STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

MARGARET M. KIERNAN	)	
	)	
VS.	)	W.C.C. 2008-07985
	)	
LIFESPAN CORP.	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's appeal from the trial judge's denial of her request for recalculation of her average weekly wage pursuant to R.I.G.L. § 28-33-20.1(a) after she was laid off from her suitable alternative employment position. After review of the pertinent statutes and consideration of the arguments of the parties, we deny and dismiss the employee's appeal and affirm the decision and decree of the trial judge.

The parties stipulated to the following facts:

> "1) The petitioner has been a long time employee of the respondent as a revenue analyst.
>
> 2) On January 3, 2006, she sustained right carpal tunnel syndrome, right thumb A-1 pulley release and tendon tenolysis, right ring finger A-1 pulley release and tendon tenolysis, right small finger A-1 pulley release and tendon tenolysis, left carpal tunnel syndrome, left index finger stenosing tenosynovitis, and left middle finger stenosing tenosynovitis.
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> 3) The petitioner's pre-injury average weekly wage was $842.99.
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> 4) On August 13, 2007, the employee returned to suitable alternative employment at Lifespan, pursuant to RIGL §28-33-18.2.

> 5) On March 26, 2008, Lifespan laid-off the employee, terminating her suitable alternative employment for reasons other than misconduct.
>
> 6) Between August 13, 2007 and March 26, 2008, the employee worked in excess of 26 weeks, the last 13 of which she earned an average weekly wage of $892.84.
>
> 7) The petitioner has been at least partially incapacitated at all times material hereto.
>
> 8) The petitioner was provided a wage statement on February 3, 2009, which was requested by letter on November 9, 2008, reference in Paragraph 9 (g), below.
>
> * * * *"

Ct. Ex. 1. In the Stipulation of Facts and Issues submitted to the trial judge, the parties also agreed to admit a number of documents into evidence and agreed that the issue presented was whether the employee was entitled to recalculation of her average weekly wage pursuant to R.I.G.L. § 28-33-20.1(a).

The trial judge denied the employee's request for recalculation of her average weekly wage because she did not leave work due to a recurrence of her injury, as required by the terms of § 28-33-20.1(a), but rather due to a layoff. He also noted that R.I.G.L. § 28-33-18.2(d), which is part of the statute governing suitable alternative employment, provides that in the situation presented by this case, the employee is entitled to receive compensation benefits at the rate she received prior to the acceptance of the suitable alternative employment. The employee filed a timely claim of appeal from the trial judge's decision.

In reviewing a trial judge's decision, we are guided by the standard set forth in R.I.G.L. § 28-35-28(b), which states that "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." In the present matter, the essential

facts have been stipulated by the parties. Consequently, our focus is simply whether the pertinent statute was properly applied to those facts by the trial judge.

Prior to 1990, an employee who sustained a return of incapacity, or recurrence, due to the effects of his work-related injury, would be paid weekly benefits based upon the average weekly wage established at the time of the original injury and incapacity. *See* Mignone v. Shapewood Design, Inc., 525 A.2d 1297, 1300 (R.I. 1987). In 1990, the legislature enacted R.I.G.L. § 28-33-20.1(a) which permitted a recalculation of the average weekly wage in certain specific instances.

> In the event a person collecting benefits under this chapter, regardless of the date of injury, has returned to employment for a period of twenty-six (26) weeks or more and suffers a recurrence of the injury which precipitated the person collecting benefits under this chapter, the average weekly wage shall be ascertained by dividing the gross wages earned by the injured worker in employment by the employer in whose service he or she is injured during the thirteen (13) weeks immediately preceding the week in which he or she suffered the recurrence, by the number of calendar weeks during which, or any portion of which, the worker was actually employed by that employer.

R.I.G.L. § 28-33-20.1(a) (emphasis added).

In determining how a statute should be interpreted and applied, we first look at the ordinary meaning of the statutory language. "Where, as here, the statute is unambiguous on its face and expresses a clear and sensible meaning, this court must interpret the statute according to the plain and literal meaning contained therein." Penn-Dutch Kitchens, Inc. v. Grady, 651 A.2d 731, 733 (R.I. 1994) (citations omitted). The language of §28-33-20.1(a) could not be any clearer on its face. In order to be eligible for recalculation of the average weekly wage, an employee must return to some type of employment for twenty-six (26) weeks and then suffer a recurrence, which is a return of incapacity due to the effects of the work-related injury.

In the present matter, it is agreed that Ms. Kiernan returned to work for more than twenty-six (26) weeks; however, she did not stop working due to a recurrence. The parties agree that she was laid off from her suitable alternative employment position. There is no evidence that she was no longer able to perform the duties of that position due to the effects of her work-related injury. Furthermore, the parties stipulated that the employee has remained partially incapacitated since the date of injury. There has never been a determination that her incapacity has ended, nor did she execute a suspension agreement agreeing to stop her weekly benefits. As such, the employee could not sustain a recurrence, or return of incapacity, when the initial incapacity never ended. Therefore, in accordance with the clear language of the statute, Ms. Kiernan is not eligible for recalculation of her average weekly wage pursuant to § 28-33-20.1(a).

The employee returned to work with the employer in a suitable alternative employment position, which is governed by the provisions of R.I.G.L. § 28-33-18.2. In particular, § 28-33-18.2(d) addresses the situation when suitable alternative employment is terminated by the employer.

> If the suitable alternative employment is terminated by the employer for reasons other than misconduct by the employee, the injured employee shall be entitled to be compensated from the employer in whose employ he or she was injured at the rate to which the employee was entitled prior to acceptance of the employment after notice by the employee to the employer in whose employ he or she was injured.

Ms. Kiernan's situation clearly falls within the confines of this provision according to the plain language of the statute. Her suitable alternative employment was terminated by the employer by a layoff, not for misconduct of the employee. Consequently, the employee is entitled to be compensated at the rate to which she was entitled prior to her acceptance of the suitable alternative employment.

In her reasons of appeal, the employee argues that § 28-33-20.1(a), which was enacted in 1990, takes precedence over § 28-33-18.2(d) because the latter provision was enacted in 1982 and is a prior inconsistent enactment dealing with the same subject. Initially we would note that "the Legislature must be presumed to know how to amend and repeal statutes." Brennan v. Kirby, 529 A.2d 633, 637 (R.I. 1987). If the Legislature intended to allow the recalculation of the average weekly wage for employees when their suitable alternative employment terminated for reasons other than their misconduct, it would have amended § 28-33-18.2(d) to permit it at the time § 28-33-20.1(a) was enacted. The fact that it was not amended reflects an intention to limit the recalculation to those employees who fall within the specific criteria of the statute.

In addition, a review of the two statutory provisions reveals that they do not deal with the same subject matter. Section 28-33-20.1(a) addresses the situation of an employee who has returned to work after an injury and then is unable to continue working due to the effects of the work-related injury. The statute allows a recalculation of the employee's average weekly wage in order to more accurately reflect his true loss of earnings at the time of the recurrence. The employee is then able to reap the benefit of any increase in his wages over the minimum twenty-six (26) week period of employment preceding the recurrence, rather than being locked into a compensation rate dating back to the time of the original injury and incapacity.

In contrast, § 28-33-18.2(d) deals with the very specific relationship created by the offer and acceptance of suitable alternative employment. It applies to an employee who remains partially disabled due to the effects of a work-related injury and accepts a suitable alternative employment position. The provision addresses what happens if the suitable alternative employment is terminated by either the employer or the employee. This is clearly distinguishable from the recalculation statute which applies to an employee who recovers

sufficiently to return to employment but then must stop working due to the effects of the work-related injury. We find that these two (2) statutes deal with two (2) very different subjects and are therefore not inconsistent.

The employee also contends that failure to apply the recalculation statute to employees whose suitable alternative employment is terminated places them in an inferior position to other employees who return to work and causes them to suffer a loss or diminution of monetary benefit in violation of § 28-33-18.2(b). In fact, the statute provides certain protections to a partially disabled employee who accepts a suitable alternative employment position which are not available to other employees. In the event that the employer terminates the suitable alternative employment for reasons other than the misconduct of the employee, the employer must immediately resume payment of weekly compensation benefits to the employee, even if the employee was earning wages in excess of her pre-injury wages.

This protection is not afforded to other employees who simply return to their regular jobs or some other type of employment earning wages equal to or in excess of their pre-injury average weekly wage. If such an employee stops working, he or she must establish that they were no longer able to work due to the effects of the work-related injury in order to resume receiving workers' compensation benefits. If the employee is simply laid off, as Ms. Kiernan was, they are not eligible for workers' compensation benefits. One could argue that the employee in a suitable alternative employment position is in a superior, rather than inferior, position as compared to other injured workers. *See* Pion v. Bess Eaton Donuts Flour Co., 637 A.2d 367, 373 (R.I. 1994).

For the foregoing reasons, we deny and dismiss the employee's appeal and affirm the decision and decree of the trial judge. 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

Connor and Ferrieri, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Connor, J.

_____
Ferrieri, J.

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the petitioner/employee and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on July 22, 2009 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

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Olsson, J.

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Connor, J.

_____
Ferrieri, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Tedford B. Radway, Esq., and Berndt W. Anderson, Esq., on

_____