STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

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| NATIONAL AMUSEMENTS | ) | |
| | ) | |
| VS. | ) | W.C.C. 2010-02828 |
| | ) | |
| REBECCA McCRAY | ) | |

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employer's appeal from the trial judge's decision and decree affirming his pretrial order in which he delayed implementation of a reduction in the employee's weekly benefits pursuant to R.I.G.L. § 28-33-18(b) for a little over eight (8) months. After a thorough review of the record and consideration of the arguments of the respective parties, we deny the employer's appeal and affirm the decision and decree of the trial judge.

The employee suffered a disc herniation at C5-6 as the result of a motor vehicle accident occurring on February 22, 2007 during the course of her employment with National Amusements. The parties shortly thereafter entered into a memorandum of agreement which provided for the payment of partial incapacity benefits from February 26, 2007 and continuing. Pursuant to a pretrial order entered in W.C.C. No. 2010-00199, the employee was found to be at maximum medical improvement (MMI) as of February 2, 2010. On May 18, 2010, the employer filed the petition to review in this matter requesting that the court order a reduction in the employee's weekly benefits to seventy percent (70%) of her weekly compensation rate in

accordance with R.I.G.L. § 28-33-18(b). The trial judge granted the petition on June 7, 2010, but delayed implementation of the reduction until February 24, 2011. The employer timely filed a claim for trial.

The evidence offered before the court during the trial included both the testimony of the employee as well as her job search folder containing copies of job applications she submitted and a list of employers to whom she submitted applications and/or contacted regarding employment. On August 16, 2010, approximately two (2) months after the pretrial conference, the employee, who resides in Springfield, Massachusetts, testified that she had not yet begun to look for work, had not sought out the assistance of an employment agency, had not sent out any employment applications nor was she currently using any online job listing sites such as Monster.com although she did have internet access in her home. The court also inquired directly about the state of the employee's job search:

> Q: So, it's your testimony that you have not, as of today, sought employment anywhere?
> A: Not actually filled out applications, no I have not.

Tr. at 12-13.

Ms. McCray, a high school graduate, was employed by National Amusements as a manager in a movie theater since July 1999. Her job involved overseeing the entire operation of the theater, including the ticket booth, projection booth, and concession stand. She explained that her previous jobs were similar management and/or cashier positions in convenience stores and gas stations. The employee expressed the desire to work, but indicated that she had no idea what she could do with the physical limitations she has as a result of the injury. She explained that she experiences sharp pains in her neck radiating across her left shoulder and down her left arm to her hand. She also cannot sit, stand or walk for extended periods of time without

developing severe pain. Ms. McCray stated that she limits the amount of driving she does because of the amount of medication she takes and because she cannot turn her head. A printout of her prescriptions was admitted into evidence and indicates that she takes Flexeril, Tramadol (previously Vicodin), and Cymbalta, on a daily basis.

The trial judge continued the trial until September 14, 2010 which allowed the employee, upon the advice of her counsel, an additional period to begin a more suitable job search. The employee testified again before the court on that date and stated on direct examination that as of August 23, 2010, she began submitting employment applications, either in person or via the internet, at thirteen (13) various businesses in the Springfield, Massachusetts area. At the instruction of her counsel, the employee kept a log of the dates and businesses where she applied and these applications were submitted primarily at retail businesses located within the Eastfield Mall in Springfield, Massachusetts. Mrs. McCray further testified that not all of these businesses were hiring at the time she applied and some businesses stated the positions she was seeking may not be appropriate for a person with her limitations, such as an inability to be on her feet for long periods of time. During examination by the employer, the employee admitted that she had not yet sought the assistance of an employment agency, searched help wanted advertisements, joined a job listing website such as Monster.com, nor had she prepared a resume or followed up with any of the businesses on the status of her employment applications.

In affirming the pretrial order implementing the reduction as of February 24, 2011, the trial judge noted the court has the discretion under the statute to delay implementation of the reduction "based upon what it perceives to be an honest attempt by the employee to seek gainful employment." Dec. at 2. Although the employee did not begin searching for a job until August 23, 2010, approximately five (5) months after being found at maximum medical improvement,

and was not successful in finding work, the trial judge was satisfied with her efforts. Citing the poor state of the present job market, the trial judge found her efforts to be "both sincere and genuine" and appropriate to meet the statutory duty to actively seek employment. Consequently, he concluded that delaying the implementation of the reduction until February 24, 2011 was not unreasonable. The employer filed a timely claim of appeal from the trial judge's decision and decree which was entered on December 17, 2010.

The parameters of appellate review of a decision rendered by a trial judge are very limited and are 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." Furthermore, the Appellate Division will only conduct a *de novo* review of the evidence when a finding made by the trial judge is first determined to be clearly wrong. Grimes Box Co. v. Miguel, 509 A.2d 1002, 1004 (R.I. 1986).

The employer has filed three (3) reasons of appeal in which it contends that the trial judge erred in delaying implementation of the reduction because the employee did not make any effort to find employment after the finding of maximum medical improvement; the employee did not make a good faith effort to find employment after being provided the opportunity to do so; and the trial judge overlooked and misconstrued the evidence when he ruled that she had satisfied her duty to seek suitable employment in good faith. After thoroughly reviewing the record and the relevant statutes and case law, we find that the appeal should be denied and dismissed by reason of mootness as there is no relief available to the employer that this court can provide.

The relief the employer seeks, implementation of the statutory thirty percent (30%) reduction, took effect on February 24, 2011, a little over two (2) months after the trial judge rendered his decision and entered his decree. The employer argues that the reduction should

have been implemented the day of the pretrial conference, June 7, 2010. Assuming, *arguendo*, that we agreed with the employer and entered a decree implementing the reduction as of June 7, 2010, we are unaware of any provision in the Workers' Compensation Act (the Act) which would enable the employer to recoup the extra thirty percent (30%) of the weekly benefits which have already been paid out between June 7, 2010 and February 24, 2011.

Rhode Island General Laws § 28-35-33 states "[i]f compensation payments have been ordered by the workers' compensation court, those payments shall be made and continued until reversal…[p]rovided, that an employee shall not be required to make restitution to the employer for any benefits paid regardless of the outcome of the appeal." This explicit statutory language does not afford the employer with a mechanism within the Act to seek reimbursement from the employee for any overpayment resulting from modification of the trial judge's decree by the appellate panel. The legislature has specifically stated that an employee cannot be compelled to reimburse the employer for any overpayment resulting from the modification or reversal of a trial judge's decree. The lack of any statutory relief available to the employer strongly suggests that it would serve little purpose to further litigate this matter.

A matter is moot under Rhode Island law "if the original complaint raised a justiciable controversy, but events occurring after the filing have deprived the litigant of a continuing stake in the controversy." Cicilline v. Almond, 809 A.2d 1101, 1105 (R.I. 2002) (per curiam) (quoting Associated Builders & Contractors of Rhode Island, Inc. v. City of Providence, 754 A.2d 89, 90 (R.I. 2000) (per curiam)). The Rhode Island Supreme Court has stated that it will not decide a moot case unless the issues raised are "of extreme public importance, which are capable of repetition but which evade review." Sullivan v. Chafee, 703 A.2d 748, 752 (R.I. 1997) (quoting Morris v. D'Amario, 416 A.2d 137, 139 (R.I. 1980)). "[C]ases demonstrating extreme public

importance are usually matters that relate to important constitutional rights, matters concerning a person's livelihood, or matters concerning citizen voting rights." Associated Builders, 754 A.2d at 91.

The employer's original argument on appeal, that the trial judge should have implemented the statutory reduction of benefits on the date of the pretrial conference, raised a justiciable controversy; however, the fact that the reduction took effect during the pendency of this appeal has deprived the employer of a continuing stake in the controversy. The issues raised in the employer's appeal do not involve matters of "extreme public importance, which are capable of repetition but which evade review," and therefore the case does not fall within the exception to the mootness doctrine.

The Act does contain some provisions allowing an employer to take credit for an overpayment of benefits in an amount set by the court against future weekly benefits. Sections 28-33-17.1(b) and 28-33-18.1(b) pertain to situations where the employee is gainfully employed and has failed to report those earnings to the employer, resulting in an overpayment of weekly benefits. Those provisions allow the court to credit the employer a set amount from the employee's future weekly benefits in order to recoup the overpayment. These situations result from the failure of the employee to report earnings. Obviously these provisions would not apply to Mrs. McCray's case.

The other provision allowing a credit against future compensation is found in R.I.G.L. § 28-35-45(b), which provides for the filing of a petition to review a compensation agreement or decree on various specific grounds, including that the weekly compensation payments have been based upon an erroneous average weekly wage, as well as any other obligation under the Act. Subsection (b) states as follows:

> Upon this review the workers' compensation court may decrease, suspend, increase, commence, or recommence compensation payments in accordance with the facts, or make any other order that the justice of the case may require. No review shall affect the agreement, award, order, finding, or decree as regards money already paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and except that if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of injury, and any payments made prior thereto in excess of the decreased rate shall be deducted from any unpaid compensation, in the manner and by the methods that may be determined by the workers' compensation court.

R.I.G.L. § 28-35-45(b).

This provision addresses the situation where the employee has been receiving weekly benefits based upon an incorrect average weekly wage resulting in an incorrect weekly compensation rate. If the employee is continuing to receive benefits, the court may allow the employer to deduct a set amount from future payments in order to recoup the overpayment resulting from an incorrect average weekly wage. The present matter does not involve an incorrect average weekly wage and a correction to the compensation rate. The weekly compensation rate for partial incapacity as calculated in Ms. McCray's case under R.I.G.L. § 28-33-18(a) remains the same even if we were to grant the employer's request. The reduction pursuant to § 28-33-18(b) results in a payment "equal to seventy percent (70%) of the weekly compensation rate as set forth in subsection (a) of this section." It does not result in a reduction in the weekly compensation rate itself. Consequently, the employer in the present matter would not be entitled to utilize this credit provision to recoup any overpayment.

Reimbursement is also provided to employers when an employee or medical service provider receives monies pursuant to a pretrial order which is subsequently reversed or modified after trial. Section 28-35-20(f) provides as follows:

> If after trial and the entry of a final decree, it is determined that the employee or medical services provider was not entitled to the relief sought in the petition, the employer or insurer shall be reimbursed from the workers' compensation administrative fund, described in chapter 37 of this title, to the extent of any payments made pursuant to the pretrial order to which there is no entitlement.

Due to the binding effect of a pretrial order pending trial, and the abbreviated hearing process of the pretrial conference procedure, the Legislature saw fit to allow an employer to be made whole if it is wrongfully ordered to pay benefits pursuant to a pretrial order which is subsequently reversed after the matter is fully litigated at trial. Gem Case v. Edna Poulin/Second Injury Fund, W.C.C. No. 97-02683 (App. Div. 2000); *see* Cardi Corp. v. Antignano, W.C.C. No. 87-01666 (App. Div. 1994) (citing John J. Orr and Sons, Inc. v. Waite, 479 A.2d 721 (R.I. 1984).

In Gem Case, *supra*, the Appellate Division addressed the issue of reimbursement to an employer under this provision when the Appellate Division reversed the decision and decree of a trial judge and found that the employee was not entitled to weekly benefits which he had been paid pursuant to the underlying pretrial order and the decision and decree of the trial judge. The Appellate Division denied the reimbursement request of the employer based upon the language and intent of the statute. In the matter presently before the panel, the employer similarly would not be entitled to reimbursement from the administrative fund even assuming that we modified the trial judge's decree to implement the reduction retroactively.

Based upon the circumstances of this case, we are unaware of any type of substantive relief that we can possibly grant the employer if we concluded that the appeal should be granted. The employer has not requested any relief other than a finding that the reduction should have been implemented on the date of the pretrial conference, which at this stage would accomplish nothing. Consequently, we find that the employer's appeal is moot.

Assuming, *arguendo*, that the employer's appeal is not moot, we would still deny the appeal as our review of the record does not reveal that the trial judge abused his discretion in delaying the implementation of the statutory reduction until February 24, 2011. Any allegation that the trial judge abused his discretion by delaying the reduction for that length of time must be viewed in light of the statute granting him that discretion. Section 28-33-18(b) of the Workers' Compensation Act affords trial judges a great deal of discretion in determining when to implement the reduction: "[t]he court may, in its discretion, take into consideration the performance of the employee's duty to actively seek employment in scheduling the implementation of the reduction." The statute leaves the trial judge with broad discretion as to when to implement the reduction as it provides no standards or guidelines to aid the trial judge in his decision.

This type of discretionary decision authorized by statute made by a trial judge is not immune from scrutiny but rather it "will be sustained provided the discretion has been soundly and judicially exercised, that is, if it has been exercised in the light of reason applied to all the facts and with a view to the rights of all the parties to the action." DeBartolo v. DiBattista, 117 R.I. 349, 353, 367 A.2d 701, 703 (citing Colitz v. Gilbert, 53 R.I. 319, 320-21, 166 A. 685, 686 (1933)). Judicial discretion shall not be exercised "arbitrarily or willfully, but with just regard to what is right and equitable under the circumstances and the law". Strzebinska v. Jary, 58 R.I. 496, 500, 193 A. 747, 749 (1937) (citing Commonwealth v. Gallo, 275 Mass. 320, 175 N.E. 718 (1931)). The decision of a trial judge, "made in the exercise of a discretionary power should not be disturbed unless it clearly appears that such discretion has been improperly exercised or that there has been an abuse thereof." Berberian v. Travisono, 114 R.I. 269, 273-74, 332 A.2d 121, 124 (1975) (citing Levy v. Equitable Fire & Marine Ins. Co., 88 R.I. 252, 146 A.2d 231 (1958)).

The trial judge's decision in this matter, viewed against the appropriate standard of review, cannot be deemed an abuse of discretion. In presiding over the trial, the trial judge was in the best position to gauge the employee's demeanor, and make a determination as to the veracity of the employee's testimony regarding her efforts in seeking employment and the sincerity and genuineness of her job search. The trial judge exercised sound judicial discretion under the statute in reaching this decision after properly assessing the testimony provided by the employee and thoroughly evaluating the available facts and circumstances. We cannot say that the trial judge abused or improperly exercised that discretion, and therefore, the decision to delay implementation of the reduction is not clearly erroneous.

Based upon the foregoing discussion, we deny and dismiss the employer's claim of appeal and affirm the decision and decree of the trial judge. In light of the successful defense of the employer's claim of appeal, the employer shall pay a counsel fee in the amount of One Thousand Seven Hundred Fifty and 00/100 ($1,750.00) Dollars to John A. Toro, Esq., the attorney for the employee. 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 Salem, J.J., concur.

ENTER:

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Olsson, J.

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Salem, J.

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Hardman, J.

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)
REBECCA McCRAY )

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the claim of appeal of the respondent/employer and upon consideration thereof, the appeal is denied and dismissed, and it is

ORDERED, ADJUDGED, AND DECREED:

1. That the findings of fact and the orders contained in a decree of this Court entered on December 24, 2010 be, and they hereby are, affirmed.

2. That the employer shall pay a counsel fee in the amount of One Thousand Seven Hundred Fifty and 00/100 ($1,750.00) Dollars to John A. Toro, Esq., attorney for the employee, for the successful defense of the employer's claim of appeal.

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.

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Salem, J.

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Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to John A. Toro, Esq., and Kyle F. Correia, Esq., on

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