STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
ALLEN LAMA	)	
	)	
VS.	)	W.C.C. 98-03245
	)	
CITY OF NEWPORT	)	

DECISION OF THE APPELLATE DIVISION

HEALY, J. This matter came on to be heard before the Appellate Division upon the petitioner/employee's appeal from the decision and decree of the trial court entered on May 20, 2002. This matter was heard before the trial court as an Employee's Original Petition alleging an aggravation of a pre-existing back condition sustained on December 31, 1989. The employee's petition sought workers' compensation benefits for total disability from December 31, 1989 and continuing. The petition further prayed that the employer receive "no credit for payments made without the filing of a Memorandum of Agreement pursuant to 28-35-9 (R.I.G.L. § 28-35-9)." In addition, the petitioner sought interest payments of twelve percent (12%) in accordance with R.I.G.L. § 28-35-12 (c). This matter was concluded on September 21, 1999. On May 20, 2002, the trial judge granted the Employee's Original Petition, but denied the employee's allegation that the

employer should be denied credit for payments made. From that decision and decree, the instant appeal followed.

The facts are not in dispute. In fact, the parties stipulated to the findings and orders contained in a pretrial order dated July 8, 1998, which recognized a low back injury and ordered compensation benefits from January 1, 1990 and continuing. The issues of date of injury, nature, and parts of the body affected by the work-related injury, the date of incapacity, the average weekly wage, and the assessment and findings of incapacity were stipulated to by the parties. (Pet. Exh. 1). The only issue for trial was whether the employer was entitled to a credit for monies paid to the employee without having filed a Memorandum of Agreement or a Non-Prejudicial Agreement.

The appellant asserts pursuant to R.I.G.L. § 28-35-9 the employer is not entitled to receive a credit for any monies paid to the employee prior to the time of the pretrial order. The petitioner claims that the employer was required to file a Memorandum of Agreement under R.I.G.L. § 28-35-9 and that the failure to do so prohibits credit for any monies paid without a Memorandum of Agreement.

The employee, Allen Lama, worked as a senior maintenance mechanic for the City of Newport (hereinafter; the city) where he was employed for over thirty (30) years. As president of his union local, he was also familiar with the terms of the collective bargaining agreement between the city and Local 911

in effect at the time of his injury. This agreement provided that union workers injured in the course of employment would receive their full salary during their period of disability. Mr. Lama testified that he was paid under the collective bargaining from 1989-1996. He stated that he received weekly workers' compensation benefits and the city also paid a differential up to the amount of his full salary. In addition, Mr. Lama continued to retain and accrue seniority rights, pension vesting, health insurance coverage, dental insurance coverage, life insurance coverage, vacation time accrual, and sick time accrual pursuant to the terms of the union contract

At trial of the instant petition, the parties litigated whether R.I.G.L. § 28-35-9 prevents the employer from taking credit for benefits paid to an injured employee without the filing of a Memorandum of Agreement. The employer argued that the earlier provisions of R.I.G.L. § 28-35-9, which were effective at the time of the employee's original incapacity do not prohibit the employer from taking credit for benefits paid to an injured employee without the filing of a Memorandum of Agreement. The employee argued that R.I.G.L. § 28-35-9, as it was written at the time of the employee's injury, already contained several sanctions against an employer who paid benefits without the filing of a Memorandum of Agreement. He suggested that because there were already sanctions in place for such actions, subsequent amendments which contained the additional penalty prohibiting the employer from taking credit should also be available to punish this employer.

The trial judge rejected the employee's argument and found that the employer may receive a credit for all payments of compensation paid to the employee subsequent to January 1, 1990. From that decision and order, the employee filed the instant petition.

The employee's reasons of appeal effectively summarize the basis of his argument.

> "1. The Trial Judge failed to recognize the amendment to § 28-35-9, which provided a sanction against employers who failed to file a memorandum of agreement by not allowing a credit for those payments made against any future benefits awarded.
>
> 2. The Trial Judge erred as a matter of law by failing to recognize the employer's obligation to file a memorandum of agreement which existed at the time of the employee's injury, and failed to apply § 28-35-9 as amended prospectively from September 1, 1990 against the employer.
>
> 3. The Trial Judge failed to recognize that § 28-35-9, as amended September 1, 1990, provided an additional penalty for employers who failed to fulfill their obligation to file a memorandum of agreement when weekly compensation benefits were paid. The filing of a memorandum of agreement is procedural. Hence, the sanction in § 28-35-9 is applicable from September 1, 1990 forward against the employer. As of September 1, 1990 the employer was on notice that failure to file a memorandum of agreement would impose an additional sanction. This is similar to § 28-35-39, enacted 1986. (See P.L. 1986, ch. 198). Section 28-35-39 amended the method of payment of workers' compensation benefits from draft to check pursuant to § 6A-3-104 (2) (a). That section is retroactive in that effective 1986 all employees were entitled to be paid by a check rather than draft regardless of the date of injury. Healy v. State, 410 A.2d 432."

We have reviewed the employee's legal arguments and disagree with the appellant that the sanctions contained in the 1990 amendments should be applied retroactively. Accordingly, the appeal is denied and dismissed.

The employee argues that the trial court erred in granting the employer a credit for monies paid to the employee by the employer without a Memorandum of Agreement having been filed. In support of his petition, the employee relies upon R.I.G.L. § 28-35-9 (b). Subsection (b) of that statute was enacted on September 1, 1990, as part of a sweeping reform of the Rhode Island Workers' Compensation Law (P.L. 1990, ch. 332) Subsection (b) provides as follows:

> "In the event that an employer or insurer makes payment of weekly benefits to an employee without filing a memorandum of agreement or non-prejudicial memorandum of agreement with the department the payment shall constitute a conclusive admission of liability and ongoing incapacity and that the employee is entitled to compensation under chapters 29-38 of this title and the employer or insurer shall not be entitled to any credit for the payment if the employee is awarded compensation in accordance with these chapters. The employer or insurer shall not file a petition to suspend or reduce payments until a memorandum has been filed with the department."

It is important to note that the employee, in the case at bar, was injured on December 31, 1989. At the time of the employee's injury, there was no provision contained in the Workers' Compensation Act which prohibited an employer or its insurer to obtain a credit for any payments made to the employee without a Memorandum of Agreement. In point of fact,

the 1990 reform also created the present Memorandum of Agreement and dictated the basic elements which had to be included. While such a term was contained in the law prior to September 1, 1990, the actual document did not resemble the Memorandum of Agreement created by the 1990 Legislation and had different legal effect. Therefore, we believe that the section of the Workers' Compensation Act upon which the employee relies upon is inapplicable to his petition.

A fundamental rule governing Workers' Compensation Law is that an employee's right to workers' compensation benefits must be determined according to the Workers' Compensation statutes existing at the time of the injury. State v. Healy, 122 R.I. 602, 410 A.2d 432, 435 (R.I. 1980). In Healy the court noted: "...the rights of the employee in compensation are governed by the law in force on the date of his injury...These are substantive rights that vest at the time the agreement is executed and approved." To hold otherwise here would be an inexcusable break from well-settled case law.

Further, it is a fundamental rule of statutory construction that statutes and their amendments are given prospective application. Wayland Health Center v. Lowe, 475 A.2d 1037, (R.I. 1984). Courts will only give retrospective application to a statute when the Legislature, by express language or necessary implication, manifests its intent that the statute be given retrospective application. State v. Northrup, 614 A.2d 783 (R.I. 1992). The Appellate Division in this case at bar has not defined any such clear

statement of Legislative intent and therefore, is without authority to apply R.I. G.L. § 28-35-9 (b) retroactively to the facts of Mr. Lama's petition. Further, our holding in the instant petition is similar to the Appellate Division's earlier decision in McCallum v. Paramount Cards, Inc., W.C.C. 94-07328. In both cases, we have held that the provisions of R.I.G.L § 28-35-9 (b) may not be applied retroactively to bar an employer's right to credit for monies paid to an employee prior to the section of a Memorandum of Agreement. As we noted in McCallum, it would be unjust to suggest that the employer should be subjected to punishment for the failure to comply with the provisions of a law which had not yet been promulgated. To hold otherwise would, in our opinion, lead to absurd results.

For the foregoing reasons, the employee's reasons of appeal are denied and dismissed and the decree appealed from are hereby affirmed.

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 Bertness, J.J. concur.

ENTER:

_____
Healy, J.

_____
Rotondi, J.

_____
Bertness, 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 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 May 20, 2002 be, and they hereby are affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Healy, J.

_____
Rotondi, J.

_____
Bertness, J.

I hereby certify that copies were mailed to John Harnett, Esq. and Michael Feeney, Esq. on

_____