STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

KERRI PEACE	)	
	)	
VS.	)	W.C.C. 06-03918
	)	
STOP & SHOP	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's appeal from the denial of her request to increase the number of exemptions utilized in calculating her spendable base wage due to the birth of her daughter during her partial incapacity resulting from an injury on November 15, 2001. After review of the record and relevant statutory and case law, we grant the employee's appeal and reverse the decision of the trial judge.

At trial, the parties submitted the following stipulation of facts:

> 1. The employee was injured in the course of her employment on November 15, 2001.
>
> 2. The employee has remained partially incapacitated from November 16, 2001 and continuing.
>
> 3. The employee returned to work in February, 2004 in a Suitable Alternative Employment position and the employee continues to collect varying partial indemnity benefits.
>
> 4. At the time of her injury the employee was married and had no dependent children.
>
> 5. Weekly benefits to date have been based upon a status of married with two exemptions.

> 6. On February 24, 2005 the employee gave birth to McKenzie Ashlyn Peace who resides with and is dependent upon the employee for support.

Joint Ex. A. The parties phrased the sole issue before the trial judge as follows:

> The sole issue before the Court is whether the employee is entitled to have her status changed from married with two exemptions to married with three exemptions as of February 24, 2005 and have her spendable base wage determined accordingly, thereby amending her weekly compensation rate.

Joint Ex. A.

The trial judge denied the employee's petition to increase the number of exemptions, citing R.I.G.L. § 28-33-17(d) as supportive of his decision. The employee then filed this claim of appeal.

Pursuant to R.I.G.L. § 28-35-28(b), the Appellate Division must defer to a trial judge's findings of fact absent a determination that they are clearly erroneous. In the present matter, the parties have stipulated to the findings of fact. Our review is therefore focused on whether the relevant law was properly applied to those facts.

The definition of "spendable earnings," or "spendable base wage," is set out in R.I.G.L. § 28-33-17(a)(3)(i):

> "Spendable earnings" means 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. <u>In all cases</u>, it is to be assumed that the amount withheld would be determined on the basis of <u>expected liability of the employee</u> <u>for tax for the taxable year in which the payments are made</u> without regard to any itemized deductions but <u>taking into account the maximum number of personal exemptions allowable</u> (emphasis added).

This is the statute which must be applied to the facts of the case presently before the panel.

We have previously addressed a change in the number of exemptions affecting the calculation of the spendable base wage in Becker v. Salvation Army, W.C.C. No. 01-05489 (App. Div. 4/24/06). In Becker, the employee was not married and had no dependent children when he was initially injured and disabled for a period of time. At the time he sustained a second period of incapacity, he was married and had one (1) dependent child. A majority of the Appellate Division, in reversing the trial judge, concluded that the employee was entitled to a recalculation of his spendable base wage for the second period of incapacity utilizing three (3) exemptions to account for his spouse and dependent child.

The decision in Becker focused more on analogizing the adjustment to the amount of compensation permitted in other sections of the statute to the situation presented by Becker, rather than the specific language of § 28-33-17(a)(3)(i). At that time, we noted that the decision only addressed the particular factual situation presented in Becker, where the employee had a second distinct period of incapacity. Contrary to the assertions of the employer in the present matter, that statement does not translate into a declaration that adjustment for additional exemptions is not permitted during a continuous period of incapacity. Rather, we left that determination to be made in the appropriate case.

The question now presented to the Appellate Division is whether an employee's spendable base wage may be recalculated due to a change in exemptions during the course of a continuing period of incapacity. A close reading of the specific language of R.I.G.L. § 28-33-17(a)(3)(i) leads this panel to respond in the affirmative.

In examining the language of a particular statute and attempting to ascertain the manner in which it should be applied, the court must begin with the most basic principle of statutory construction, that we give the words of the statute their plain and ordinary meaning. State v.

Healy, 122 R.I. 602, 607, 410 A.2d 432, 434 (1980). Unless the language is found to be ambiguous, there is no room for interpretation or extension of the wording; the specific language must be applied literally. Roe v. Affleck, 120 R.I. 679, 688, 390 A.2d 361, 366 (1978).

Section 28-33-17(a)(3)(i) states that the amount deducted from the gross average weekly wage to arrive at the employee's spendable earnings is the "expected liability of the employee for tax for the taxable year in which the payments are made . . . taking into account the maximum number of personal exemptions allowable." R.I.G.L. § 28-33-17(a)(3)(i)(emphasis added). The statute does not refer to the tax liability for the year the injury occurred; it specifically states the year in which the payments are made. Furthermore, it does not limit the maximum number of personal exemptions to the number on the date of injury, but again refers back to the maximum number of personal exemptions allowable for the taxable year in which the payment of benefits is made.

We find no ambiguity in the terminology employed in this statute. In the event that an employee's personal exemptions change during the time that he or she is receiving weekly benefits, the amount deducted must be adjusted to the expected tax liability for that taxable year in which he or she receives the benefits, taking into account the maximum number of allowable exemptions for that year. The spendable base wage is not locked into a defined amount determined as the circumstances exist on the date of injury.

We are mindful of the decision of the Rhode Island Supreme Court in State v. Healy, 122 R.I. 602, 410 A.2d 432 (1980). That case involved a question of retroactive application of a statute allowing unilateral termination of weekly benefits when an employee returned to work at wages equal to or in excess of his pre-injury average weekly wage. In determining whether retroactive application of the statute would violate vested rights, the Court stated:

> We have repeatedly held that an employee's right to compensation must be determined according [sic] the Workers' Compensation statutes existing at the time of the injury. Parkinson v. Leesona Corp., 115 R.I. 120, 126, 341 A.2d 33, 37 (1975); Romano v. B. B. Greenberg Co., *supra*, at 136, 273 A.2d at 317 (1971). A statute enacted thereafter cannot be applied retroactively to modify a preexisting compensation right which has already vested in the injured employee. *See* Cipriano v. Personnel Appeal Bd., *supra*, at 144, 330 A.2d at 73-74.

Id. at 608, 410 A.2d at 435.

In the matter presently before the panel, we are not applying a statute retroactively to alter the amount of compensation received by the employee; rather the statute in effect at the time of the employee's injury specifically provides for the potential adjustment of the amount of compensation if the number of allowable exemptions changes. Pursuant to the terms of the statute itself, the employee does not have a vested right to a defined amount of compensation set on the date of injury that will never change; it specifically provides for some potential fluctuation. Therefore, the principle enunciated in Healy does not apply in these circumstances. On the contrary, we believe we would be remiss if we ignored the plain language of R.I.G.L. § 28-33-17(a)(3)(i).

Regrettably, our discussion in Becker, regarding dependency benefits under R.I.G.L. § 28-33-17(c), may have caused a loss of focus on the real statute in question in these cases, § 28-33-17(a)(3)(i). We would now make clear that it is our holding that the specific language of R.I.G.L. § 28-33-17(a)(3)(i) provides that the deduction utilized to arrive at the spendable base wage is the expected tax liability of the employee for the taxable year in which the payment of compensation benefits is made, taking into account the maximum number of exemptions allowed at the time the benefits are paid. Therefore, if the number of exemptions changes, the amount

reflecting the expected tax liability of the employee would change, thereby changing the spendable base wage.

We expect that the argument will be made that permitting re-calculation of the spendable base wage every time the number of exemptions changes will impose an untenable burden upon insurers. Such a contention lacks substance and does not present grounds for ignoring the plain language of the statute. The employee bears the burden of notifying the insurer that the number of exemptions has changed; there is no monitoring or oversight required of the insurer. After notification from the employee, the insurer can make the appropriate adjustment. Considering the relatively low number of cases that would even qualify for some adjustment, this process is not unduly burdensome.

We would also note that an employee's exemptions may decrease in certain circumstances, as well as increase. A divorce or a change in the eligibility of a child as an exemption is an example of this type of situation. If the number of exemptions is permanently fixed on the date of the injury, the employee's spendable base wage is improperly inflated. He or she would receive an increased amount of weekly benefits to support dependents for whom he or she is no longer responsible and for whom he or she can no longer claim a tax exemption. The clear language of the statute provides that an employee's spendable base wage and resulting compensation rate must be adjusted accordingly for the appropriate taxable year.

Based upon the foregoing, the employee's appeal is granted and the trial decision and decree are vacated. This matter was tried on a stipulation of facts at the trial level. No testimony was presented, nor was memoranda filed. At the appellate level, counsel for the employee filed a two (2) page statement of the case which was simply a duplication of the reasons of appeal. We did hear oral argument on the matter as well. Considering these factors and the very limited

scope of the issue presented by the case, we conclude that a counsel fee in the sum of Five Thousand One Hundred and 00/100 ($5,100.00) Dollars is fair and reasonable for the services rendered at the pretrial, trial, and appellate levels. In accordance with our decision, a new decree shall enter containing the following findings of fact:

1. That the employee was injured in the course of her employment with the respondent on November 15, 2001.

2. That at the time of her injury, the employee was married and had no dependent children.

3. That the employee has been receiving weekly benefits for partial incapacity from November 16, 2001 and continuing, and the amount of those benefits has been based upon her status of married with two (2) exemptions for purposes of calculating her spendable base wage pursuant to R.I.G.L. § 28-33-17(a)(3)(i).

4. That on February 24, 2005, the employee gave birth to McKenzie Ashlyn Peace who resides with and is dependent upon the employee for support.

It is, therefore, ordered:

1. That the employee's claim of appeal is granted and the decision and decree of the trial judge are hereby vacated.

2. That the employer shall recalculate the employee's spendable base wage in accordance with R.I.G.L. § 28-33-17(a)(3)(i) to take into account her status of married with three (3) exemptions effective February 24, 2005 and adjust her compensation rate accordingly.

3. That the employer shall reimburse the employee's counsel the sums of Forty-five and 00/100 ($45.00) Dollars for the filing of the petition and the claim of appeal, and Eighteen and 00/100 ($18.00) Dollars for the cost of the trial transcript.

4. That the employer shall pay a counsel fee in the sum of Five Thousand One Hundred and 00/100 ($5,100.00) Dollars to John M. Harnett, Esq., attorney for the employee, for services rendered at the trial level and in the successful prosecution of the appeal.

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

Connor and Hardman, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Connor, J.

_____
Hardman, 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 petitioner/employee. 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 employee was injured in the course of her employment with the respondent on November 15, 2001.

2. That at the time of her injury, the employee was married and had no dependent children.

3. That the employee has been receiving weekly benefits for partial incapacity from November 16, 2001 and continuing, and the amount of those benefits has been based upon her status of married with two (2) exemptions for purposes of calculating her spendable base wage pursuant to R.I.G.L. § 28-33-17(a)(3)(i).

4. That on February 24, 2005, the employee gave birth to McKenzie Ashlyn Peace who resides with and is dependent upon the employee for support.

It is, therefore, ordered:

1. That the employee's claim of appeal is granted and the decision and decree of the trial judge are hereby vacated.

2. That the employer shall recalculate the employee's spendable base wage in accordance with R.I.G.L. § 28-33-17(a)(3)(i) to take into account her status of married with three (3) exemptions effective February 24, 2005 and adjust her compensation rate accordingly.

3. That the employer shall reimburse the employee's counsel the sums of Forty-five and 00/100 ($45.00) Dollars for the filing of the petition and the claim of appeal, and Eighteen and 00/100 ($18.00) Dollars for the cost of the trial transcript.

4. That the employer shall pay a counsel fee in the sum of Five Thousand One Hundred and 00/100 ($5,100.00) Dollars to John M. Harnett, Esq., attorney for the employee, for services rendered at the pretrial and trial levels and in the successful prosecution of the appeal.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Connor, J.

_____
Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to John M. Harnett, Esq., and Jessica L. Cleary, Esq., on

_____