STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

MARK D. POWERS	)	
	)	
VS.	)	W.C.C. No. 2013-00558
	)	
WARWICK PUBLIC SCHOOLS	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's claim of appeal from the trial judge's decision and decree in which he excluded work-sharing benefits received by the employee under R.I. Gen. Laws § 28-44-69 from the calculation of the employee's average weekly wage. After thoroughly reviewing the record in this matter and considering the arguments made by the parties, we deny the employee's claim of appeal.

This matter came before the court on the employee's original petition alleging he sustained a dislocated left patella on December 31, 2012 while shoveling snow at work resulting in incapacity beginning January 2, 2013. A pretrial order was entered on March 8, 2013, awarding partial incapacity benefits to the employee from January 1, 2013 and continuing. The employee filed a timely claim for trial. On April 3, 2013, while the trial was pending, a pretrial order was entered in W.C.C. No. 2013-01532 which discontinued the employee's weekly benefits as of that date based on the finding that his incapacity had ended.

At trial, the parties stipulated to the findings and orders contained in the pretrial order in this matter except for the amount of the average weekly wage (AWW). The parties also

submitted a stipulation of facts which we have summarized for purposes of this decision. As of December 31, 2012, the employee, Mark Powers, was a part-time employee of the employer, Warwick Public Schools. During the twenty-six (26) weeks prior to his injury on December 31, 2012, the employee earned wages from the employer for work performed. Additionally, during the twenty-six (26) weeks prior to the week of the injury, the employee received benefits from the State of Rhode Island pursuant to a work-sharing plan which had been submitted and approved in accordance with § 28-44-69. The amount of wages earned by the employee during the weeks of October 20, 2012 through December 29, 2012 totaled Two Thousand Eight Hundred Eighty and 62/100 ($2,880.62) Dollars. The amount of compensation received by the employee from the State of Rhode Island in the twenty-six (26) weeks prior to the injury totaled Eight Thousand Four Hundred Five and 00/100 ($8,405.00) Dollars. This amount apparently included some amount of standard unemployment compensation as well as work-sharing benefits since the employee had only been working since October 20, 2012.

The sole issue before the trial judge was whether or not the benefits paid to the employee by the State of Rhode Island pursuant to the work-sharing plan under § 28-44-69 in the twenty-six (26) weeks prior to the injury should have been included in the calculation of the employee's AWW. The trial judge concluded that work-sharing benefits are tantamount to unemployment compensation benefits, and as such, are not to be included in the employee's AWW calculation. In support of his decision, the trial judge cited Larson's Workers' Compensation Law, which states that "[u]nemployment benefits received during 'down-times' during the year prior to the injury, while otherwise employed by the employer, are not 'wages' and accordingly, are not used to compute the average weekly wage." 8 Lex K. Larson, Larson's Workers' Compensation Law, § 93.01[2](a) (Matthew Bender, Rev. Ed.).

In reviewing the trial judge's decision, the Appellate Division is guided by the standard set forth in R.I. Gen. Laws § 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." In the present matter, the necessary facts of the case have been stipulated by the parties. Therefore, the focus of our review is whether the pertinent law was properly applied to those facts by the trial judge.

The employee sets forth two (2) reasons of appeal which can be consolidated into one (1) primary argument. The employee argues that the trial judge erred as a matter of law in holding that the monies received by the employee pursuant to the work-sharing plan were tantamount to unemployment compensation benefits, and as such, should not be included in the employee's AWW calculation. The employee contends that the work-sharing benefits are paid so that he is compensated as though he was fully employed, and he analogizes the work-sharing benefits to holiday pay or vacation pay, which are included in calculating an employee's AWW.

The issue regarding whether work-sharing benefits received under § 28-44-69 should be included in the calculation of an employee's AWW is a matter of first impression. In Rhode Island, the computation of a part-time employee's earnings is controlled by R.I. Gen. Laws § 28-33-20(a)(3)(i). That section provides in pertinent part as follows:

> (3) "Wages of an employee working part-time" means the gross wages earned during the number of weeks so employed, or of weeks in which the employee worked, up to a maximum of twenty-six (26) calendar weeks immediately preceding the date of injury, divided by the number of weeks employed, or by twenty-six (26), as the case may be. "Part-time" means working by custom and practice under the verbal or written employment contract in force at the time of the injury, where the employee agrees to work or is expected to work on a regular basis less than twenty (20) hours per week. Wages shall be calculated as follows:

> (i) For part-time employees, by dividing the gross wages, inclusive of overtime pay; provided, any bonuses and overtime shall be averaged over the length of employment but not in excess of the preceding fifty-two (52) week period, earned by the injured worker in employment by the employer in whose service he or she is injured during the twenty-six (26) consecutive calendar weeks immediately preceding the week in which he or she was injured, by the number of calendar weeks during which, or any portion of which, the worker was actually employed by that employer, including any paid vacation time.

§ 28-33-20(a)(3)(i).

The provisions regarding work-sharing benefits are found in Chapter 44 of Title 28 of the General Laws which is the chapter regarding unemployment compensation. Section 28-44-69(a)(9) defines work-sharing benefits as "benefits payable to employees in an affected unit under an approved work-sharing plan." A work-sharing plan is a "plan submitted by an employer under which there is a reduction in the number of hours worked by the employees in the affected unit in lieu of layoffs of some of the employees." § 28-44-69(a)(11). The plan must be approved by the Director of the Department of Labor and Training in accordance with criteria detailed in the statute. An individual must apply for work-sharing benefits in the same manner as applying for unemployment compensation, serve a waiting period, and satisfy other eligibility requirements for regular unemployment compensation. See §§ 28-44-69(g), (h)(6). In addition, pursuant to § 28-44-69(h)(2) and (h)(3), "[a]n individual may be eligible for work-sharing benefits or regular unemployment compensation, as appropriate, except that no individual shall be eligible for combined benefits in any benefit year in an amount more than the maximum entitlement established for unemployment compensation," and "work-sharing benefits paid shall be deducted from the maximum-entitlement amount established for that individual's benefit year." Finally, § 28-44-69(i) provides that "[w]ork-sharing benefits shall be charged to employer accounts in the same manner as regular unemployment benefits in accordance with the

provisions of §§ 28-43-3 and 28-43-29," and the benefits are paid by the State directly to the employee, not by the employer to the employee.

The employee argues that the work-sharing benefits are essentially supplemental wages because the employee must actually be working in order to receive them, as distinguished from unemployment benefits. The employee overlooks the fact that the work-sharing benefits are paid for the time that he does not work, similar to unemployment compensation. We cannot equate the nature of those benefits with the ordinary meaning of the word "wages," which is "the value received for the duties and labors which a workman performs, i.e., the value received for services actually rendered." Parise v. Indus. Comm'n, 16 Ariz. App. 177, 179, 492 P.2d 426, 428 (Ariz. Ct. App. 1971).

In Bailey v. American Stores, Inc./Star Market, the Rhode Island Supreme Court declared that the "purpose of the Workers' Compensation Act is to compensate most injured employees adequately on the basis of a calculation of their actual wages," in accordance with § 28-33-20. 610 A.2d 117, 119 (R.I. 1992). The term "wage" is defined in Black's Law Dictionary as the "[p]ayment for labor or services…based on time worked or quantity produced… Wages include every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, bonuses, and the reasonable value of board, lodging, payments in kind, tips, and any similar advantage received from the employer." WAGE, Black's Law Dictionary (10th ed. 2014). Additionally, in regard to what is included in calculating an injured worker's benefits, Larson's Workers' Compensation Law states, "[i]n computing actual earnings as the beginning point of wage-basis calculations, there should be included not only wages and salary but anything of value received as consideration for the work, as, for example, tips, bonuses, commissions and room and board, constituting real economic gain

to the employee." 8 Lex K. Larson, Larson's Workers' Compensation Law, § 93.01[2](a) (Matthew Bender, Rev. Ed.).

These definitions correspond with the Act as § 28-33-17.2(b) provides that it is an employee's affirmative duty to report his earnings, which include "wages or salary remuneration paid for personal services, commissions, and bonuses, including the cash value of all remuneration payable in any medium other than cash. . . ." Finally, the Rhode Island Supreme Court has also addressed holiday pay, overtime, year-end bonuses, and earnings from multiple employers, all to be included in the calculation of an employee's AWW. See Smith v. Colonial Knife Co., 731 A.2d 724, 725 (R.I. 1999) (holiday pay); McKenna v. Turnquist Lumber Co., Inc., 511 A.2d 298, 299 (R.I. 1986) (overtime); Sullivan v. Empire Equip. Eng'g Co., 492 A.2d 1212, 1214 (R.I. 1985) (bonuses); McCormick v. Ice Cream Mach. Co., 442 A.2d 433, 434 (R.I. 1982) (multiple employers). The most recent version of § 28-33-20 specifically includes vacation pay, overtime and bonuses in the calculation of the AWW, with a special calculation for overtime and bonuses. Unemployment compensation has never been included in an employee's AWW by the Act or Rhode Island case law.

Decisions of other jurisdictions and secondary sources support the conclusion that unemployment compensation is not considered wages and should not be included in the calculation of the AWW. As noted by the trial judge, Professor Arthur Larson's treatise on workers' compensation provides that when determining what is included in wages, "[u]nemployment benefits received during 'down-times' during the year prior to the injury, while otherwise employed by the employer, are not 'wages' and, accordingly are not used to compute the average weekly wage." 8 Lex K. Larson, Larson's Workers' Compensation Law, §93.01[2](a) (Matthew Bender, Rev. Ed.). Additionally, the issue of whether to include

unemployment compensation in the AWW calculation has been addressed in several jurisdictions. In In re Mike's Case, the Appeals Court of Massachusetts held, after considering the plain and ordinary meaning of the unemployment insurance law and the relevant workers' compensation statutes, that unemployment benefits were properly excluded when calculating an injured worker's AWW. 73 Mass. App. Ct. 44, 49, 895 N.E.2d 512, 515(2008). In Jewell v. Ford Motor Company, the Supreme Court of Kentucky held that unemployment compensation benefits are excluded from the calculation of the AWW as they are "not payments for services rendered, and they are not received from the employer; therefore, they are not wages." Jewell v. Ford Motor Co., 462 S.W.3d 713, 716 (Ky. 2015).

The employee argues that the work-sharing benefits are analogous to vacation pay and holiday pay, which are included in the calculation of the AWW, because the employee receives them only while employed by the employer, and they are included despite the fact that the employee is not actually working on the holiday or during his vacation. See §§ 28-33-20(a)(1),(a)(3)(i); Smith, 731 A.2d at 725. We believe that holiday and vacation pay are distinguishable from work-sharing benefits.

In Smith, the Rhode Island Supreme Court concluded that holiday pay should be included in the calculation of the employee's AWW because "[t]o conclude otherwise is patently unfair to the injured employee who should not suffer a loss of compensation based upon the fortuitous event of when one's incapacity occurs." Id. Holiday pay and vacation pay are incidents of employment. See Cole v. Davol, 679 A.2d 875, 878 (R.I. 1996). Both types of payments are "benefit[s] typically provided under an employment agreement, and [are] benefit[s] that an employee acquires over time as a result of continued employment with the same employer." Id. In this sense, they are "earned" monies, despite the fact that the employee is not actually working

on the date for which he receives the payment. In contrast, an employee only receives work-sharing benefits for the days he actually works. On those days, he is not "earning" his work-sharing benefits. He earns wages from the employer for the hours he works and receives work-sharing benefits based upon the hours he is not working. If he does not work at all on a given day, he is eligible to receive his full unemployment benefit rather than the reduced work-sharing benefit. Vacation pay and holiday pay are further distinguished from work-sharing benefits because they are paid directly from the employer to the employee, as distinguished from work-sharing benefits which are paid by the State to the employee.

In conclusion, for the aforementioned reasons, we find that the work-sharing benefits received by the employee in accordance with the provisions of § 28-44-69 are a type of unemployment compensation and are not a form of wages to be included in the calculation of the AWW. Therefore, the employee's appeal is denied and dismissed and the decision and decree of the trial judge are affirmed. In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, a copy which is enclosed, shall be entered on

Salem and Hardman, JJ., concur.

ENTER:

/s/Olsson, C.J. (Acting)
Olsson, C.J. (Acting)

/s/Salem, J.
Salem, J.

/s/Hardman, J.
Hardman, J.

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the claim of appeal of the petitioner/employee and upon consideration thereof, the employee's 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 October 7, 2013 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

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John A. Sabatini, Administrator

ENTER:

_____
Olsson, C.J. (Acting)

_____
Salem, J.

_____
Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were sent to Stephen J. Dennis, Esq., Christine M. Curley, Esq., and Michael J. Feeney, Esq., on

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