Rhode Island Worker Compensation
November 1997 - October 1998.

97-01070 (1998). LOUIS PORTER VS. STEEL SPECIALISTS, INC

Term: November 1997 - October 1998

W.C.C. 97-01070

LOUIS PORTER VS. STEEL SPECIALISTS, INC.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT APPELLATE DIVISION

DECISION OF THE APPELLATE DIVISION

HEALY, J

This matter was heard before the Appellate Division in connection with the employee's claim of appeal from an adverse decision of the trial court. This matter was heard as a Employee's Petition to Review alleging total incapacity as of January 1, 1997. Essentially, the employee sought compensation benefits under the terms of R.I.G.L. Sec. 28-33-17 (b) (2).

After a trial on the merits, the Court determined that the employee had failed in his burden of proof and therefore, denied and dismissed the petition. From said decree, the employee filed a timely claim of appeal.

In support of his appeal, the employee filed nine reasons of appeal. Essentially, he argues that the trial court misinterpreted the provisions of R.I.G.L. Sec. 28-33-17 (b) (2) in finding that the employee had failed in his burden of proof. The employee also argues that since the trial court misinterpreted the provisions of this section, she also misconceived the medical and vocational evidence demonstrating that the employee was totally incapacitated.

Following a review of the entire record in this matter as well as the supported memoranda and after considering the arguments of counsel, we feel that the court correctly interpreted the provisions of R.I.G.L. Sec. 28-33-17 (b) (2) and therefore, deny and dismiss the employee's reasons of appeal.

As noted earlier, the employee is seeking total disability benefits under the provisions of R.I.G.L. Sec. 28-33-17 (b) (2). That section notes:

"In all other cases, total disability shall be determined only if, as a result of the injury, the employee is physically unable to earn any wages in any employment; provided, however, that 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 court may deny total disability under this subsection without requiring the employer to identify particular alternative employment."

This section has come to be known as the "Odd Lot" Section.

In fact review of the historical development of the Odd Lot Doctrine indicates that the relief granted by this section is dramatically different from the common law theory of the "Odd Lot Doctrine". The origin and effect of the Doctrine is discussed by Professor Larson in his Treatise (4 Larson, Law of Larson, Workers' Compensation Law, Sec. 57.51 (b)). There Larson notes that the phrase was originally coined in Cardiff Corp. v. Hall, (1911) 1KB 1009. In Jordan v. Decorative Company, 230 N.Y. 522, 130 N.E. 634 (1921), Judge Cardoza eloquently discussed the theory. There, Judge Cardoza described the Odd Lot employee as "...an unskilled or common laborer". He coupled his request for employment with notice that the labor must be light. The applicant imposing such conditions is quickly put aside for more versatile competitors. Business has little patience with the suitor for ease and favor. He is the 'odd lot' man, the 'nondescript in the labor market'. Work, if he gets it, is likely to be casual and intermittent."

Essentially, the Odd Lot Doctrine is intended to apply to the injured employee, who because of the work-related injury, can not on a practical basis obtain or sustain employment. Interestingly, when initially enunciated, this principle applied as a defense to an employer's petition to review and did not offer any affirmative relief to an injured employee. Typically, the employer would file a petition alleging that the employee was no longer totally incapacitated because he or she had been able to obtain some intermittent earnings. The Odd Lot Doctrine was then applied to defeat a claim that the employee was no longer totally incapacitated because they had obtained an occasional odd job.

The traditional Odd Lot Doctrine was adopted by the Rhode Island Courts in Lupoli v. Atlantic Tubing Co., 43 R.I. 299, 111 A.2d 766 (R.I. 1920). There the Rhode Island Supreme Court defined the Odd Lot Doctrine as follows:

"...Broadly stated this rule is, that 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. In other words the burden is on the employer, the moving party, to show that the workman can get a job." (emphasis added)

In essence, the Odd Lot Doctrine was a discussion of the employer's burden or proof rather than the provision of any additional affirmative right or benefit to the injured employee. This concept was reinforced in Olneyville Wool Combing Co. v. DiDonato, 65 R.I. 154, 13 A.2d 817 (R.I. 1940). The court there cited Lupoli, supra, with approval and noted that the rule was a statement of the employer's burden of proof, and therefore dismissed the employee's petition to review.

In Thompson v. Coats and Clark, Inc., 105 R.I. 214, 251, A.2d 403 (R.I. 1969), Justice Powers, citing prior cases, essentially indicated that the Odd Lot rule was a discussion of the employers burden or proof and dismissed the employee's petition to review alleging incapacity had increased or returned as a result of the Odd Lot Doctrine.

In the 1992 reform of the Rhode Island Workers' Compensation Law, P.L. 1992 Ch. 31, Sec. 5, the Legislature amended the provisions of R.I.G.L. Sec. 28-33-17 to confer an additional benefit upon an injured employee. This section allowed an employee who was unable to return to prior employment but physically capable of other forms of employment to obtain a total incapacity benefit when as on account of the claimants age, education, background, abilities and training they are realistically unable to perform any alternative employment. This provision holds that the total disability benefits can be granted under such circumstances "when manifest injustice would otherwise result."

In the present case, the medical evidence uniformly indicates that the petitioner is capable of light selected employment. Dr. Froehlich testified as follows:

"He is totally disabled in terms of normal gainful employment. He certainly should be able to do work of a very light sedentary nature if that work were available and in his realm of training."(Froehlich Depo. pg. 36, emphasis added)

Dr. Pizzarello, who examined on behalf of the employer, testified that the employee could return to selected light duty and that such a return to work would not be unduly injurious to the employee. (Pizzarello Depo. p. 8).

Judith Drew, a vocational rehabilitation counselor, testified that she had evaluated the employee to determine what type of work he could perform and the availability of such work in the local economy. Ms. Drew testified that based upon her evaluation, there were no jobs in the Rhode Island and Southern New England Labor market which may be done by the employee. (Tr. p. 48). Ms. Drew did indicate on cross-examination that from a vocational standpoint Mr. Porter had numerous transferrable skills and high level skills (Tr. p. 52). She further noted that her opinion that the employee was incapable of returning to employment was based upon her understanding of his multiple orthopedic muscular and vascular problems. (Tr. p. 51-52). Based upon this evidence, the trial judge determined that the employee did not meet his burden of proof as enunciated by the terms of this section.

Our review of the section indicates that the Legislature required that the employee demonstrate an inability to find work when the work-related injury combine with the employee's limited vocational skills to result in total incapacity. That is dramatically different from the employee's suggestion that an award of total disability benefits can be made based upon the employee's own personal underlying medical conditions which are not affected by the work-related injury.

From the facts of this particular matter when considered in light of the express language of the statute, we do feel that it is clear the Appellant's petition must fail. As noted earlier, the statute does require the employee to demonstrate "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." (emphasis added) This particular section seems to be free of any ambiguity. The employee must demonstrate that the compensable injury when combined with the employee's personal limitations (age, education, background, abilities and training) result in the inability to find any realistic employment. Here, the employee has essentially demonstrated disability based mainly on his underlying arthritic condition which has progressed since the time of his injury resulting in the ability only to perform sedentary employment. This is dramatically different from the requirement of the statute. Rather than demonstrating that the work related injury deprived the employee of the only work he could perform the evidence revealed the petitioner as a talented and experienced business person who is disabled due to the progression of a non-work related condition.

It is axiomatic that in interrupting any statute, the Court has the obligation to determine and effectuate the Legislative intent. Brennan v. Kirby, 529 A.2d 633. Additionally, in construing a statute, the court must consider the statute as a whole and the individual sections must be considered in the context of the entire statutory scheme. Sorenson v. Colibri Corp., 658 A.2d 125 (R.I. 1994). When the section in question is considered in light of these rules of construction, we do feel that the interpretation adopted by the trial court effectuates the Legislative intent and comports with the general statutory scheme. It has traditionally been a tenet of the workers' compensation law that if an employee's pre-existing condition is neither caused by nor aggravated by the work-related injury, any disability caused by it is not compensable. Leviton Mfg. Co. v. Lillibridge, 120 R.I. 283, 387 A.2d 1034 (R.I. 1978). Coletta v. Leviton Mfg. Co., 437 A.2d 1380 (R.I. 1981). This principle was reiterated by the General Assembly as part of the 1992 Workers' Compensation reform. Rhode Island General Law Sec. 28-35-45, specifically provide for review of decrees seeking to reduce or terminate workers' compensation benefits on the grounds that "employee has recovered from the effects of his or her work-related injury and is disabled only as a result of a pre-existing condition." (emphasis added). It is interesting to note that the Legislature included this section in the same chapter of the public laws which granted the benefits found in Sec. 28-33-17 (b) (2). Thus, the intent of the Legislature seems clear.

Finally, this construction recognizes one of the essential philosophies of the Law of Workers' Compensation, namely, that while the statute should be construed liberally to effectuate its humanitarian purpose, no construction can be imposed upon it which would convert it to general health or disability insurance. DeLallo v. Queen Dyeing Co., 73 R.I. 325, 56 A.2d 174 (R.I. 1947).

If the employee's interpretation were accepted here, the employer would be responsible to pay workers' compensation benefits to any injured employee who suffers an increase in incapacity for any reason while receiving workers' compensation benefits. Thus, the employee with a relatively minor work-related injury who suffers a significant medical setback while receiving compensation would be entitled to benefits for an extended period of time even though the cause of disability was not connected to the work-related injury. The employer would be forced to assume responsibility for injuries neither caused nor connected with employment. There is, frankly, nothing in the statute which would suggest this construction or would expand the employer's liability to that degree. Thus, we do feel that the statutory construction urged by the employee must be rejected.

Accordingly, the employee's reasons of appeal are denied and the decree appealed from is affirmed.

In accordance with Sec. 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, copy of which is enclosed, shall be entered on

Arrigan C.J. and Morin, J concur.

FINAL DECREE OF THE APPELLATE DIVISION

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT APPELLATE DIVISION

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This cause came on to be heard by the Appellate Division upon the appeal of the 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 January 28, 1998 be, and they hereby are affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

Dennis I. Revens, Administrator

ENTER:

Arrigan, C.J. Healy, J. Morin, J.

I hereby certify that copies were mailed to David Bagus, Esq. and Christopher Fiore, Esq. on