STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

RACHEL WATERMAN	)	
	)	
VS.	)	W.C.C. 02-00853
	)	
CVS PHARMACY, INC.	)	
RACHEL WATERMAN	)	
	)	
VS.	)	W.C.C. 01-08619
	)	
CVS PHARMACY, INC.	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. These two (2) matters were consolidated for trial and remain consolidated before the Appellate Division. The employer has appealed the decision of the trial judge in which she concluded that holiday pay received by a partially disabled employee who had returned to work could not be considered earnings for purposes of calculating the amount of weekly workers' compensation benefits to be paid to the employee. After thorough review of the pertinent statutory and case law and consideration of the arguments presented by the respective parties, we grant the employer's appeal and reverse the decision of the trial judge.

W.C.C. No. 01-08619 is an employee's petition to review alleging that the employer erroneously took credit for holiday pay received by the employee in calculating her weekly benefits for the week ending November 17, 2001. At the pretrial conference, the employee's petition was granted and the employer claimed a trial. W.C.C. No. 02-00853 is also an employee's petition to review alleging that the employer failed to pay the correct amount of weekly benefits for the week ending November 24, 2001 due to including holiday pay as earnings. The trial judge granted this petition as well and the employer duly filed a claim for trial.

Ms. Waterman sustained an aggravation of an L-5/S-1 herniated disc on March 14, 2001 while working for CVS. She has been receiving weekly benefits for partial incapacity since April 10, 2001. The only evidence presented at trial was a stipulation of facts signed by both parties which provides as follows:

1. Rachel Waterman (the "employee") has been receiving weekly benefits from 4/10/01 and continuing for an aggravation of L-5/S-1 herniated disc sustained on 3/14/01.

2. The employee returned to CVS (the "employer") performing light duty employment in August 2001 and since then she has been receiving benefits for varying partial incapacity.

3. The employee's average weekly wage is $443.79.

4. The following is a list of holidays observed by the employer: New Years Day, Easter, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day and Christmas Day. The employer is closed on Christmas Day and open for business on the other holidays. The employer may implement limited hours on holidays during which the employer is open for business.

5. All employees, regardless of length of service, are eligible for holiday pay for the above days as long as they work their last scheduled day before and their first scheduled day after the holiday.

6. The employee was not scheduled to work and did not work on Veterans Day (11/12/01) and Thanksgiving Day (11/23/01), however, she received holiday pay for those days in addition to the amount of benefits for varying partial incapacity she would ordinarily receive.

7. The employer took a credit for holiday payments made to the employee for the Veterans Day and Thanksgiving Day holidays.

The issue before the Court is whether an employer can reduce workers' compensation payments to an employee, who is receiving varying partial after returning to light duty employment, by the amount of holiday-pay paid to the employee for holidays she was not scheduled to work and did not work.

Jt. Exh. 1.

The trial judge equated the holiday pay in this instance to accrued vacation pay and sick leave benefits. Citing Cole v. Davol, Inc., 679 A.2d 875 (R.I. 1996), in which the Rhode Island Supreme Court found that the employer could not take credit for payments of accrued vacation benefits in calculating partial disability benefits during a plant shutdown, the trial judge concluded that the employer could not treat the holiday pay as earnings for purposes of calculating partial disability benefits. The employer filed a claim of appeal alleging that the Cole decision is not applicable to this case and that holiday pay should be considered as earnings in calculating post-injury partial incapacity benefits because holiday pay is included in calculating the employee's pre-injury average weekly wage. We find merit in the employer's contentions.

Pursuant to the stipulated facts, Ms. Waterman is receiving varying partial disability benefits which are calculated in accordance with R.I.G.L. § 28-33-18(a) which states as follows:

> While the incapacity for work resulting from the injury is partial, the employer shall pay the injured employee a weekly compensation equal to seventy-five percent (75%) of the difference between his or her spendable average weekly base wages, earnings, or salary before the injury as computed pursuant to the provisions of § 28-38-20 [sic], and his or her spendable weekly wages, earnings, salary, or earnings capacity after that, ...

Ms. Waterman was apparently working for the employer, CVS, but was not earning wages equal to her pre-injury average weekly wage. Consequently, the employer paid weekly benefits to the employee in accordance with the formula set out in § 28-33-18(a) which allows a deduction or offset for wages or earnings.

The Cole case involved an employee who sustained a work-related injury and then returned to work for the employer in a light duty position. Pursuant to the collective bargaining agreement with Davol, the employer, the employee earned credit for vacation pay based upon the time worked for Davol. Each year, Davol would close its plant operations for two (2) weeks. During the shutdown, all employees who had worked at least a certain minimum period for Davol would receive varying amounts of vacation pay based upon their period of employment. The issue in the case was whether Davol could include the vacation pay as earnings in calculating the weekly compensation benefits due to the employee pursuant to R.I.G.L. § 28-33-18(a).

The Court had previously addressed whether a disabled employee could receive weekly benefits when he had received accrued sick leave and vacation pay in an amount greater than his pre-injury wages. In holding that the employee was entitled to compensation benefits, the Court stated:

> Just as . . . wages paid out of sympathy and in consideration of long service do not reflect actual earning capacity, so, too, is it now our judgment that the accumulated sick or vacation leave payments which the employee may have earned by virtue of his past services and which would otherwise be available to him when not suffering from a work-incurred disability might be lost forever if required to be included in the computation of his earning capacity.

Robidoux v. Uniroyal, Inc., 116 R.I. 594, 598, 359 A.2d 45, 48 (1976). Vacation pay is an accumulated benefit which an employee accrues based on the length of his service to the

employer. Employees may receive vacation pay whether or not they sustained a work-related injury. In Cole, it was noted that if an employee terminated his employment prior to the plant shutdown, he would still receive his accrued vacation pay. Based upon this reasoning, the Court in Cole concluded that the employer could not take credit for the vacation pay in calculating the partial disability benefits due to the employee.

In the present matter, the trial judge noted that the employee received holiday pay if she worked the day before and the day after the holiday. She concluded that the employee earned the holiday pay based on past and future service. The trial judge reasoned that the holiday pay was therefore an accrued benefit, similar to the vacation pay in Cole and Robidoux, and therefore the employer could not take credit for it. We do not agree with this analysis.

The holiday pay in this particular instance is not a benefit accrued over time as a result of the employee's work for the employer. When the employee receives holiday pay, there is no reduction of an accumulated benefit as there is with vacation pay and sick leave pay. CVS pays employees for holidays only if they work their scheduled day before and after the particular holiday. Unlike vacation pay and sick leave pay, the employee is not entitled to receive holiday pay if she terminates her employment or does not work the day before or after the holiday. The holiday pay is received as a direct result of working, rather than being out of work or unable to work. We conclude that under the circumstances of this case, the employer is permitted to offset or take credit for the holiday pay when calculating the amount of partial incapacity benefits due to Ms. Waterman.

Furthermore, we are persuaded that equity favors such a result. In Smith v. Colonial Knife Co., 731 A.2d 724 (R.I. 1999), the Rhode Island Supreme Court held that holiday pay should be included in the calculation of an employee's pre-injury average weekly wage so as to

avoid an inequitable result when an employee sustains an injury shortly after a holiday. Id. at 726. Consequently, if holiday pay is utilized in the same manner as pre-injury wages to determine the amount of compensation an injured worker should receive in the first instance, it is only fair and equitable to include holiday pay in the category of wages or earnings when calculating the amount of partial disability benefits due an employee who has returned to work at wages less than her pre-injury average weekly wage.

We would note that the Cole court did not address this equity argument with regard to vacation pay because the amendment to R.I.G.L. § 28-33-20 which included vacation pay when calculating the employee's pre-injury average weekly wage applied only to injuries occurring on or after May 18, 1992. The employees in Cole sustained their work-related injuries prior to that date. The Court gave no indication as to whether the amendment would alter the analysis set forth in Cole in the appropriate case. It should also be pointed out that this appellate panel is only addressing the factual situation presented in this particular case. Holiday pay may be paid under a variety of conditions depending upon the particular employment agreement. We do not deem it advisable to issue a blanket mandate that in all circumstances holiday pay shall be considered as wages or earnings in calculating partial disability benefits pursuant to R.I.G.L. § 28-33-18(a) and we decline to do so.

For the foregoing reasons, we grant the employer's appeals in these matters and reverse the decision and decrees of the trial judge. In accordance with our decision, new decrees shall enter containing the following findings and orders.

In W.C.C. No. 01-08619:

1. That the employee has been receiving weekly benefits for partial incapacity from April 10, 2001 and continuing due to a work-related injury she sustained on March 14, 2001.

2. That in August 2001, the employee returned to work for the employer performing light duty work and has been receiving varying partial incapacity benefits since that time.

3. That the employee received holiday pay for Veterans' Day, November 12, 2001, although she was not scheduled to work and did not work that day.

4. That in calculating the amount of varying partial incapacity benefits due to the employee for the week including November 12, 2001, the employer correctly took credit for the holiday pay as wages or earnings in computing the amount due to the employee pursuant to R.I.G.L. § 28-33-18(a).

It is, therefore, ordered:

1. That the employer's claim of appeal is granted and the decree of the trial judge is vacated.

2. That the employee's petition to review alleging that the employer erroneously took credit for holiday pay in calculating the amount of partial incapacity benefits due to the employee is denied and dismissed.

In W.C.C. No. 02-00853:

1. That the employee has been receiving weekly benefits for partial incapacity from April 10, 2001 and continuing due to a work-related injury she sustained on March 14, 2001.

2. That in August 2001, the employee returned to work for the employer performing light duty work and has been receiving varying partial incapacity benefits since that time.

3. That the employee received holiday pay for Thanksgiving Day in 2001, as well as subsequent holidays recognized by the employer.

4. That in calculating the amount of varying partial incapacity benefits due to the employee for the those weeks in which the employee received holiday pay, the employer

correctly took credit for the holiday pay as wages or earnings in computing the amount due to the employee pursuant to R.I.G.L. § 28-33-18(a).

It is, therefore, ordered:

1. That the employer's claim of appeal is granted and the decree of the trial judge is vacated.

2. That the employee's petition to review alleging that the employer erroneously took credit for holiday pay in calculating the amount of partial incapacity benefits due to the employee is denied and dismissed.

We have prepared and submit herewith new decrees in accordance with our decision. The parties may appear on at 10:00 a.m. to show cause, if any they have, why said decrees shall not be entered.

Healy, C. J. and Connor, J. concur.

ENTER:

_____
Healy, C. J.

_____
Olsson, J.

_____
Connor, J.

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the appeal of the respondent/employer and upon consideration thereof, the appeal of the employer is granted. In accordance with the decision of the Appellate Division, the following findings of fact are made:

1. That the employee has been receiving weekly benefits for partial incapacity from April 10, 2001 and continuing due to a work-related injury she sustained on March 14, 2001.

2. That in August 2001, the employee returned to work for the employer performing light duty work and has been receiving varying partial incapacity benefits since that time.

3. That the employee received holiday pay for Thanksgiving Day in 2001, as well as subsequent holidays recognized by the employer.

4. That in calculating the amount of varying partial incapacity benefits due to the employee for the those weeks in which the employee received holiday pay, the employer correctly took credit for the holiday pay as wages or earnings in computing the amount due to the employee pursuant to R.I.G.L. § 28-33-18(a).

It is, therefore, ordered:

1. That the employer's claim of appeal is granted and the decree of the trial judge is vacated.

2. That the employee's petition to review alleging that the employer erroneously took credit for holiday pay in calculating the amount of partial incapacity benefits due to the employee is denied and dismissed.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Healy, C. J.

_____
Olsson, J.

_____
Connor, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Earl E. Metcalf, Esq., and Gregory L. Boyer, Esq., on

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2. That in August 2001, the employee returned to work for the employer performing light duty work and has been receiving varying partial incapacity benefits since that time.

3. That the employee received holiday pay for Veterans' Day, November 12, 2001, although she was not scheduled to work and did not work that day.

4. That in calculating the amount of varying partial incapacity benefits due to the employee for the week including November 12, 2001, the employer correctly took credit for the holiday pay as wages or earnings in computing the amount due to the employee pursuant to R.I.G.L. § 28-33-18(a).

It is, therefore, ordered:

1. That the employer's claim of appeal is granted and the decree of the trial judge is vacated.

2. That the employee's petition to review alleging that the employer erroneously took credit for holiday pay in calculating the amount of partial incapacity benefits due to the employee is denied and dismissed.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

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Healy, C. J.

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Olsson, J.

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Connor, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Earl E. Metcalf, Esq., and Gregory L. Boyer, Esq., on

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