STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

PHILIP C. KLEINKAUF, JR.	)	
	)	
VS.	)	W.C.C. 98-02114
	)	
WESTERLY FORM COMPANY	)	

DECISION OF THE APPELLATE DIVISION

HEALY, C. J. This matter was heard before the Appellate Division in connection with the employee's appeal from a decree entered by the trial court. The matter was heard by the court as an employee's petition to review seeking total disability benefits on the grounds that the employee is realistically unemployable and, therefore, totally disabled pursuant to the "odd lot" doctrine.

In his petition, the employee pursued alternate theories of recovery. Initially, the petition alleged an entitlement to total disability benefits pursuant to the provisions of R.I.G.L. § 28-33-17(b)(2). This section provides for the payment of total disability benefits

> ". . . in cases where manifest injustice would otherwise result, total disability shall be determined when an employee proves, taking into account the employee's age, education, background, abilities, and training, that he or she is unable on account of his or her compensable injury to perform his or her regular job and is unable to perform any alternative employment."

The employee also presented evidence in support of the application of the common-law odd lot doctrine enunciated by the Rhode Island Supreme Court in Lupoli v. Atlantic Tubing Co., 43 R.I. 299, 111 A. 766 (1920). There, the court noted that in a petition filed by the employee

seeking to establish permanent total incapacity,

> "…if the effects of the accident have not been removed, it is not sufficient to entitle an employer to have a reduction in the weekly compensation ordered by the court, that it appears the workman has the physical capacity to do some kind of work different from the general kind of work he was engaged in at the time of the accident, but it must also be shown that the workman either by his own efforts or that of his employer can actually get such work." Id. at 304, 111 A. at 768.

The petitioner in the case at bar argued that the common law odd lot doctrine could be used affirmatively by the employee to establish an entitlement to total disability benefits.

Following trial on the merits, the trial judge held that the employee had failed to meet his burden of proof due to the absence of evidence that the failure to continue total incapacity benefits would work manifest injustice. Thus, the court denied and dismissed the petition. The employee appealed this matter to the Appellate Division and filed his reasons of appeal. During the pendency of this appeal, the Rhode Island Supreme Court had heard oral argument in a case involving a similar issue. In light of that fact, based upon the theory of judicial economy, the Appellate Division and the parties decided to defer any further action in the case at bar until the Justices handed down their decision. Thereafter, by agreement of all parties, this matter was held to await the Supreme Court's decision in Lombardo v. Atkinson-Kiewit, 746 A.2d 679 (R.I. 2000).

In its decision, the court addressed the issue of proof involving manifest injustice. The court noted:

> "Although this new and undefined statutory concept was not referenced by the name of 'manifest injustice' when the common-law odd-lot doctrine was in force, we construe 'manifest injustice' to exist when, considering the totality of the specific statutory circumstances affecting a particular employee's ability to find and perform work (namely, the employee's age, education, background, abilities, and training), the employee's permanent-but-partial disability renders him or her incapable of returning to

> his or her regular job and of securing and performing alternative employment. Given proof of such circumstances, the employee, as a practical matter, is in no better position workwise than if he or she were permanently and totally disabled from work. If, on the other hand, the employee is able to return to his or her regular job or to secure and perform suitable-alternative employment notwithstanding his or her permanent-and-partial disability, then no manifest injustice would result in denying such benefits to the employee." Id. at 687.

Thus, the court concluded that the determination of manifest injustice is inherent in the proof that the employee is unable to obtain or maintain employment. The Court also specifically rejected the theory that the employee had the affirmative burden to show actual reliance on the weekly compensation payments for subsistence. Thus, the manifest injustice provision of R.I.G.L. § 28-33-17(b)(2) does not in any way enlarge the employee's burden of proof.

In light of the Court's decision in Lombardo, *supra*, we find that the trial court's legal argument for denying the employee's petition is clearly wrong. However, pursuant to R.I.G.L. § 28-35-28, we have conducted an independent review of the evidence and the relevant case law and are convinced that, while the trial judge was incorrect in her evaluation of the manifest injustice standard, her ultimate conclusion is correct. Therefore, the decision should be sustained and the appeal denied.

Initially, it must be noted that the employee in the case at bar was originally injured on May 8, 1986. The provisions of R.I.G.L. § 28-33-17(b)(2) upon which the employee attempts to rely were promulgated by the General Assembly in 1992 and became effective for all injuries which occurred on or after May 18, 1992. In Lombardo, *supra*, the Court took great pains to point out that the amendment to R.I.G.L. § 28-33-17 would normally be given prospective application. The Justices determined that the statute would be applied retroactively in the case being heard on appeal only because the employee was estopped from arguing in favor of

prospective application based upon his pleading history. Rather, the Court specifically noted the legislative intent to give the statute prospective application and that the act

> ". . . 'shall not abrogate or affect substantive rights or pre-existing agreements, preliminary determinations, orders or decrees,'. . ." Lombardo, 746 A.2d at 685, fn. 4 (quoting Public Laws 1992, ch. 31, § 31).

In these circumstances, the legislative intent appears obvious. When the serpentine procedural history in Lombardo is considered, there seems little doubt that the Court would hold that the statute should be applied prospectively. (Indeed, if the majority believed that the statute should apply retroactively in all cases, the estoppel theory utilized in Lombardo would not have been necessary.) Thus, the statutory remedy contained in the 1992 amendment would not be available to the employee in the matter before us since his injury occurred prior to the effective date of the law.

It would, therefore, appear that the only possible remedy available to the employee would be the so-called common-law "odd lot doctrine" enunciated by the court in Lupoli, *supra*. In Lupoli, the court summarized the doctrine as follows:

> "In other words, the burden is on the employer, the moving party, to show that the workman can get a job." 43 R.I. at 304, 111 A. 768.

In Olneyville Wool Combing Co. v. DiDonato, 65 R.I. 154, 13 A.2d 817 (1940), the Supreme Court reiterated their position that the common-law odd lot doctrine essentially imposes an additional element to the employer's burden of proof in petitions seeking to move the employee from total to partial disability status. The court there stated

> ". . . the burden under the rule set out in the Lupoli case is then placed upon the employer, who is seeking a reduction in the compensation being paid, to show 'that the workman either by his own efforts or that of his employer can actually get such work.'" Id. at 158, 13 A.2d at ?.

The court then went on to note that the employer, due to its failure to produce evidence of the employee's ability to find suitable work, had failed in its burden of proof. Although the Court has not necessarily framed the issue in terms of the odd lot doctrine, it has consistently applied this rule of law in subsequent employers' petitions. *See* Maia v. Soprano Const. Co., 431 A.2d 1223 (R.I. 1981); Suffoletta v. Ricci Drain Laying Co., 113 R.I. 114, 319 A.2d 19 (1974). Our research fails to demonstrate a single situation where the doctrine was employed as an affirmative tool to elevate a partially incapacitated employee to total disability status. Thus, we are compelled to conclude that, prior to the amendment to the Workers' Compensation Act in 1992, the odd lot doctrine was only a shield and could not have been employed as a sword by an employee.

The inclusion of R.I.G.L. § 28-33-17(b)(2) in the 1992 amendments supports this panel's holding. It is axiomatic that the legislature is presumed to appreciate the nature of existing relevant law when enacting legislation on a particular subject. Sorenson v. Colibri Corp., 650 A.2d 125 (R.I. 1994); Brennan v. Kirby, 529 A.2d 633 (R.I. 1987). The fact that they sought to grant an affirmative remedy to the employee and gave that provision prospective application, strengthens our belief that the odd lot doctrine at common law was exclusively focused upon the employer's burden of proof in petitions to review and did not grant any additional remedy to an injured employee.

Accordingly, we are compelled to conclude that at the time of his injury, the common-law odd lot doctrine was not available to this employee. Moreover, we believe that the provisions of R.I.G.L. § 28-33-17(b)(2) were given prospective application only and cannot assist the appellant in the case at bar. Accordingly, we find that the trial court's ultimate holding

in this matter was appropriate and that the trial decision should be sustained and the appeal dismissed.

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

Rotondi and Morin, JJ. concur.

ENTER:

_____
Healy, C.J.

_____
Rotondi, J.

_____
Morin, 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 September 10, 1998, be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Healy, C. J.

_____
Rotondi, J.

_____
Morin, J.

I hereby certify that copies were mailed to Gregory L. Boyer, Esq., and Tracey McPeak-Morel, Esq., on

_____