STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
BRITTO ENTERPRISES	)	
	)	
VS.	)	W.C.C. 01-04006
	)	
RICHARD OLIVER	)	

AMENDED DECISION OF THE APPELLATE DIVISION

OLSSON, J. In accordance with Rule 1.5 of the Rules of Practice of the Workers' Compensation Court, an amended decision is hereby rendered in order to correct a typographical error.

This matter is before the Appellate Division on the petitioner/employer's appeal from the denial of its request for suspension of the employee's weekly benefits pursuant to R.I.G.L. § 28-33-41(c). After careful review of the evidence presented and consideration of the arguments of the parties, we deny the appeal and affirm the decision and decree of the trial judge.

The employee sustained a work-related injury on June 27, 1990 which was described as a displaced tibia of the right leg. Since that date, he has had four (4) surgeries on his right leg. At various times, he has returned to work for the employer in a modified duty job. He has never returned to his regular job as a working construction foreman. Most recently, he has been receiving weekly

benefits for partial incapacity since January 16, 1995 pursuant to a decree entered in W.C.C. No. 95-01095 on April 5, 1995.

On June 14, 2001, the employer filed an Employer's Petition to Review requesting suspension of the employee's weekly benefits for failure to participate in an approved rehabilitation program. At the pretrial conference, the trial judge agreed that the employee was no longer complying with the terms of the approved rehabilitation program. However, he denied the request to suspend the employee's benefits because the employee was still making efforts to rehabilitate himself. The employer claimed a trial in a timely manner.

After completion of the trial, the judge affirmed his previous findings and orders continuing the employee's weekly benefits and denying the employer's petition. The employer filed a claim of appeal which is currently before this panel.

The employer presented the deposition testimony of Cynthia Baldwin, the Assistant Administrator of Vocational Services at the Department of Labor and Training, along with various documents regarding the rehabilitation plan. The original request for approval of a rehabilitation plan was submitted by Albert Sabella, a vocational rehabilitation counselor, on behalf of the employee on August 17, 1999. The stated goal of the plan was to complete retraining at the Community College of Rhode Island (CCRI) and obtain an associate's degree in electronic technology/microcomputing systems and networking. The first step in the plan was to attend CCRI and complete the requirements for a certificate in

microcomputing networking and maintenance from January 2000 to December 2000. From January to March 2001, the employee was to participate in resume development and a job seeking skills workshop and then begin looking for employment. From January to December 2001, Mr. Oliver would continue to attend CCRI and complete the requirements for his associate's degree. The plan also stated that he would be required to maintain at least a 2.5 grade point average.

Apparently, the employer and insurer objected to the approval of the plan. A hearing was held at the Department of Labor and Training on November 9, 1999 and a decision was issued on August 22, 2000 approving the plan. That decision was appealed to the Workers' Compensation Court. It appears that sometime in November 2000, a decision was issued affirming the approval of the proposed rehabilitation plan.

Mr. Oliver testified that he began taking courses at CCRI in the fall of 1999, paying his own expenses. He continued to take courses while the litigation regarding approval of his rehabilitation plan was ongoing. By the time the litigation was over, Ms. Baldwin had taken over as the employee's rehabilitation counselor. On April 20, 2001, Ms. Baldwin wrote to the employee, requesting a copy of his transcript from CCRI documenting the courses taken so she could determine when he would likely obtain his certificate and associate's degree. She requested this information in order to submit a request to modify the plan to

change the time frames for completion of the different steps because the litigation had rendered the old time frames invalid.

In addition, Ms. Baldwin advised the employee that he should be taking at least twelve (12) credits each semester, noting that the objective of all rehabilitation plans was to obtain employment at pre-injury wages or greater as soon as possible. Mr. Oliver expressed concerns that he would not be able to maintain an acceptable grade point average if he attempted to carry a full course load of at least twelve (12) credits. Ms. Baldwin stated that she could not support a plan for only part-time attendance at CCRI and informed Mr. Oliver that she was going to request closure of the existing plan so that he could pursue a new plan with another vocational counselor of his choosing.

On May 15, 2001, Ms. Baldwin submitted a form requesting closure of the plan. Mr. Oliver was notified by letter dated May 24, 2001 from the Department of Labor and Training that the plan terminated and he was no longer considered to be participating in an approved rehabilitation plan.

No further action was taken by the employee to attempt to have another plan submitted for approval. On June 14, 2001, the employer filed this petition to suspend the employee's weekly benefits for refusal to participate in an approved rehabilitation plan. In December 2001, Mr. Oliver completed the requirements for a certificate in computer and networking maintenance. At the time of his testimony in July 2002, he was still taking courses at CCRI and had

another year to year and half before completing the requirements for an associate's degree.

The scope of review on appeal before the Appellate Division is very limited. Rhode Island General Laws § 28-35-28(b) 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." Although we find that the trial judge erred in finding that the employee had failed to comply with the terms of the approved rehabilitation plan, we agree with his conclusion that the employer failed to prove that the employee willfully refused to participate in the plan. Consequently, we will deny the employer's appeal and affirm the trial judge's decree with some modifications.

The employer has filed four (4) reasons of appeal, all basically contending that the trial judge was clearly wrong in finding that the employee's failure to adhere to the approved program was not a willful refusal warranting suspension of his weekly benefits. Section 28-33-41(c) of the Rhode Island General Laws provides that "compensation payments shall be suspended while an injured employee willfully refuses to participate in a rehabilitation program approved by the workers' compensation court or agreed to by the parties." The employer argues that by failing to increase his course load to at least twelve (12) credits per semester, the employee willfully refused to participate in the approved plan. We disagree.

A copy of the rehabilitation plan submitted on the employee's behalf and approved by the court is attached to the deposition of Ms. Baldwin. The part of

the R-2 form describing the plan states the objectives and services, evaluation criterion, and estimated time for completion. The plan for Mr. Oliver does not state how many courses he is to take each semester or that he is to carry a full course load or take at least twelve (12) credits. It simply states that he is to enter CCRI and complete the requirements for a certificate and then complete the requirements for an associate's degree. The plan does note that the estimated time frame for completion of each of these steps is one (1) year. However, it clearly states that this is an estimate. In addition, Ms. Baldwin even acknowledged that these time frames were invalid because the approval of the plan was in litigation for a lengthy period of time. While the matter was in litigation, Mr. Oliver went ahead on his own initiative and began taking courses at CCRI at his own expense.

The mandate to take a full course load came from Ms. Baldwin, not from the terms of the approved plan. Even assuming that her recommendation was correct that the goal of a rehabilitation plan is to return the employee to the work force as soon as possible, the requirement to take a minimum of twelve (12) credits each semester was not made part of the approved plan and we will not presume to incorporate it by inference. Consequently, the employee cannot be held to such a mandate.

The record reflects that Mr. Oliver has continually taken courses at CCRI, even in the summer months, and has obtained his certificate in computer and networking maintenance. At this point in time, he has probably already obtained

his associate's degree or is very close to achieving that goal. It should be noted that one of the other steps in the plan was that after obtaining his certificate, the employee would begin looking for employment and keep a log of potential employer contacts. Ms. Baldwin terminated the rehabilitation plan by submitting a closure report dated May 15, 2001. Mr. Oliver did not obtain his certificate from CCRI until December 2001, at which time there was no plan in effect. Therefore, he was not refusing to participate in a plan at that point when he did not begin to conduct a job search.

Based upon the foregoing, the employer's appeal is denied and dismissed. However, we shall submit a new decree containing findings and orders in accordance with our decision as follows:

1. That the petitioner/employer has failed to prove by a fair preponderance of the credible evidence that the employee willfully refused to participate in the court approved rehabilitation program as required by R.I.G.L. § 28-33-41(c).

It is, therefore, ordered:

1. That the employer's petition is denied.

2. That the employee's weekly benefits shall be continued at the rate for partial incapacity to the present and continuing until further order or decree of the court.

3. That it shall be the duty of the employee to furnish to the employer and/or its insurance carrier evidence of the amount of wages earned from any

employer other than the petitioner in order that the amount of compensation due to the employee may be properly computed.

4. That the employer shall reimburse to Richard Oliver the sum of Seventy-nine and 40/100 ($79.40) Dollars for the cost of the transcript of the deposition of Cynthia Baldwin.

5. That the employer shall pay to Peter A. Schavone, Esq., attorney for the employee, a counsel fee in the amount of Twenty-five Hundred and 00/100 ($2,500.00) Dollars for services rendered during the trial of this matter.

6. That the employer shall pay to Peter A. Schavone, Esq., attorney for the employee, a counsel fee in the sum of Seven Hundred Fifty and 00/100 ($750.00) Dollars for his successful defense of the employer's appeal.

We have prepared and submit herewith a new decree in accordance with the decision. The parties may appear on at 10:00 a.m. to show cause, if any they have, why said decree shall not be entered.

Sowa and Connor, JJ. concur.

ENTER:

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Olsson, J.

_____
Sowa, J.

_____
Connor, 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/employer from a decree entered on September 11, 2003.

Upon consideration thereof, the appeal of the petitioner/employer is denied and dismissed, and in accordance with the decision of the Appellate Division, the following findings of fact are made:

1. That the petitioner/employer has failed to prove by a fair preponderance of the credible evidence that the employee willfully refused to participate in the court approved rehabilitation program as required by R.I.G.L. § 28-33-41(c).

It is, therefore, ordered:

1. That the employer's petition is denied.

2. That the employee's weekly benefits shall be continued at the rate for partial incapacity to the present and continuing until further order or decree of the court.

3. That it shall be the duty of the employee to furnish to the employer and/or its insurance carrier evidence of the amount of wages earned from any employer other than the petitioner in order that the amount of compensation due to the employee may be properly computed.

4. That the employer shall reimburse to Richard Oliver the sum of Seventy-nine and 40/100 ($79.40) Dollars for the cost of the transcript of the deposition of Cynthia Baldwin.

5. That the employer shall pay to Peter A. Schavone, Esq., attorney for the employee, a counsel fee in the amount of Twenty-five Hundred and 00/100 ($2,500.00) Dollars for services rendered during the trial of this matter.

6. That the employer shall pay to Peter A. Schavone, Esq., attorney for the employee, a counsel fee in the sum of Seven Hundred Fifty and 00/100 ($750.00) Dollars for his successful defense of the employer's appeal.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Olsson, J.

_____
Sowa, J.

_____
Connor, J.

I hereby certify that copies were mailed to Gerard S. Lobosco, Esq., and Peter A. Schavone, Esq., on

_____