STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

ARDEN ENGINEERING
CONSTRUCTION, INC.)
)
VS. W.C.C. 96-04844
)
MAX FISH PLUMBING)
& HEATING/D.DIXON
DONOVAN, INC.)

DECISION OF THE APPELLATE DIVISION

HEALY, J. This matter is before the Appellate Division in connection with the appeals of the Travelers Insurance Company and the Rhode Island Insurers Insolvency Fund following a decision on a Petition for Apportionment. The petition at trial was an Employers Petition for Apportionment of liability among successive employers filed pursuant to the provisions of Rhode Island General Laws § 28-34-8. Following a pretrial order in this matter, the case proceeded to trial. This matter was essentially decided based upon a stipulation of facts. The stipulation of facts is lengthy and relates the work history of the employee, Leonard P. Silva, from the time he commenced employment through the period of time he became disabled due to an occupational disease characterized as bilateral carpal tunnel syndrome. The stipulation further details the length of employment with the several employers for whom Mr. Silva worked, as well as their respective insurers and

the inclusive dates of coverage. After the review of extensive memoranda on the legal issues involved, the trial judge determined that he did not have authority to apportion liability among successive insurers, and limited his decision to the apportionment of liability among Mr. Silva's actual employers. Based upon his decision, the trial judge entered a decree which held that Mr. Silva's employment with D. Dixon Donovan, Inc. caused or contributed to the development of his bilateral carpal tunnel syndrome. He also found that Mr. Silva's employment with Max Fish Plumbing & Heating caused or contributed to the occupational disease. Based upon Mr. Silva's stipulated length of service, he entered an order directing that D. Dixon Donovan, Inc. contribute fifty-five percent (55%) of Mr. Silva's benefit entitlement and the Max Fish Plumbing & Heating Company contribute thirty-seven percent (37%) of the benefit entitlement.

Following the entry of this decree, Travelers Insurance, as the insurer of Max Fish Plumbing & Heating filed a claim of appeal to the Appellate Division. The Rhode Island Insurers Insolvency Fund filed a similar claim of appeal. The Insolvency Fund appeared as the successor of the American Mutual Insurance Company another insurer of Max Fish. American Mutual had been declared insolvent prior to the filing of this petition and the fund appeared in its stead. Both carriers filed numerous reasons of appeal and extensive memoranda of law relating to the court's determination regarding jurisdiction and its authority to order contribution from the insurers. Based upon our

review of the record before us, as well as our understanding of the relevant decisional and statutory precepts, we believe that the appellants here have failed to demonstrate error and, therefore, we sustain the decision of the trial judge and deny and dismiss the appeals.

As noted earlier, the basic petition pending before the trial judge was a Petition for Apportionment of liability among successive employers. This vehicle is available to the employer deemed liable to pay compensation benefits to an employee as a result of a disablement caused by an occupational disease. Pursuant to the provisions of Rhode Island General Law § 28-34-8 such employer:

> "...may petition the workers' compensation court for an apportionment of the compensation among the several employers who since the contraction of the disease shall have employed the employee in the employment to the nature of which the disease was due. The apportionment shall be proportioned to the time the employee was employed in the service of the employers and shall be determined only after a hearing, notice of the time and place of which shall have been given to every employer alleged to be liable for any portion of the compensation...."

In the stipulation of facts, the several employers essentially agreed that Mr. Silva, the disabled employee, did suffer harmful exposure in each of their employments. They also agreed upon his length of service for each employer. The trial judge, relying upon Home Indemnity Ins. v. Travelers Ins., 109 R.I. 162, 282 A.2d 594 (1971) held that this Court did not have jurisdiction to address disputes between insurers as to their relative contribution arising from their coverage of a particular employer. Based upon this determination,

the court ordered contribution only from the actual employers based upon the formula set forth in the statute.

Following the trial courts decision of this matter, the Appellate Division had the opportunity to decide the matter of Unified Management of R.I. v. Manuel Garcia, W.C.C. No. 97-04712 on precisely the same issue. In Unified Management, the Appellate Division noted:

> "Section 28-34-8 on its face does not provide for or mention apportionment against successive insurers. Rather, § 28-34-8 uses only the term 'employers' throughout its language. As the trial judge noted, the failure of the Legislature to use the term 'insurer' under § 28-34-8 evidences that the Legislature did not intend this court to apportion liability among successive insurers."

The Appellate Division went on to cite with approval our Supreme Court's holding in Home Indemnity Ins., supra. In the discussion of that case, the Appellate Division noted:

> "In that decision, the court found that the Workers' Compensation Court did not have either implied or express legislative authority to adjudicate the right to apportionment of benefits between responsible carriers."

In that matter, the court relied heavily upon its prior decision in Woods v. Safeway System, Inc., 102 R.I. 493, 232 A.2d 121 (1967). In Woods, the court stated:

> "Workmen's compensation proceedings are entirely statutory – the court's jurisdiction and the rights of the parties are governed by the provisions of the act." Id. at 495.

The Appellate Division went on to discuss the particular provisions of R.I.G.L. § 28-34-8 as follows:

> "The statute in question is unambiguous. The purpose is clear. The formula set forth in the statute bases the degree of participation on the length of time in each employment. To accomplish this, it focuses only on the employer rather than the insurer. It would, frankly, require a stretch to extend the section to insurers instead of employers and the appellant has failed to provide us with any logical reason to do so."

We believe that the Appellate Division decision in Garcia, supra, is dispositive of the issue in the present appeal.

Additionally, it is essential to note that in this particular matter neither of the insurance carriers who have pursued the appeal to this level were named as parties respondent in this matter. The sole parties' respondent were the actual employers. In Milner v. 250 Greenwood Ave. Corp., 78 R.I. 5, 78 A.2d 358, (1951), the Rhode Island Supreme Court dealt with a similar situation. Although there was only a single employer involved, the court's language applies to the facts under review:

> "Upon consideration of the scope of the petition now before us, the travel of the case and the evidence at trial in the superior court, it is clear that the only issue properly before that court was the liability of the employing corporation as a sole respondent. Under the petition as drawn and prosecuted petitioner's purpose in instituting these proceedings was to establish his right under the provisions of the act to recover compensation directly from the employer." (emphasis added)

The court went on to note:

> "...Since the petitioner here elected to proceed directly against the employer as the only party respondent in the case, Travelers derives no assistance from the act in its attempt to inject into the case the question of an insurer's liability."

Similarly in the present matter, the trial judge expressly indicated that he did not believe he had jurisdiction to address the liability issues between the two (2) insurers and refrained from so acting. Thus, it would appear that the carriers' claim is somewhat elliptical. They are suggesting that the trial court erred in refusing to discuss the liability issues relating to them but that such error would apply only if the trial court were to grant liability against them. However, their arguments miss the basis for the court's decision, namely, that the court lacked the statutory authority to proceed.

Finally, we would note that in their reasons of appeal, Travelers also argues that the court erred in imposing liability on Max Fish because the petitioner had voluntarily accepted liability by issuing a memorandum of agreement and was not "made liable" as required by R.I.G.L § 28-34-8. Recently, in American Power Conversion v. Benny's, 740 A.2d 1265 (R.I. 1999), the Supreme Court addressed this issue and found that the acceptance of liability pursuant to the terms of a memorandum of agreement did not deprive the employer of the right to seek apportionment from other employers. The court noted that the employer seeking contribution had the duty to prove by competent evidence that the other employment contributed

to the contraction of the occupational disease. In the present case, the parties stipulated to the opinions of Dr. Steven Graff, who specifically noted such contribution. Thus, the employer's reason of appeal in this regard must be denied.

Based upon our determination of the facts and prevalent law in this matter we do not, therefore, find merit in the insurer's arguments. Accordingly, the decision of the trial judge is sustained and the appeal is denied and dismissed.

In accordance with Sec. 2.20 of the Rules of Practice of the Workers' Compensation Court, a decree, copy of which is enclosed, shall be entered on

Rotondi and Morin, JJ. concur.

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Rotondi, J.

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Healy, J.

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Morin, 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 respondent 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 28, 1998 be, and they hereby are affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

____

ENTER:

____
Rotondi, J.

____
Healy, J.

____
Morin, J.

I hereby certify that copies were mailed to Michael T. Wallor, Esq., Howard L. Feldman, Esq., Berndt W. Anderson, Esq. and Robert Jeffrey, Esq. on

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