STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

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| LARRY J. BEDARD | ) | |
| | ) | |
| VS. | ) | W.C.C. 98-05839 |
| | ) | |
| BELL ATLANTIC | ) | |

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division pursuant to appeals filed by both parties. The employee has appealed the trial judge's application of R.I.G.L. § 28-33-45(c) which resulted in the termination of his weekly benefits upon his retirement from his job with the respondent. The employer has appealed the denial of its motion to extend the time for filing a claim of appeal. After thoroughly reviewing the record in this matter and carefully considering the arguments of the parties, we deny both of the appeals.

The employee filed an original petition on October 16, 1998 alleging that he sustained an injury to his left eye on January 21, 1998 during the course of his employment with the respondent. Mr. Bedard had been employed by the respondent as a repair technician since 1969. He would drive a company-owned van to the customer's home or business and do whatever was necessary to correct the problem. He used ladders and bucket trucks, climbed telephone poles, utilized a number of hand tools, and worked with various types of wire. On January 21, 1998, as he was working with a piece of wire, it snapped back and the end of it hit him in the left eye.

He did not seek medical treatment until the next day and ended up having surgery in the

afternoon on January 22, 1998. The employee initially told the two (2) doctors he saw that the incident occurred at home; however, he changed his story the day after the surgery. Mr. Bedard explained that he was reluctant to report the incident as a work-related injury because he had a bad experience with a previous workers' compensation claim with Bell Atlantic.

The injury was quite serious and, despite appropriate medical treatment, the pupil of the employee's left eye is permanently dilated and his vision is reduced. Dr. Thomas R. Leddy, the ophthalmologist who treated Mr. Bedard, indicated that he could not return to his duties as a repair technician without restrictions.

The employee testified that he filed an application for retirement in January 1998. Although he initially stated that he applied because the doctor had told him that he would not be able to return to his former employment, he later indicated that he voluntarily retired. *See* Tr. pp. 42, 61. Mr. Bedard indicated that his employer was offering an early retirement plan and he knew that he needed to file his application by January 31, 1998. Tr. p. 42. His retirement was effective July 31, 1998.

The employer filed two (2) Non-Prejudicial Memoranda of Agreement; one (1) dated January 30, 1998 and the second dated February 11, 1998. The employer paid weekly benefits to the employee from January 22, 1998 to July 31, 1998, the effective date of his retirement. It is clear that the employer paid weekly benefits in excess of thirteen (13) weeks. Pursuant to R.I.G.L. § 28-35-8(b), payments beyond thirteen (13) weeks after the filing of a Non-Prejudicial Agreement constitute "a conclusive admission of liability and ongoing incapacity as to the injuries set forth in the non-prejudicial memorandum of agreement."

After reviewing all of the evidence, the trial judge stated that she found the employee to be credible and she believed his explanation as to why he did not initially report the incident as a

work-related injury. Consequently, she found that he sustained an injury to his left eye on January 21, 1998 which resulted in total incapacity from January 22, 1998 to April 8, 1998 and partial incapacity from that date forward. However, the trial judge concluded that the employee was no longer eligible for weekly benefits as of July 31, 1998 pursuant to the provisions of R.I.G.L. § 28-33-45(c), due to his retirement.

The decree containing the trial judge's findings and orders was entered on Tuesday, December 12, 2000. A copy of the decision and the proposed decree had been mailed to the parties on December 5, 2000, which also notified the parties that the decree would be entered on December 12, 2000. Pursuant to R.I.G.L. § 28-35-28(a), a party contesting the trial judge's findings and orders must file a claim of appeal within five (5) days of the entry of the decree, exclusive of Saturdays, Sundays, and holidays. The employee filed his claim of appeal, along with his reasons of appeal, on December 13, 2000. The certification indicates that a copy was sent to the employer's attorney on the same date.

The employer filed a claim of appeal on December 20, 2000. Counsel for the employee then filed a motion to dismiss the employer's claim of appeal as untimely. On February 5, 2001, the employer filed a motion for an extension of time within which to file a claim of appeal. That motion was denied on March 1, 2001. The employer then filed a claim of appeal from the denial of the motion.

In reviewing the decision rendered below, the appellate panel views the findings of fact made by a trial judge with great deference. Rhode Island General Laws § 28-35-28(b) sets forth the standard we must abide by:

> "The findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous."

Absent a specific determination that the trial judge was clearly wrong, the appellate panel cannot

undertake a *de novo* review of the evidence and render its own independent findings. *See* Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996).

We will first address the employer's appeal from the denial of the motion for an extension of time. In its reasons of appeal, the employer contends that the denial of the motion is against the law and the evidence because the trial judge failed to take into account that there would be no prejudice to the employee in allowing the employer to pursue its appeal and that she failed to apply standards of "liberality and equity" in not extending the filing period by one (1) day. We find no merit in the employer's arguments.

We would disagree with the employer that no prejudice will result if it is permitted to pursue its appeal. In documents submitted to the court, the employer is challenging the trial judge's finding of liability which formed the basis for the award of benefits. The employee, in his appeal, is only challenging the trial judge's application of R.I.G.L. § 28-33-45(c) to cut off his receipt of workers' compensation benefits as of July 31, 1998. However, with the finding of liability in hand, the employee remains entitled to the payment of any medical expenses associated with the injury. We believe it would be prejudicial to the employee to be placed in the position of defending against the employer's challenge to liability in this instance.

The employer argues that the claim of appeal was filed late because it was waiting to see if the employee would appeal and this delayed its own process of filing within the appropriate time period. However, the facts do not support this contention. Counsel for the employer, who has practiced before this court for many years, was well aware of the time constraints on filing an appeal. He received a copy of the decision and decree within a few days of December 5, 2000, which put him on notice that the decree was to be entered on December 12, 2000, thereby starting the ticking of the clock on the appeal period which would end on December 19, 2000.

At that time, he was well aware of the result of the case and could have consulted his client as to the possibility of filing an appeal.

The employee's claim of appeal was filed on December 13, 2000, the day after the entry of the decree. It was a matter of public record and could easily be verified by the employer at any time thereafter. We perceive no reason for the delay of seven (7) days from the filing of the employee's appeal to the date the employer filed which would substantiate a request for the exercise of the court's discretion in the interests of equity.

The employer cites Sullivan v. Empire Equipment Eng. Co., 492 A.2d 1212 (R.I. 1985) in support of its contention that the court has the discretion to extend the time for filing a claim of appeal when equity would best be served by exercising that discretion. However, that case is distinguishable from the present matter and due to a change in the rules since that decision was issued, there is some question whether the court continues to have the authority to extend the appeal period. In the Sullivan matter, the employer filed a motion for an extension of time within the five (5) day appeal period, but the motion was apparently lost by the court. The Rhode Island Supreme Court cited Rule 4.2 of the Workers' Compensation Commission Rules of Practice (1982) as the basis for the court's authority to extend the time to file an appeal. At the time, Rule 4.2 read, in pertinent part, as follows:

> "Any extensions granted for extending the filing time of the claim of appeal and transcript shall likewise forthwith be sent to all other parties." (Emphasis added.)

The rule was amended sometime thereafter. It appears that at least as of 1994, and continuing through December 2000 (when Bell Atlantic attempted to file its claim of appeal out of time), the rule states as follows:

> "Any requests thereafter granted to extend the time for filing the reasons of appeal and the transcript shall likewise be sent to all

other parties forthwith." (Emphasis added.)

The Sullivan Court relied upon the language of Rule 4.2 as impliedly authorizing the extension of the five (5) day time period for filing a claim of appeal. However, the subsequent version of the rule eliminated the reference to the claim of appeal and merely refers to extending the time for the filing of the reasons of appeal, which is the second step in the process of perfecting an appeal. Consequently, Rule 4.2 can no longer form the basis for any authority to extend the time for filing a claim of appeal.

In any case, based upon the circumstances of the present matter, we find that the trial judge was correct in refusing to exercise her discretion to grant the employer's request. In Sullivan, the Court found that the trial judge properly exercised his discretion in extending the time period in light of the fact that the employer had filed a motion to extend the time within the five (5) day time period and the loss of the motion was not the employer's fault. In the case before this panel, the employer did not file a motion to extend the time for filing a claim of appeal until February 5, 2001, over a month after the appeal period had expired and after the employee filed a motion to dismiss the employer's appeal.

Considering the totality of the circumstances presented in this case, we find that the trial judge did not abuse her discretion in denying the employer's motion for an extension of the time for filing a claim of appeal. Regardless of whether the extension involves one (1) day or one (1) month, the moving party must present compelling circumstances to warrant the exercise of our discretion in extending specific statutory deadlines. The employer's claim of appeal from the denial of its motion is, therefore, denied.

The employee filed a single reason of appeal stating as follows:

> "The trial judge erroneously concluded that the employee's eligibility for weekly indemnity benefits ceased on July 31, 1998,

the date he voluntarily retired."

The employee did not submit a memorandum or any other documents at the appellate level which would provide further information as to the basis for his contention. However, in his memorandum to the trial judge, he argued that the employer was precluded from collaterally attacking the length of incapacity in light of the provisions of R.I.G.L. § 28-35-8(b) and that R.I.G.L. § 28-33-45(c) should not be applied when the employee's retirement is due to the effects of the work-related injury. Therefore, we will address these arguments as the basis for his appeal.

It is undisputed that the employer paid weekly benefits to the employee in excess of thirteen (13) weeks pursuant to a Non-Prejudicial Memorandum of Agreement and in accordance with the terms of R.I.G.L. § 28-35-8(b), this payment constitutes a conclusive admission of liability and ongoing incapacity. In fact, the trial judge found that the employee remained partially disabled due to the work-related injury to his left eye. However, she also concluded that the employee was no longer eligible for workers' compensation benefits as of July 31, 1998 pursuant to the provision of R.I.G.L. § 28-33-45(c) which states:

> "An employee shall not collect any indemnity benefits after his or her retirement for any injury sustained less than two (2) years prior to his or her retirement."

We are unaware of any statutory provision or legal principle which would allow us to ignore this legislative mandate. Once the employee retires, his eligibility for workers' compensation benefits is terminated, regardless of whether he remains disabled as a result of the injury.

The statute does not make any allowance for, or give any consideration to, the circumstances of the retirement. Even if we were to consider an exception in the case of an employee who is forced to retire because he can no longer perform his job with the employer as a

result of the effects of a work-related injury, we are not persuaded that the record establishes that Mr. Bedard felt compelled to retire due to the effects of his injury.

There was not a great deal of testimony regarding the circumstances of his retirement. The incident occurred on January 21, 1998 and he underwent surgery on January 22, 1998. The employee stated that he applied for retirement in late January 1998, but the date was never established. He initially stated that he retired due to his eye injury, although he acknowledged that the employer was offering an early retirement plan and he was aware that he had to file his application by January 31, 1998 to take advantage of the plan. *See* Tr. p. 42. On cross-examination, the employee responded that he had voluntarily retired. Tr. p. 61.

The employee had been working for the employer for over twenty-eight (28) years. Assuming the employee had not yet filed for retirement at the time of his injury, he had only nine (9) days to decide whether to accept the benefits of the early retirement plan. Mr. Bedard testified that he believed that he and his wife spoke with Dr. Leddy about his ability to work. In a note dated January 26, 1998, the doctor noted that the employee is concerned about getting back to work and being able to see the small wires involved in his work. However, there is no indication in the doctor's notes or his testimony that he informed the employee that it was unlikely that he would be able to work. Based upon our review of the record, we cannot say that the trial judge was clearly wrong in concluding that the employee voluntarily retired.

Based upon the foregoing discussion, the appeals of both the employer and the employee are denied and dismissed and the decision and decree of the trial judge is affirmed. In light of the employee's successful defense of the employer's appeal, attorney Marc B. Gursky is awarded a counsel fee in the sum of One Thousand and 00/100 ($1,000.00) Dollars. 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

Healy, C. J. and Sowa, J. concur.

ENTER:

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Healy, C. J.

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Olsson, J.

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Sowa, J.

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)
BELL ATLANTIC )

FINAL DECREE OF THE APPELLATE DIVISION

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

ORDERED, ADJUDGED, AND DECREED:

1. The findings of fact and the orders contained in a decree of this Court entered on December 12, 2000 and the order of this Court rendered on March 1, 2001 be, and they hereby are, affirmed.

2. The employer shall pay a counsel fee in the sum of One Thousand and 00/100 ($1,000.00) Dollars to Marc B. Gursky, Esq., for the successful defense of the employer's claim of appeal.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

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Healy, C. J.

_____
Olsson, J.

_____
Sowa, J.

I hereby certify that copies were mailed to Marc B. Gursky, Esq., and Thomas M. Bruzzese, Esq., on

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