

STATE OF RHODE ISLAND

**FINAL DECREE OF THE APPELLATE DIVISION**

This matter 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 claim of appeal is denied and dismissed, and it is

**ORDERED, ADJUDGED, AND DECREED:**

That the findings of fact and the orders contained in a decree of this Court entered on October 4, 2019 be, and they hereby are, affirmed.

Entered as the final decree of this Court this 25<sup>th</sup> day of February 2021.

PER ORDER:

Mr. D. Z.

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Nicholas DiFilippo, Administrator

ENTER:

Olmon, J.  
Olsson, J.

Feeney, J.  
Feeney, J.

Cardoza, J.  
Cardoza, J.

STATE OF RHODE ISLAND

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT  
APPELLATE DIVISION

SANDRA TIERNAN )

)

VS. ) W.C.C. 2016-06718

)

UNIVERSITY OF RHODE ISLAND )

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 denying her Petition to Adjudge in Contempt alleging that the employer failed to comply with the pretrial order entered in W.C.C. No. 2009-01099 on February 25, 2009 and seeking a twenty percent (20%) penalty on the amount of past due benefits. The trial judge entered a pretrial order on February 1, 2017 granting the employee's petition on the basis that the employee was entitled to cost-of-living adjustments (COLA) from 2009 to 2016 and assessing a twenty percent (20%) penalty on those retroactive benefits but denying all other allegations. The employee and the employer filed claims for trial *de novo* in a timely fashion.

The only evidence in this matter is an amended stipulation of facts submitted by the parties which we will summarize for purposes of this decision. Sandra Tiernan (employee) was injured during and in the course of her employment with the University of Rhode Island (employer) on April 25, 2002. A pretrial order was entered in W.C.C. No. 2002-05245 on

August 21, 2002 granting the employee weekly compensation benefits for partial incapacity beginning April 26, 2002 for a cervical strain, low back strain, and left shoulder strain.

Subsequently, the employee applied for an Accidental Disability Retirement pension through the Employees' Retirement System of the State of Rhode Island (ERSRI). The employee's application was approved on March 9, 2005. At that time, the employee's weekly workers' compensation rate exceeded her monthly pension benefit, and as a result, she was not paid her disability retirement benefit.

On November 28, 2007, the employer notified the employee of its intent to discontinue her weekly workers' compensation benefits in accordance with Rhode Island General Laws § 28-33-18. Section 28-33-18(d) provides for termination of an employee's workers' compensation benefits after payment of three hundred and twelve (312) weeks of partial incapacity benefits. Under Rhode Island General Laws § 28-33-18.3(a)(1), commonly referred to as the "gate" provision, the employee may have a right to continuing weekly compensation benefits if she proves that her disability "poses a material hindrance to obtaining employment." On February 27, 2009, the employee and the employer executed a Suspension Agreement and Receipt pursuant to which the parties agreed that the employee's weekly workers' compensation indemnity payments would end as of March 1, 2009 in favor of her accidental disability pension.

Prior to the execution of the Suspension Agreement and Receipt, the employee filed a petition to review, W.C.C. No. 2009-01099, in which she sought a ruling by the court on the coordination of her workers' compensation benefits and disability pension pursuant to § 28-33-45(a).<sup>1</sup> On February 25, 2009, the Workers' Compensation Court entered a pretrial order in

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<sup>1</sup>Rhode Island General Laws § 28-33-45(a) provides that:

It is the intention of the general assembly that at retirement a person receiving benefits under chapters 29 — 38 of this title shall receive compensation and retirement benefits in a sum equal to the greater of the compensation or retirement benefits for which that person

W.C.C. No. 2009-01099 ordering the employer to pay the employee a weekly workers' compensation indemnity benefit in the amount of \$21.27 above and beyond the amount of the employee's disability pension benefit from March 1, 2009 and continuing. This order was based upon a determination that the employee was entitled to a continuation of her weekly benefits for partial incapacity pursuant to § 28-33-18.3(a)(1).

Effective March 2, 2009, ERSRI began paying the employee her full disability pension benefit. However, sometime after entry of the pretrial order in W.C.C. No. 2009-01099, ERSRI began deducting the weekly amount of \$21.27 from the payment of the employee's disability pension benefit. In June 2009, the parties executed a Mutual Agreement correcting the amount of the employee's weekly workers' compensation benefit to \$76.80 effective March 1, 2009.

In January 2010, ERSRI notified the employee of its intention to deduct the weekly sum of \$76.80, the amount of her weekly compensation benefit, from the employee's accidental disability pension payment, retroactive to March 1, 2009, in the weekly amount, citing Rhode Island General Laws § 36-10-31.<sup>2</sup> As a result of this action, the employee initiated proceedings

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was otherwise eligible, however, not including retirement benefits to the extent derived exclusively from employee contributions.

The amount of the employee's monthly disability pension, including health insurance, is \$1,060.64. The employee's weekly compensation rate is \$266.04, which equates to \$1,152.84 per month. Therefore, the difference between the disability pension benefit and the workers' compensation benefit is \$92.20 per month, or a weekly rate of \$21.27 per week in workers' compensation benefits, which is the amount awarded in the pretrial order entered in W.C.C. No. 2009-01099.

<sup>2</sup> Rhode Island General Laws § 36-10-31, entitled "Deduction of amounts received from workers' compensation or as damages," states that:

[a]ny amount paid or payable under the provisions of any workers' compensation law exclusive of Medicare set-aside allocations, specific compensation benefits or any benefits authorized by the terms of a collective bargaining agreement or as the result of any action for damages for personal injuries against the state of Rhode Island on account of the death or disability of a member shall be offset against and payable in lieu of any benefits payable out of funds provided by the state under the provisions of this chapter on account of the death or disability of the member. If the value of the total commuted benefits under any workers' compensation law or action is less than the present value on an actuarial basis of

in the Superior Court, which were stayed while the employee exhausted her administrative remedies before the Retirement Board. In a letter dated May 28, 2015, ERSRI notified the employee's counsel of its intention to immediately offset her pension benefit in the amount of \$76.80 weekly, or \$332.80 monthly. In addition, ERSRI stated that it would begin recouping the alleged overpayment of disability pension benefits, which totaled \$24,396.24, retroactive to March 1, 2009, in the amount of \$325.28 per month, such that the employee's monthly pension benefit would be reduced to \$49.01.

On November 16, 2016, the employee filed a petition to adjudge the employer in contempt in the Workers' Compensation Court for failure to comply with the pretrial order entered in W.C.C. No. 2009-01099. On February 1, 2017, a pretrial order was entered ordering the payment of COLA increases from May 10, 2009 and each year thereafter in accordance with § 28-33-18.3(b), based on a weekly compensation rate of \$76.80. The employer was also ordered to pay a twenty percent (20%) penalty on all amounts due and owing as a result of the employer's failure to issue annual COLA increases since 2009. The employer subsequently adjusted the employee's weekly compensation rate to account for all COLA increases. Her current weekly compensation rate is \$91.98 after offsetting the full amount of her disability pension benefit. Both parties filed a claim for trial from the pretrial order.

After reviewing the evidence and hearing arguments from the parties, the trial judge determined that the employer had been in contempt of the pretrial order entered in W.C.C. No. 2009-01099 with respect to COLA increases mandated by Rhode Island General Laws § 28-33-18.3(b)(1). The parties agreed that the employee was receiving benefits pursuant to § 28-33-

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the benefits otherwise payable under this chapter, the value of the commuted payments shall be deducted from the present value of the benefits and the balance thereof shall be payable under the provisions of this chapter.

18.3(a)(1), and as such, was entitled to COLA increases effective May 10<sup>th</sup> of each year. The parties stipulated that after the entry of the pretrial order, the employer adjusted the employee's indemnity rate to account for the COLA increases.

In his bench decision, the trial judge held that the employer was no longer in contempt as it had adjusted the employee's weekly compensation rate to account for the COLAs owed since 2009 and had paid the twenty percent (20%) penalty as mandated in the pretrial order. The trial judge also concluded that the employer was in compliance with § 28-33-45(a) by paying the employee an amount equal to her weekly workers' compensation benefit less the amount she received for her accidental disability pension. The trial judge interpreted the statute to allow the employer to offset the disability pension benefit against the workers' compensation benefit and pay only the excess amount above the disability pension benefit when the workers' compensation benefit was the greater of the two. He reasoned that, "because Ms. Tiernan was receiving in excess of her monthly accidental retirement disability benefits, she was entitled to [an] additional workers' compensation indemnity check paid by the state . . . as well as the COLA adjustment." Trial Tr. 22:19-24. Furthermore, he found that "[a]s the state has complied with the within pretrial order . . . no additional benefits are due to the employee." Trial Tr. 22:19-23:2. The employee promptly filed a claim of appeal from the trial judge's decision.

Section 28-35-28(b) of the Rhode Island General Laws provides a deferential standard for the Appellate Division to employ in reviewing the decision of a trial judge. The statute mandates that "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." R.I. Gen. Laws § 28-35-28(b). "Absent a finding that the trial [judge] misconceived or overlooked material evidence, the [Appellate Division] should not review and reject the factual findings of the trial [judge]." *Grimes Box Co. v. Miguel*, 509 A.2d

1002, 1004 (R.I. 1986) (citing *Mulcahey v. New England Newspapers, Inc.*, 488 A.2d 681, 683 (R.I. 1985)). After our review of the record and the trial judge's decision, we find that his analysis of the relevant statutes and resulting findings of fact are not clearly erroneous. We therefore affirm the decision and decree of the trial judge and deny and dismiss the appeal.

The employee has filed two (2) reasons of appeal in which she argues that two (2) decisions rendered by the Superior Court effectively reversed the orders of this court and that the Appellate Division should apply principles of equity and order the employer to pay the full amount of weekly workers' compensation benefits, without any offset for the disability pension benefits. For purposes of our analysis, a brief discussion of the two (2) Superior Court decisions is necessary.

In December 2009, the employee filed a petition for declaratory judgment in the Superior Court against the General Treasurer and the Executive Director of ERSRI. *See Tiernan v. Magaziner*, C.A. No. PC-2009-7242, 2018 WL 3536362 (R.I. Super. July 10, 2018). This action was held in abeyance while the employee exhausted her administrative remedies before the Retirement Board. After a hearing was conducted on April 29, 2010, the hearing officer appointed by the Retirement Board issued a decision on October 15, 2015, denying the employee's request to reconsider the Retirement Board's decision to offset the supplemental weekly workers' compensation benefit from her disability retirement benefits. Thereafter, the Retirement Board affirmed the decision of the hearing officer. The employee then filed an amended complaint in Superior Court, adding an administrative appeal to the declaratory judgment action. Subsequently, the employee filed a second amended complaint which added a claim of estoppel.

At the request of the parties, the Superior Court addressed the administrative appeal first, issuing a decision on July 10, 2018, denying the employee's appeal from the decision of the Retirement Board and affirming the Board's decision to offset her weekly workers' compensation benefits from her disability retirement benefit in accordance with Rhode Island General Laws § 36-10-31. *Tiernan*, 2018 WL 3536362, at \*15. On November 26, 2018, the Superior Court issued a second decision granting ERSRI's motion for summary judgment regarding the employee's declaratory judgment action and estoppel argument. *See Tiernan v. Magaziner*, C.A. No. PC-2009-7242, 2018 WL 6270969 (R.I. Super. November 26, 2018). The employee then filed an appeal and a petition for writ of certiorari which are presently pending before the Rhode Island Supreme Court. *See Tiernan v. Magaziner*, No. SU-2019-0101-MP (R.I. S. Ct.) and *Tiernan v. Magaziner*, No. SU-2019-0306-A (R.I. S. Ct.).

The employee's two (2) reasons of appeal recite essentially the same argument – that the trial judge erred in not ordering the employer to pay her the full amount of her weekly workers' compensation benefit in light of the decision of the Retirement Board, as affirmed by the Superior Court, that her disability pension would be reduced by the amount of workers' compensation benefits she received, and that the Board was entitled to retroactively take credit for any workers' compensation benefits paid since March 1, 2009. The employee contends that she has therefore been denied her entitlement to an amount equal to the greater of her workers' compensation benefits and disability pension benefit, as set forth in § 28-33-45. The employee urges the appellate panel to reverse the decision of the trial judge and order the employer to pay her the full amount of her weekly workers' compensation benefits retroactive to the time the Superior Court terminated her entitlement to her full disability pension benefits based upon an "erroneous reading" of the coordination of benefits statute. Pet'r's Reasons of Appeal 1.

As a starting point, we first note that this matter is before the court pursuant to the employee's petition to adjudge the employer in contempt. The petition alleges that the employer failed to make payments in accordance with the pretrial order entered in W.C.C. No. 2009-01099 and the mutual agreement executed by the parties. Those documents fixed the specific amount of weekly benefits to be paid by the employer to the employee, taking into consideration the dictates of § 28-33-45 to coordinate the workers' compensation payments with the employee's disability pension benefits. At the pretrial conference, the trial judge found that the employer, by operation of law, should have adjusted the amount of weekly workers' compensation benefits to account for the annual COLA increases mandated by § 28-33-18.3(b) and he therefore granted the petition in part.

The employee claimed a trial and the parties subsequently stipulated that the employer had made the necessary adjustments to the employee's weekly compensation rate and had paid all monies owed in accordance with the pretrial order. The trial judge affirmed his pretrial order awarding the employee the COLA increases. This was the only issue presented by the allegation contained in the employee's petition to adjudge in contempt. After reviewing the record, we find no error on the part of the trial judge in finding that the employee is entitled to the COLA increases and that the employer is no longer in contempt.

The trial judge's inquiry, as well as our inquiry, could easily have stopped at this point as the allegation contained in the employee's petition has been addressed. However, the employee raised the issue of the interpretation and application of § 28-33-45, the coordination of benefits statute, before the trial judge and before the appellate panel. In light of the matters pending before the Rhode Island Supreme Court regarding the two (2) Superior Court decisions discussed

above, we find it prudent, as did the trial judge, to briefly address the interpretation and application of §§ 28-33-45 and 36-10-31.

Section 28-33-45, enacted in 1992, applies to all employees and employers subject to the Workers' Compensation Act, not just State and municipal employees, and states as follows:

- (a) The department of labor and training shall immediately promulgate rules and regulations concerning the offset of workers' compensation benefits and retirement benefits. It is the intention of the general assembly that at retirement a person receiving benefits under chapters 29—38 of this title shall receive compensation and retirement benefits in a sum equal to the greater of the compensation or retirement benefits for which that person was otherwise eligible, however, not including retirement benefits to the extent derived exclusively from employee contributions.
- (b) The offset provided for pursuant to this section shall not be applicable to those collecting retirement benefits while collecting compensation benefits for an injury sustained before the age of fifty-five (55) years and more than five (5) years prior to the date of retirement.
- (c) 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.

The statute was an attempt to address concerns that employees nearing retirement would sustain a work-related injury and then retire shortly thereafter, enabling them to receive both workers' compensation benefits and retirement benefits, i.e., a double recovery.

Looking at the statute as a whole, it becomes clear that it applies to the payment of weekly workers' compensation benefits upon retirement and permits the employer/insurer to take credit for, deduct, or offset the amount of the employer-funded retirement benefits against the amount of weekly workers' compensation benefits. Subsection (a) sets forth the Legislature's intent that an employee who retires while receiving workers' compensation benefits, shall receive an amount equal to the greater of the workers' compensation benefits or the retirement benefits; however, retirement benefits which are funded exclusively by employee contributions are excluded. Therefore, in applying the statute, if the amount of the weekly workers' compensation benefit is greater than the amount of the retirement benefit, the employer/insurer

can take credit for the retirement benefit and only pay weekly benefits in the amount in excess of the retirement benefit. If the amount of the weekly workers' compensation benefit is less than the retirement benefit, the employer/insurer would pay nothing, and the employee would simply receive the full amount of his or her retirement benefit.

The wording of sections (b) and (c) of the statute supports this conclusion. Section (b) provides that "the offset provided for" in the statute does not apply in the situation where the employee sustained the work injury before the age of fifty-five (55) and more than five (5) years prior to retirement. In this situation, the employee is entitled to receive the full amount of the workers' compensation benefits and the retirement benefits. In contrast, section (c) precludes an employee from collecting any workers' compensation benefits upon retirement if the work-related injury was sustained less than two (2) years prior to retirement. In striking this balance, the Legislature addressed employers' concerns that an employee would sustain a work-related injury, legitimate or otherwise, and retire shortly thereafter in order to reap a double recovery.

Section 28-33-45 addresses the coordination of *weekly* workers' compensation benefits and employer-funded retirement benefits. In attempting to reconcile this provision of the Workers' Compensation Act with § 36-10-31, the wording of the statute as a whole must be considered. Section 36-10-31 states as follows:

Any amount paid or payable under the provisions of any workers' compensation law or as the result of any action for *damages* for personal injuries against the state of Rhode Island on account of the death or disability of a member shall be offset against and payable in lieu of any benefits payable out of funds provided by the state under the provisions of this chapter on account of the death or disability of the member. If the value of the total *commuted* benefits under any workers' compensation law or action is less than the present value on an actuarial basis of the benefits otherwise payable under this chapter, the value of the *commuted* payments shall be deducted from the present value of the benefits and the balance thereof shall be payable under the provisions of this chapter. (Emphasis added).

In 2014, the statute was amended to exempt “Medicare set-aside allocations, specific compensation benefits or any benefits authorized by the terms of a collective bargaining agreement.” *Id.*

The terms “damages,” “commuted benefits,” and “commuted payments” refer to lump sum payments, not weekly benefits. In addition, Medicare set-aside allocations are made as part of a lump sum settlement in workers’ compensation and specific compensation benefits are paid in a lump sum for disfigurement and loss of use due to a work-related injury. The last sentence of the statute refers to comparing the value of any lump sum paid for workers’ compensation or personal injury to the present value on an actuarial basis of the retirement benefit. Such a calculation does not apply to workers’ compensation benefits paid *weekly*. Despite use of the overly broad phrase at the beginning of the first sentence of the statute referring to “[a]ny amount paid or payable under the provisions of any workers’ compensation law,” it appears from the wording of the remainder of the statute that the offset of workers’ compensation benefits or damages against retirement benefits applies only to lump sum payments. R.I. Gen. Laws § 36-10-31.

We would also note that § 36-10-31 applies only to State employees. Allowing the State to offset or take credit for the payment of weekly workers’ compensation benefits against retirement benefits when other employers cannot would lead to an inequitable result. Pursuant to § 28-33-45, other employers are required to pay the full amount of retirement benefits and the self-insured employer or insurer offsets or takes credit for the amount of the retirement benefits against the amount owed in weekly workers’ compensation benefits.

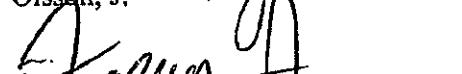
The jurisdiction of this court extends only to the application of the provisions of the Workers’ Compensation Act. In his bench decision, the trial judge concluded that “[t]he offset

R.I.G.L. section 28-33-45(b) referred to is indeed an offset by the workers' compensation carrier." Trial Tr. 19:17-19. The statute allows the employer/workers' compensation insurance carrier to offset or deduct retirement pension benefits provided by the employer from what is owed in workers' compensation benefits. In the present matter, the amount of the employee's weekly workers' compensation benefit was greater than her accidental disability retirement benefit, and she was therefore entitled to a workers' compensation benefit equal to the amount above and beyond the retirement benefit. The trial judge could only order that the employer pay that excess amount and we have no greater authority to compel the employer to pay the full amount of workers' compensation benefits, as such a ruling would violate the terms of the statute.

Accordingly, we find that the determinations made by the trial judge are not clearly erroneous and we therefore deny the employee's claim of appeal and affirm the decision and decree of the trial judge. In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, a proposed version of which is enclosed, shall be entered on **February 25, 2021.**

Feeney, J. and Cardoza, J., concur.

ENTER:

  
Olson, J.  
  
Feeney, J.  
  
Cardoza, J.