

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

K-MART CORPORATION)

)

VS.)

W.C.C. 03-03864

)

LEVITON MFG. CO.)

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division pursuant to an order issued to the parties to appear and show cause why the matter should not be summarily decided on the grounds that the petitioner's appeal is controlled by the provisions of R.I.G.L. § 28-33-25(a)(3). The petitioner/appellant is seeking contribution from the respondent for the workers' compensation benefits it has paid to an injured employee, including monies paid as a result of a commutation, or lump sum settlement, of that employee's workers' compensation claim. The petition for contribution, or apportionment, pursuant to R.I.G.L. § 28-34-8, was denied by the trial judge. After considering the arguments of the parties, we grant the petitioner's appeal and remand the matter to the trial judge for further consideration of the merits of the petition.

The petitioner, K-Mart Corporation (hereinafter "K-Mart"), paid weekly workers' compensation benefits to their injured employee, Myrtle Turbitt, pursuant to a Memorandum of Agreement dated August 21, 2002. The Memorandum of Agreement listed the date of injury as December 15, 2001 and the first date of disability as April 12, 2002. The injury is described as right carpal tunnel syndrome, right lateral epicondylitis, and right rotator cuff inflammation. The

employee testified that around June 2003, she commuted her case and received a lump sum settlement.

On June 5, 2003, K-Mart filed this petition for apportionment against Leviton Manufacturing Company (hereinafter “Leviton”). Ms. Turbitt had worked for Leviton prior to her employment with K-Mart. During the trial, the employee testified and K-Mart submitted the deposition of her treating physician, Dr. Arnold-Peter Weiss. The trial judge rendered a bench decision denying the petition on the grounds that R.I.G.L. § 28-33-25, the commutation statute, does not have any provision for apportioning monies paid as part of a lump sum settlement after the employer receives a complete discharge of its liability to the employee. After reviewing the pertinent statutes, we find that the trial judge’s application of this statute was incorrect.

Section 28-33-25 of the Rhode Island General Laws sets out the procedure for commutation proceedings in which the employer’s liability for future weekly payments is settled with a lump sum or structured-type periodic payment. The trial judge in the present matter cited the following language of the statute in support of his decision:

“(a)(3) Upon payment, the employer and insurer shall be entitled to a duly executed release, which fully and finally absolves and discharges the employer and insurer from any and all liability arising out of the injury.”

The release provided for in the statute runs between the employer and the employee. The employer is not releasing any rights it may have pursuant to R.I.G.L. § 28-34-8 to apportionment of the weekly benefits it paid to the employee prior to the commutation and even, potentially, the lump sum settlement. Any apportionment claim is between the employer, K-Mart, and the prior employers and would not be precluded by the commutation and discharge executed by K-Mart and the employee. Such an action would not be an attack on the commutation proceeding itself and would not be barred by the doctrine of *res judicata*.

Section 28-34-8 of the Rhode Island General Laws provides that, in the case of an occupational disease, the total compensation due to the employee shall be collected from the last employer who employed the worker in the type of employment that caused the disease and in which it was contracted. The statute also states that if the disease was contracted during employment with a previous employer, the last employer can seek apportionment of the compensation paid from those previous employers. In the present case, K-Mart paid weekly compensation benefits to the employee up until the time of the commutation. The lump sum settlement paid to the employee constitutes the payment of workers' compensation benefits. We see no reason why K-Mart cannot seek apportionment of both the weekly benefits paid to the employee prior to the commutation and also apportionment of the lump sum settlement.

Based upon the foregoing, we find that the trial judge erred in concluding that the court lacked jurisdiction to address whether the lump sum settlement was subject to apportionment. Therefore, the appeal of K-Mart is granted and the decision and decree of the trial judge is vacated. The matter is remanded so that the trial judge may address the merits of the apportionment petition. We would note that we are not addressing whether this particular injury is, in fact, an occupational disease which would be subject to apportionment. The mere fact that the condition may have resulted from repetitive trauma rather than a specific incident does not automatically categorize it as an occupational disease. See Shoren v. United States Rubber Co., 87 R.I. 319, 140 A.2d 768 (1958); Ashtari v. Carbon Technology, W.C.C. No. 01-03138 (App. Div. 9/24/04). In addition, we would point out that if the trial judge concludes that the benefits may be apportioned, it is entirely within his discretion to apportion some or all of those benefits based upon his determination as to whether the actions of K-Mart in the handling of the claim

were prudent and appropriate. See American Power Conversion v. Benny's, 740 A.2d 1265, 1267 (R.I. 1999).

In accordance with Rule 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

Sowa and Connor, JJ. concur.

ENTER:

Olsson, J.

Sowa, J.

Connor, J.

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DECREE AND ORDER OF REMAND OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the appeal of the petitioner, K-Mart Corporation, from a decree entered on July 7, 2004.

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

1. That pursuant to R.I.G.L. § 28-34-8, the petitioner seeks apportionment of weekly benefits paid to an injured worker for a period subsequent to her work-related injury as well as benefits paid in a lump sum settlement approved by the court pursuant to R.I.G.L. § 28-33-25.

2. That, contrary to the trial judge's conclusion, this court does have jurisdiction to address such a claim.

3. That the language of R.I.G.L. § 28-33-25(a)(3) does not preclude this petitioner from seeking apportionment from the respondent.

It is, therefore, ordered:

1. That the decree of the trial judge entered on July 7, 2004 is hereby vacated.

2. That the matter is remanded to the trial judge for consideration of the merits of the petition and the issuance of a new decision and decree.

Entered as the final decree of this Court this _____ day of _____

BY ORDER:

John A. Sabatini, Interim Administrator

ENTER:

Olsson, J.

Sowa J.

Connor, J.

I hereby certify that copies were mailed to George E. Furtado, Esq., and Peter S. Haydon, Esq., on _____