STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

GERALD RIENDEAU, SR.	)	
	)	
VS.	)	W.C.C. 2008-07172
	)	
TWINS CONSTRUCTION, INC.	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's appeal from the denial of his petition to enforce in which he alleges that the employer unilaterally reduced his weekly compensation rate, specifically eliminating the dependency benefit, when the receipt of the cost-of-living adjustment in May 2008 resulted in a compensation rate which exceeded eighty percent (80%) of his average weekly wage. The trial judge concluded that the language of R.I.G.L. § 28-33-17(c)(1) mandates that the sum of any dependency benefits and the weekly compensation rate shall not exceed eighty percent (80%) of the employee's average weekly wage. He also found that the employer was permitted to act unilaterally in this case and was, therefore, not in contempt. After reviewing the record in this matter and considering the arguments of the parties, we grant the employee's appeal and reverse the decision and decree of the trial judge.

The parties submitted a stipulation of facts to the trial judge, along with two (2) supporting documents. The employee sustained a herniated lumbar disc at L4-5 on March 15, 1995. A Memorandum of Agreement was issued on June 14, 1995 providing for the payment of

weekly benefits for partial incapacity beginning March 16, 1995. The employee's average weekly wage was set at Seven Hundred and 00/100 ($700.00) Dollars resulting in a base weekly compensation rate of Four Hundred Twenty-two and 78/100 ($422.78) Dollars. It was also noted that the employee had two (2) dependents.

On March 23, 2001, a final decree of the Appellate Division was entered which amended the Memorandum of Agreement to state that the employee was totally disabled as of March 16, 1995 and continuing. Under the terms of this decree, the employee was entitled to the payment of dependency benefits pursuant to R.I.G.L. § 28-33-17(c)(1) and cost-of-living adjustments under R.I.G.L. § 28-33-17(f)(1) retroactive to March 16, 1995 and continuing.

Following the May 2008 cost-of-living adjustment (hereinafter "COLA"), the employee's weekly compensation rate increased to Five Hundred Seventy-five and 99/100 ($575.99) Dollars. With the addition of Fifteen and 00/100 ($15.00) Dollars for one (1) dependent (apparently the number of dependents decreased from two (2) to one (1) at some point), the employee's weekly benefit would be Five Hundred Ninety and 99/100 ($590.99) Dollars. Eighty percent (80%) of the employee's average weekly wage is Five Hundred Sixty and 00/100 ($560.00) Dollars. On October 22, 2008, the employer stopped payment of the dependency benefits pursuant to R.I.G.L. § 28-33-17(c)(1) because the aggregate of the weekly benefit and the dependency benefit exceeded eighty percent (80%) of the employee's average weekly wage. The employee then filed a petition to enforce alleging that the employer is in contempt for failure to pay the dependency benefit.

The appellate division is precluded from reviewing the findings of fact rendered by a trial judge without initially determining that they are clearly erroneous. R.I.G.L. § 28-35-28(b). In the present matter, the pertinent facts of the case have been stipulated by the parties. The focus

of our review is therefore whether the trial judge correctly applied the law to the scenario presented by the stipulated facts.

A number of calculations are involved in arriving at the amount of weekly benefits to be paid an injured employee. The average weekly wage is determined in accordance with R.I.G.L. § 28-33-20, and very generally speaking, is the average of the gross wages of the employee for the thirteen (13) weeks prior to the injury. "Spendable earnings" is the average weekly wage reduced by an amount reflecting the employee's liability for federal and state income taxes, and Social Security and Medicare taxes (under FICA). Under the provisions of R.I.G.L. § 28-33-17(a)(1), an employee who is totally disabled receives a weekly benefit equal to seventy-five percent (75%) of his spendable earnings.

While the employee is totally disabled, he is also entitled to receive dependency benefits, in addition to his weekly benefit, as provided in R.I.G.L. § 28-33-17(c)(1) and (2).

> "(1) Where the employee has persons conclusively presumed to be dependent upon him or her or in fact so dependent, the sum of fifteen dollars ($15.00) shall be added to the weekly compensation payable for total incapacity for each person wholly dependent on the employee, . . ., but in no case shall the aggregate of those amounts exceed eighty percent (80%) of the average weekly wage of the employee, ...
> (2) The dependency allowance shall be in addition to the compensation benefits for total disability otherwise payable under the provisions of this section. . . ."

Dependency benefits are separate and distinct payment which may be paid directly to a dependent in certain circumstances (*see* § 28-33-17(e)), and may be suspended without court order when a dependent child reaches eighteen (18) years of age. Marshall v. Kaiser Aluminum & Chem. Corp., 121 R.I. 624, 402 A.2d 575 (1979).

An employee who is totally disabled for more than fifty-two (52) weeks is entitled to receive a COLA in accordance with the provisions of R.I.G.L. § 28-33-17(f).

> "(1) Where any employee's incapacity is total and has extended beyond fifty-two (52) weeks, regardless of the date of injury, payment made to all totally incapacitated employees shall be increased as of May 10, 1991, and annually on the tenth of May after that as long as the employee remains totally incapacitated.
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> (6) This section applies only to the payment of weekly indemnity benefits to employees as described in subdivision (1) of this subsection, and does not apply to specific compensation payments for loss of use or disfigurement or payment of dependency benefits or any other benefits payable under the Workers' Compensation Act."

The COLA provision allows for an increase in the amount of weekly compensation paid to totally disabled employees after a period of one (1) year in an attempt to address the effect of inflation. The Legislature apparently recognized that after a period of time, due to inflation, the base weekly compensation rate established at the time of the injury would no longer provide an adequate replacement for lost wages.

The Appellate Division previously addressed the issue presented in this matter in Higgins v. Art Mold/Pierre Cardin, W.C.C. No. 91-07909 (App. Div. 12/1/92). The facts in Higgins are virtually identical to those stipulated to by the parties in this case. The Appellate Division in Higgins, in denying the employer's appeal, indicated that allowing the employer to effectively eliminate the dependency benefit would violate the legislative intent behind the COLA provision.

> If we accepted the employer's position, we would effectively be changing the language of R.I.G.L. § 28-33-18.3(B)(1) by adding a provision that disabled employees who meet the criteria set out in the section qualify for the COLA benefits only so long as the additional payment, when added to other benefits already being received, does not result in a total benefit package in excess of eighty percent (80%) of the average weekly wage. This we may not do.

We find no reason to deviate from the conclusion reached by the Appellate Division in Higgins. The eighty percent (80%) limitation is only applicable in the initial calculation of the weekly benefit to be paid to the totally disabled injured worker. It is analogous to the limitation imposed by § 28-33-17(a)(1) which provides that the maximum rate for weekly benefits for total disability shall not exceed one hundred fifteen percent (115%) of the state average weekly wage, regardless of the employee's actual average weekly wage. An employee's weekly benefits may be initially capped at the maximum due to this provision. If he remains totally disabled for the required time period, the employee would qualify for the COLA. Obviously the addition of the COLA to his weekly benefit will result in a payment in excess of the maximum. To deny the COLA in this situation, as in the case presently before the panel, would render the COLA provision meaningless and violate the legislative intent behind its enactment.

We would also note that the COLA is apparently considered as a distinct type of payment in the Workers' Compensation Act. Section 28-33-17(f)(2) provides that if an employee is found to be partially disabled after receiving one (1) or more COLAs, his weekly benefits payment shall be reduced to an amount "equal to the payment in effect prior to his or her most recent cost of living adjustment." Id. We believe this provides further support for our conclusion that the COLA is not to be taken into account in determining the maximum allowable benefit under §§ 28-33-17(a)(1) and 28-33-17(c)(1).

Based upon the foregoing discussion, the appeal of the employee is granted and the decision and decree of the trial judge are hereby vacated. A new decree shall enter containing the following findings and orders:

1. That the employee has been totally disabled since March 16, 1995 due to the effects of a work-related injury he sustained on March 15, 1995.

2. That the employee has one (1) dependent.

3. That following the May 2008 cost-of-living adjustment pursuant to R.I.G.L. § 28-33-17(f)(1), the employer, relying on R.I.G.L. § 28-33-17(c)(1), unilaterally stopped payment of the dependency benefit on October 22, 2008 because the aggregate of those benefits exceeded eighty (80%) percent of the employee's average weekly wage.

4. That the employer is in contempt of the outstanding decree entered in W.C.C. No. 96-00736, which ordered the ongoing payment of total disability benefits, including dependency benefits.

It is, therefore, ordered:

1. That the employer shall pay dependency benefits to the employee retroactive to October 22, 2008 and continuing so long as the child or spouse qualifies as a dependent under the Workers' Compensation Act and the employee remains totally disabled.

2. That the employer shall pay interest on the amount of retroactive benefits payable from May 7, 2009 (six (6) months after the filing of the petition) to the date the payment is made in accordance with R.I.G.L. § 28-312(c).

3. That the employer shall reimburse John M. Harnett, Esq., counsel for the employee, the sum of Fifty-five and 00/100 ($55.00) Dollars for the cost of the transcript of the trial proceedings and the filing of the claim of appeal.

4. That the employer shall pay a counsel fee in the amount of Five Thousand and 00/100 ($5,000.00) Dollars to John M. Harnett, Esq., for services rendered during the trial and during the appellate proceedings.

We have prepared and submit herewith a new decree in accordance with our decision. 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

Hardman and Ferrieri, JJ. concur.

ENTER:

_____
Olsson, J.

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Hardman, J.

_____
Ferrieri, J.

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division on the claim of appeal of the petitioner/employee from a decree entered on October 6, 2009. Upon consideration thereof, the appeal of the employee is granted and the decision and decree of the trial judge are vacated. In accordance with the decision of the Appellate Division, the following findings of fact are made:

1. That the employee has been totally disabled since March 16, 1995 due to the effects of a work-related injury he sustained on March 15, 1995.

2. That the employee has one (1) dependent.

3. That following the May 2008 cost-of-living adjustment pursuant to R.I.G.L. § 28-33-17(f)(1), the employer, relying on R.I.G.L. § 28-33-17(c)(1), unilaterally stopped payment of the dependency benefit on October 22, 2008 because the aggregate of those benefits exceeded eighty (80%) percent of the employee's average weekly wage.

4. That the employer is in contempt of the outstanding decree entered in W.C.C. No. 96-00736, which ordered the ongoing payment of total disability benefits, including dependency benefits.

It is, therefore, ordered:

1. That the employer shall pay dependency benefits to the employee retroactive to October 22, 2008 and continuing so long as the child or spouse qualifies as a dependent under the Workers' Compensation Act and the employee remains totally disabled.

2. That the employer shall pay interest on the amount of retroactive benefits payable from May 7, 2009 (six (6) months after the filing of the petition) to the date the payment is made in accordance with R.I.G.L. § 28-312(c).

3. That the employer shall reimburse John M. Harnett, Esq., counsel for the employee, the sum of Fifty-five and 00/100 ($55.00) Dollars for the cost of the transcript of the trial proceedings and the filing of the claim of appeal.

4. That the employer shall pay a counsel fee in the amount of Five Thousand and 00/100 ($5,000.00) Dollars to John M. Harnett, Esq., for services rendered during the trial and during the appellate proceedings.

Entered as the final decree of this Court this day of

PER ORDER:

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John A. Sabatini, Administrator

ENTER:

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Olsson, J.

_____
Hardman, J.

_____
Ferrieri, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to John M. Harnett, Esq., and Francis T. Connor, Esq., on

_____