

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

MANUEL REZENDES

)

)

VS.

)

W.C.C. 03-00265

)

AMERICAN INSULATED WIRE

)

AMERICAN INSULATED WIRE

)

)

VS.

)

W.C.C. 02-07148

)

MANUEL REZENDES

)

DECISION OF THE APPELLATE DIVISION

OLSSON, J. These two (2) matters have been consolidated by the court on appeal in the same manner that they traveled together at the trial level. W.C.C. No. 02-07148 is an Employer's Petition to Review alleging that the employee has returned to work and is receiving wages of Five Hundred Twelve and 29/100 (\$512.29) Dollars a week. The trial judge granted the employer's request to set an earnings capacity based upon those wages. The employee has appealed from that decision. After review of the record, we grant the employee's appeal and reverse the decision and decree of the trial judge.

W.C.C. No. 03-00265 is an Employee's Petition to Review requesting that the description of the employee's work-related injury in the Memorandum of Agreement be amended to include the back and right leg. The petition also alleges that the employee sustained a return or increase of incapacity beginning January 27, 2003 due to his work-related injuries. The trial judge granted the request to amend the description of the injury, but he found that the employee had failed to prove that he was disabled as of January 27, 2003 and that the employee's claim for weekly benefits was time barred. The employee duly filed a claim of appeal from this decision. After reviewing the record and considering the arguments of the parties, we deny the employee's appeal and affirm the decision and decree of the trial judge.

The employee sustained a work-related injury on July 23, 1988. A Memorandum of Agreement dated August 22, 1988 describes the injury as "tendonitis, left calf and thigh" and indicates that the employee was totally disabled as of August 7, 1988. Pursuant to a decree entered in W.C.C. No. 89-09213 on December 6, 1989, the employee's weekly benefits were modified from those for total incapacity to partial incapacity.

Mr. Rezendes testified that he began working for the employer in 1979. He was out of work after the 1988 injury until April 1991 when he accepted a light duty job as a security guard for the employer. On November 22, 2002, he was laid off and has not returned to work since that date. During the period he was working as a security guard, he was earning slightly less than his pre-injury average weekly wage and so he was paid a small amount of weekly workers' compensation benefits from the insurer. The employee asserted that he cannot return to his original job with the employer because it requires standing all day and lifting up to sixty (60) pounds, although he felt that he could still perform his former duties as a security guard. He indicated that in 1988 he sustained injuries to his right leg and back in addition to his left leg.

The deposition and records of Dr. Mehrdad M. Motamed were introduced into evidence. The records included reports of Dr. Manoel A. Falcao, who began treating the employee in November 1989. At that time, the employee told the doctor that at the time of the injury, he had low back pain radiating into his left leg. After about six (6) weeks, the left leg pain subsided, but he developed more severe pain radiating down his right leg. In his November 1989 report, Dr. Falcao stated that the employee's condition was due to the work injury and he was partially disabled.

Dr. Motamed began treating the employee sometime in 1995 after Dr. Falcao retired. The doctor's impression was that the employee suffered from a chronic lumbar strain with residual sciatic neuroradiculitis as well as a herniated disc at L5-S1 by MRI. He found that he was partially disabled and that the diagnosis and disability were caused by the injury at work. The employee has been treated conservatively with medication and periodic checkups.

The trial judge, citing the most recent version of R.I.G.L. § 28-29-2(3)(i), granted the employer's petition and set an earnings capacity based upon the wages the employee earned as a security guard during the thirteen (13) weeks prior to his layoff. With regard to the employee's petition, the trial judge found that the description of the injury in the Memorandum of Agreement should be amended to include the back and right leg. However, he denied the employee's allegation that his incapacity returned or increased from partial to total incapacity as of January 27, 2003 because it was not filed in a timely manner.

Our appellate review standard is very deferential to the determinations made by the trial judge. Section 28-35-28(b) of the Rhode Island General Laws provides that the factual findings made by a trial judge are final unless the appellate panel finds them to be clearly erroneous. The appellate panel may conduct a *de novo* review of the record only after specifically finding that

the trial judge was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996) (citing Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986)).

We will first address the employee's appeal in W.C.C. No. 02-07148 in which the trial judge set an earnings capacity based upon wages earned by the employee in a light duty job with the employer. The employee has filed six (6) reasons of appeal with regard to this employer's petition. We need only address the second reason of appeal in which the employee argues that the trial judge utilized the incorrect version of the statute as the basis for setting an earning capacity.

Discussion of the term "earnings capacity" is contained in the definitional section of the Workers' Compensation Act. The trial judge cited R.I.G.L. § 28-29-2(3)(i) as the basis for his decision. That section, in pertinent part, reads as follows:

"In the event that an employee returns to light duty employment while partially disabled, an earnings capacity shall not be set based upon actual wages earned until the employee has successfully worked at light duty for a period of at least thirteen (13) weeks."

The above-quoted language did not appear in the statute until 1995.

Mr. Rezendes sustained his work-related injury in 1988. It is well-settled that the rights of an employee with regard to his workers' compensation benefits are governed by the law in effect on the date of his injury. See State v. Healy, 122 R.I. 602, 410 A.2d 432 (1980). The law in effect in 1988 regarding earnings capacity, then designated as § 28-29-2(6) (it was subsequently renumbered in the 1995 Re-enactment) provided, in relevant part, as follows:

"Earnings capacity' means the weekly straight time earnings which an employee could receive if the employee accepted an actual offer of suitable alternative employment. Earnings capacity can also be established . . . based on medical evidence that an employee is capable of performing suitable alternative employment and clear and convincing evidence that work of that type is available in the community."

Based upon the language of the statute in effect at the time of Mr. Rezendes' injury, there are only two (2) methods by which to establish an earnings capacity. The first scenario is if the employee refuses an offer of suitable alternative employment, an earnings capacity could be set based upon what the employee would have earned in the job that was offered. The position of security guard which Mr. Rezendes performed for almost ten (10) years was deemed not to qualify as suitable alternative employment by the Rhode Island Supreme Court in Rezendes v. American Insulated Wire, 754 A.2d 110 (R.I. 2000). Therefore, this method of setting an earnings capacity based upon a refusal or termination of suitable alternative employment is not available.

The second method requires the employer to produce medical evidence that the employee is capable of suitable alternative employment and work of that type is available to him. No such evidence was submitted by the employer. Consequently, the trial judge was clearly wrong in applying the incorrect statute as the basis for setting an earnings capacity in this case. We, therefore, grant the employee's appeal and reverse the decision and decree of the trial judge, thereby vacating the earnings capacity which was set by him. The result of our decision in this matter is to restore the employee's weekly benefits at the full rate for partial incapacity, retroactive to November 13, 2002, the date of the entry of the pretrial order in this case.

Our decision in W.C.C. No. 02-07148 in effect renders the employee's appeal in W.C.C. No. 03-00265 moot. In that matter, the employee alleged that the Memorandum of Agreement did not accurately reflect all of the injuries he sustained in 1988. He further alleged that his incapacity had either returned or increased as of January 27, 2003. The trial judge agreed to amend the description of the injury to include the right leg and back, but denied the contention that the employee's incapacity had returned or increased. The employer did not appeal the trial

judge's decision to amend the description of the injury, so that ruling is final. The employee appealed the denial of his second allegation as to the return or increase of incapacity.

As noted above, the effect of our ruling in W.C.C. No. 02-07148 is to reinstate the employee's weekly benefits for partial incapacity retroactive to November 13, 2002, the date the pretrial order entered setting an earnings capacity. Obviously, any allegation that the employee's incapacity had returned as of January 27, 2003 is moot because his incapacity never ended. In order to establish that his incapacity had increased from partial to total, the employee would have had to produce medical evidence to support that contention. Dr. Motamed, the only medical expert presented by the parties, testified that the employee is partially disabled and is capable of working with certain restrictions. The employee also testified that he felt that he could return to work in his former position as a security guard. There is no evidence to support the allegation that the employee is totally disabled as a result of the 1988 work-related injury.

Based upon the foregoing discussion, the employee's appeal in W.C.C. No. 03-00265 is denied and dismissed, however, as a result of our decision in the companion case, W.C.C. No. 02-07148, we will submit a new decree modifying the trial judge's findings and orders as follows:

1. That the employee has proven by a fair preponderance of the credible evidence that the Memorandum of Agreement does not accurately and completely set forth and describe the nature and location of all of the injuries he sustained on July 23, 1988.
2. That in addition to tendonitis in the left calf and thigh, the employee sustained injuries to his low back and right leg on July 23, 1988 during the course of his employment.

3. That the employee has failed to establish by a fair preponderance of the credible evidence that his incapacity increased from partial to total incapacity as of January 27, 2003 due to the effects of his work-related injuries.

It is, therefore, ordered:

1. That the Memorandum of Agreement dated August 22, 1988 shall be amended to add the low back and right leg to the description of the work-related injury which occurred on July 23, 1988.

2. That the employee's allegation regarding an increase in incapacity as of January 27, 2003 is denied and dismissed.

3. That the employee remains partially disabled.

With regard to the companion case, W.C.C. No. 02-07148, we grant the employee's appeal and reverse the findings and orders of the trial judge. In accordance with our decision in that matter, a new decree shall enter containing the following findings and orders:

1. That the employer has failed to establish that an earnings capacity should be set for the employee.

2. That R.I.G.L. § 28-33-2(3)(i), as enacted in 1995, cannot be applied to the employee, who suffered his work-related injury in 1988.

It is, therefore, ordered:

1. That the employer's petition is denied and dismissed.

2. That the employer shall pay to the employee weekly benefits at the full rate for partial incapacity retroactive to November 13, 2002, the date of the entry of the pretrial order setting an earnings capacity, and continue to pay such benefits until further order of this court or agreement of the parties.

3. That the employer shall reimburse the employee's counsel the sum of Two Hundred Thirty-five and 00/100 (\$235.00) Dollars for the cost of filing the claim of appeal and obtaining the transcript of the trial.

4. That the employer shall pay a counsel fee in the sum of Three Thousand and 00/100 (\$3,000.00) Dollars to Stephen J. Dennis, Esq., attorney for the employee, for services rendered at the pretrial and trial levels of this case.

5. That the employer shall pay a counsel fee in the sum of Three Thousand and 00/100 (\$3,000.00) Dollars to Lauren E. Jones, Esq., Robert S. Thurston, Esq., and Stephen J. Dennis, Esq., attorneys for the employee, for services rendered in the successful prosecution of the appeal in this matter.

We have prepared and submit herewith new decrees in both W.C.C. Nos. 02-07148 and 03-00265 in accordance with the decision of the Appellate Division. The parties may appear on at 10:00 A.M. to show cause, if any they have, why said decrees shall not be entered.

Bertness and Connor, JJ. concur.

ENTER:

Olsson, J.

Bertness, J.

Connor, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

AMERICAN INSULATED WIRE)

)

VS.)

W.C.C. 02-07148

)

MANUEL REZENDES)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the appeal of the respondent/employee from a decree entered on July 16, 2003.

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

1. That the employer has failed to establish that an earnings capacity should be set for the employee.
2. That R.I.G.L. § 28-33-2(3)(i), as enacted in 1995, cannot be applied to the employee, who suffered his work-related injury in 1988.

It is, therefore, ordered:

1. That the employer's petition is denied and dismissed.
2. That the employer shall pay to the employee weekly benefits at the full rate for partial incapacity retroactive to November 13, 2002, the date of the entry of the pretrial order setting an earnings capacity, and continue to pay such benefits until further order of this court or agreement of the parties.

3. That the employer shall reimburse the employee's counsel the sum of Two Hundred Thirty-five and 00/100 (\$235.00) Dollars for the cost of filing the claim of appeal and obtaining the transcript of the trial.

4. That the employer shall pay a counsel fee in the sum of Three Thousand and 00/100 (\$3,000.00) Dollars to Stephen J. Dennis, Esq., attorney for the employee, for services rendered at the pretrial and trial levels of this case.

5. That the employer shall pay a counsel fee in the sum of Three Thousand and 00/100 (\$3,000.00) Dollars to Lauren E. Jones, Esq., Robert S. Thurston, Esq., and Stephen J. Dennis, Esq., attorneys for the employee, for services rendered in the successful prosecution of the appeal in this matter.

Entered as the final decree of this Court this day of

BY ORDER:

ENTER:

Olsson, J.

Bertness, J.

Connor, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq., Lauren E. Jones, Esq., and Diana E. Pearson, Esq., on

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

MANUEL REZENDES

)

)

VS.

)

W.C.C. 03-00265

)

AMERICAN INSULATED WIRE

)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to heard before the Appellate Division upon the appeal of the petitioner/employee from a decree entered on July 16, 2003.

Upon consideration thereof, the appeal of the employee is denied and dismissed, and in accordance with the decision of the Appellate Division, the findings and orders of the trial judge are modified to read as follows:

1. That the employee has proven by a fair preponderance of the credible evidence that the Memorandum of Agreement does not accurately and completely set forth and describe the nature and location of all of the injuries he sustained on July 23, 1988.
2. That in addition to tendonitis in the left calf and thigh, the employee sustained injuries to his low back and right leg on July 23, 1988 during the course of his employment.
3. That the employee has failed to establish by a fair preponderance of the credible evidence that his incapacity increased from partial to total incapacity as of January 27, 2003 due to the effects of his work-related injuries.

It is, therefore, ordered:

1. That the Memorandum of Agreement dated August 22, 1988 shall be amended to add the low back and right leg to the description of the work-related injury which occurred on July 23, 1988.

2. That the employee's allegation regarding an increase in incapacity as of January 27, 2003 is denied and dismissed.

3. That the employee remains partially disabled.

Entered as the final decree of this Court this day of

BY ORDER:

ENTER:

Olsson, J.

Bertness, J.

Connor, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq., Lauren E. Jones, Esq., and Diana E. Pearson, Esq., on
