage is Three Hundred Sixty ($360.00) Dollars per week.

"4. That the employee had no one dependent upon her for support.

"5. That the employee was totally disabled from August 1, 2001 to October 12, 2001 and partially disabled from October 13 and continuing."

The employer filed a timely claim of appeal.

The employee's underlying incapacity is not an issue in this appeal. Originally, the trial judge was confronted with the question of whether the employee had sustained a recurrence of a prior injury or a new injury, the issue having been litigated in consolidated petitions. The trial judge rendered an opinion that the petitioner sustained a work-related injury on July 31, 2001 and the issue of recurrence versus aggravation was not appealed by the parties.

The employer offers two (2) reasons of appeal:

"1. The Trial Court erred in calculating the employee's average weekly wage. The Trial court erroneously based its average weekly wage calculation on the prevailing wage for other employees. Because the employee was employed for more than two weeks, her average weekly wage should have been calculated based upon the employee's actual earnings. R.I.G.L. § 28-33-20.

"2. The Trial Court erred in failing to suspend the weekly workers' compensation benefits of an employee who has returned to work at an average weekly wage that was greater than the average weekly wage on the date of injury. R.I.G.L. § 28-33-17.1(a)."

Rhode Island General Law Section 28-33-20 states as follows:

"...When the employment previous to injury as provided

in this section is computed to be less than a net period of two (2) calendar weeks, his or her weekly wage is considered to be equivalent to the average weekly wage prevailing in the same or similar employment at the time of injury except that, when an employer has agreed to pay a certain hourly wage to the worker, the hourly wage agreed upon is the hourly wage for the injured worker and his or her average weekly wage is computed by multiplying that hourly wage by the number of weekly hours scheduled for full time work by full-time employees regularly employed by the employer..."

Mr. Robert Haigh, owner of Health Care Services, was called as an employer's witness. He testified that the employee was scheduled to work Monday through Friday, forty (40) hours per week at an hourly rate of $9.00 per hour. (Tr. p. 44). She actually worked on the following days prior to her July 31, 2001 work injury:

1. Week ending July 20, 2001

   Tuesday – 7/17/01 – 2 hrs. x $9.00 = $18.00

2. Week ending July 27, 2001

   Monday – 7/23/01 – 2 hrs. x $9.00 = $18.00
   Tuesday – 7/24/01 – 1 ¾ hrs. x $9.00 = $15.75
   Wednesday – 7/25/01 – 2 hrs. x $9.00 = $18.00
   Thursday – 7/26/01 – 3 ¾ hrs. x $9.00 = $33.75
   Friday – 7/27/01 – 2 hrs. x $9.00 = $18.00

3. Week ending July 31, 2001

   Monday – 7/30/01 – 5 hrs. x $9.00 = $45.00
   Tuesday – 7/31/01 – 1 hr. x $9.00 = $9.00

The trial judge noted that July 17, 2001 was a Tuesday. The employee's employment did not commence at the beginning of a calendar week. The record also indicates that the injury occurred on July 31, 2001.

In December 2001, the employee returned to work as a CNA with West Shore Health Center at a rate of $9.50 per hour. Her wage stubs were introduced into evidence and showed an average weekly wage of $176.82. She left that employment after becoming diagnosed with bronchitis. Subsequent thereto, in April, 2001, she began working for Intrepid Health Care Services. There she was employed for eighteen (18) hours per week at a rate of $9.00 per hour.

The average weekly wage is determined through a computation utilizing the provisions of R.I.G.L. § 28-33-20. If the employee is employed for a period of more than two weeks, the wage is calculated by averaging the employee's earnings during the thirteen weeks preceding an injury. However, if the employee was employed for "less than a net period of two calendar weeks" a different computation applies. In that situation, the average weekly wage is calculated by multiplying the current hourly wage by the number of weekly hours worked by an average full time employee working for that employer.

The respondent, in its brief, accurately sets forth the court's duty as it relates to statutory construction. A basic tenet of statutory construction provides that if the language of a statute is clear on its face, the words must be given their plain and ordinary meaning. Krikorian v. Rhode Island Department of Human Services, 606 A.2d 671, 675 (R.I. 1992). Fruit Growers' Exp. Co. v. Norberg, 471 A.2d 628 (R.I. 1984); Absent any

ambiguity, the wording shall not be interpreted or extended. Pizza Hut of America, Inc. v. Pastore, 519 A.2d 592, 593 (R.I. 1987). In re Advisory Opinion to the Governor, 504 A.2d 456, 459 (R.I. 1986); Rather, it must be applied literally. Caithness Rica Ltd. v. Malachowski, et.al, 619 A.2d 833, 836 (R.I. 1993).

Respondent argues that the trial court failed to give Section 28-33-20 its literal interpretation. It argues that the employment exceeded two weeks, although admitting that the employment did not commence at the beginning of a calendar week, and that the injury occurred during the third week of employment as it relates to calculating average weekly wage. The respondent, in its argument, fails to acknowledge or comprehend the literal meaning of the term "less than a net period of two calendar weeks." That language is determinative in establishing the average weekly wage.

The employment of Ms. Salvas did not commence at the beginning of a calendar week, or on a day deemed to be the first day of the work week. Accordingly, that week, the week ending July 20, 2001 must be excluded for purposes of calculating average weekly wage. Likewise, the week of injury is excluded by statutory construction. The provisions of Section 28-33-20 provide for calculations based upon the "thirteen weeks immediately proceeding the week in which he or she was injured."

The trial judge correctly noted that there was one week of wages that could be utilized for the calculation of average weekly wage. By definition, this was less than the two weeks net contemplated by Section 28-33-20.

The testimony of the employee and Mr. Haigh provided uncontradicted evidence that the employee was to work forty (40) hours per week at the rate of Nine (9) dollars per hour, establishing an average weekly wage of $360.00. Having established an average weekly wage of $360.00, the employer's second reason of appeal fails since there was no evidence presented to the trial judge was that the employee returned to wages equal to or greater than the average weekly wage on the date of injury.

Pursuant to R.I.G.L. § 28-35-28(b), a trial judge's findings on factual matters are final unless found to be clearly erroneous. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). The Appellate Division is entitled to conduct a *de novo* review only when a finding is made that the trial judge was clearly wrong. Id. (citing R.I.G.L. § 28-35-28(b); Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986)). Such review, however, is limited to the record made before the trial judge. Vaz, supra (citing Whittaker v. Health-Tex, Inc., 440 A.2d 122 (R.I. 1982)).

Cognizant of this legal duty imposed upon us, we have carefully reviewed the entire record of this proceeding, and we find no merit in the employer's reasons of appeal.

For the aforesaid reasons, the respondent's reasons of appeal are hereby denied and dismissed and the decree appealed from is hereby affirmed.

A counsel fee of Twelve hundred ($1,200) dollars to be awarded to Alfredo Conte, Esquire for his successful result before the Appellate Division.

In accordance with Sec. 2.20 of the Rule of Practice of the Workers' Compensation Court, a final decree, a copy of which is enclosed, shall be entered on

ENTER:

_____
Healy, J.

_____
Bertness, J.

_____
Sowa, J.

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APPELLATE DIVISION

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HEALTH CARE SERVICES)

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:

The findings of fact and the orders contained in a decree of this Court entered on June 7, 2002 be, and they hereby are affirmed.

A counsel fee of Twelve hundred ($1,200) dollars to be awarded to Alfredo Conte, Esquire for his successful result before the Appellate Division.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Healy, J.

_____
Bertness, J.

_____
Sowa, J.

I hereby certify that copies were mailed to Alfredo Conte, Esq. and Bruce Balon, Esq. on

_____