STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

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| RHODE ISLAND MACK SALES | ) | |
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| VS. | ) | W.C.C. 01-06562 |
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| ROGER LETENDRE | ) | |
| ROGER LETENDRE | ) | |
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| VS. | ) | W.C.C. 01-04657 |
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| RHODE ISLAND MACK SALES | ) | |

DECISION OF THE APPELLATE DIVISION

HEALY, C. J. This matter came before the Appellate Division upon the employer's appeal from the adverse decision and decrees entered on March 21, 2002. This cause was heard originally as an employee's Petition to Enforce a Memorandum of Agreement, W.C.C. No. 01-04657, and an employer's Petition for Determination of a Controversy, W.C.C. No. 01-06562. The employer's petition sought confirmation of its calculation of a reduction of weekly benefits due to the receipt of Social Security retirement benefits based upon R.I.G.L. § 28-33-45. The employee alleged in his petition that the employer had improperly unilaterally reduced his weekly benefits. The matters were consolidated for both the pretrial conference and subsequent

trial. At the pretrial conference, the trial judge found with regard to the petition to enforce: (1) that the employee had proven that his benefits were reduced unilaterally on or about June 14, 2001, (2) that the period from June 14, 2001 to August 16, 2001 would be dealt with at trial, (3) that the assessment of a penalty was to remain open, and (4) that the employer was to recommence the payment of weekly benefits as of August 16, 2001 and continuing in accordance with the Memorandum of Agreement. In addition, the trial judge denied the employer's petition seeking to confirm its calculation of a reduction of benefits based upon R.I.G.L. § 28-33-45. Both parties claimed a trial.

After a full hearing on the merits, the trial judge denied and dismissed the employer's petition in W.C.C. No. 01-06562. In W.C.C. No. 01-04657, the trial judge found that the employer had impermissibly modified the employee's compensation benefits and ordered the resumption of payments at the amount set forth in the Memorandum of Agreement. The employer has claimed an appeal from the decrees entered in both cases.

The facts of this case are not in strenuous dispute. The employee, Roger Letendre, became disabled on May 8, 1997 as a result of a work-related injury to his right shoulder. He began receiving weekly benefits for partial incapacity pursuant to a Memorandum of Agreement on May 12, 1997. At the time of his injury, Mr. Letendre was sixty-two (62) years old. A year or two (2) later, he applied for and began receiving disability benefits from the Social Security Administration.

The employee continued to receive his benefits in this fashion until he attained sixty-five (65) years of age in December 1999. At that point, pursuant to federal regulation, the Social Security Administration automatically converted the employee's disability benefits to retirement benefits. In addition, the employee indicated that in July 2000, he began receiving payments

from the employer through a salary continuation agreement, which had been executed on February 12, 1996. Pursuant to that agreement, the employee received Twenty-Five Thousand Dollars ($25,000.00) annually.

As a result of these benefit modifications, the employer unilaterally calculated and implemented a reduction in the weekly compensation benefits payable to the employee pursuant to R.I.G.L. § 28-33-45. The employee responded with a petition to enforce the Memorandum of Agreement (W.C.C. No. 01-04657). Shortly thereafter, the employer filed a Petition for Determination of a Controversy seeking to confirm its calculation of a reduction of weekly benefits (W.C.C. No. 01-06562).

At the time of the trial, the employee also maintained a 401(K) retirement plan with the employer. Mr. Letendre stated that he had not made an election to receive any benefits from this plan or to retire from any employment.

After a full hearing on the matter, the trial judge found that the employee's absence from the workforce did not result from an unwillingness to work but was due to his continued inability to perform gainful employment. In addition, he specifically found that the employee never elected to receive Social Security retirement benefits. Based upon these findings, the trial judge explicitly stated that "to allow an offset in [sic] these facts would result in penalizing the employee for simply turning 65 years of age, which it is clear was not the intention of the Legislature when they enacted Section 28-33-45." (Decision at 7.) Thus, he granted the employee's petition to enforce and denied the employer's miscellaneous petition.

As noted earlier, the trial judge's findings of fact are not disputed and we are left to consider the legal issue. We have carefully reviewed the record of this proceeding, and we find

no merit in the employer's reasons of appeal. We, therefore, deny the employer's appeal and affirm the decision and decrees of the trial judge.

On appeal, the employer raises one predominant issue, namely, that the trial judge was wrong in his determination that the employee had not voluntarily retired. Thus, he erred in his refusal to apply the coordination of benefits provision, R.I.G.L. § 28-33-45.

The appellant essentially argues that the trial court erred when it determined that Mr. Letendre's employment status had not changed when the Social Security Administration deemed him to be entitled to retirement benefits as opposed to disability payments. The appellant's theory is that the employee's intent is not the basis for this determination and that the trial judge erred as a matter of law when he considered the employee's subjective intent. The appellant urges this panel to hold that the court was bound as a matter of law to offset any retirement benefits received by the employee regardless of the basis under which the employee received the benefit.

In the present case, the trial judge found that the testimony and facts of the matter revealed that "the employee's absence from work did not result from an unwillingness to work but was due to his medical inability to perform his gainful employment resulting from the May 8, 1997 right shoulder injury." (Decision at 7.) The trial judge explicitly referred to the change in the nature of the employee's benefits by way of a federal statute. There is ample evidence within the record to support such a finding by the trial judge and we can find no error in the trial judge's determination.

More significantly, at the hub of this controversy is the question of how an employee's retirement status would affect his or her right to a weekly workers' compensation benefit. This discussion demands some historical perspective. The retirement of an injured employee has long

been a source of vexation for employers and insurers. In BIF A Unit of Gen. Signal Corp. v. Des Roches, 116 R.I. 280, 355 A.2d 404 (1976), the employer filed a petition to review alleging that the employee was no longer entitled to weekly workers' compensation benefits because he had voluntarily retired and was receiving pension benefits from his employer under a noncontributing pension agreement. In Des Roches, the Rhode Island Supreme Court held that the issue for determination was not whether the employee had voluntarily terminated his employment but, rather, whether the incapacity due to the work-related injury continued. See id. at 281, 355 A.2d at 405. The Court there noted that if the employee remained incapacitated, the right to weekly benefits continued unabated. See id.

Thereafter, in Mullaney v. Gilbane Building Co., 520 A.2d 141 (R.I. 1987), the Court drew a significant distinction on this issue when they held that an employee who had become disabled subsequent to the time he or she had voluntarily retired from the workforce was not entitled to weekly compensation benefits. The justices commented that workers' compensation benefits were indeed a substitute for the employee's loss of earning capacity caused by a work-related injury. See id. at 143. Thus, in those situations where the injured worker had voluntarily surrendered the ability to earn wages prior to the onset of incapacity, he or she would not be entitled to weekly workers' compensation benefits. Id. at 144. These cases essentially created a distinction between the employee who became disabled before retirement and the injured worker whose disability began after he or she had begun receiving a pension or other retirement benefits.

This dichotomy continued until the General Assembly undertook sweeping workers' compensation reform in 1992 and promulgated R.I.G.L. § 28-33-45 in an effort to address this issue. The legislation was intended to address the situation where the employee began receiving a pension benefit subsequent to the onset of incapacity. The expressed legislative intent was that

"at retirement a person receiving benefits under chapter 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." R.I.G.L. § 28-33-45(a). Thus, it would appear that the employee's intent in receiving a pension benefit is not the determinative factor in considering whether a pension offset should be applied to the weekly compensation benefit.

It would, however, be a gross oversimplification to simply apply a mathematical formula to this situation. Further review of the statute clearly demonstrates that the legislature envisioned a more complex (and more humane) approach to this problem. Subsection (b) of this statute sets forth a specific exclusion for the employee who was injured before attaining the age of fifty-five (55) years and more than five (5) years prior to the date of retirement. This safe harbor given to the employee who qualifies under this section must be contrasted with the provision in subsection (c) which bars the employee from collecting a weekly indemnity benefit after retirement if the injury is suffered less than two (2) years prior to his or her retirement. Finally, as noted above, any retirement benefits derived exclusively from contributions made by the employee may not be used to offset any workers' compensation benefits.

When all of these provisions are read together, the situation sought to be remedied becomes much clearer. Clearly, the legislature was focused upon the situation where an employee seeks to collect a weekly workers' compensation benefit together with an employer-funded pension benefit. In Des Roches, the Court alluded to this practice (quoting Roberts v. General Elec. Co., 6 App. Div. 2d 43, 45, 174 N.Y.S.2d 533, 535 (1958)) in acknowledging the employer's concern that the continuation of compensation benefits following the receipt of a

pension benefit will ". . . result in a situation where employees [will] obtain . . . benefits supplementing . . . their pension and social security payments, without the employee being compelled to show causal connection between the disability and the inability to find work." See 116 R.I. at 282, 355 A.2d at 405.

The abuse which the General Assembly attempted to correct, however, seems to be more clearly delineated. In promulgating R.I.G.L. § 28-33-45, it appears that the legislature was attempting to focus upon the employee who was receiving both a workers' compensation benefit as well as an employer-funded pension in order to prevent a double recovery. The exception carved out for the portion of the retirement benefit funded by the employee's own contribution seems to support this position. Furthermore, the Workers' Compensation Act has traditionally held that the employee's savings or other insurance are not to be considered in determining the compensation to be paid to the employee. See R.I.G.L. § 28-33-21. While this statute was amended to acknowledge the provisions of R.I.G.L. § 28-33-45, we do not believe that it mandates a reduction for all benefits received simply because they are designated as a retirement benefit.

The employer has also argued that the court overlooked material evidence, namely, the salary continuation agreement entered into between the employee and the employer. The appellant argues that this document proves that the employee has voluntarily retired and therefore submitted himself to the coordination of benefits rule. The appellant argues that even if the execution of this agreement did not trigger the provisions of R.I.G.L. § 28-33-45, the payments made under the terms of this agreement should be viewed as earnings and offset against the weekly compensation payment.

The salary continuation agreement was admitted into evidence and marked as a respondent's exhibit. The agreement establishes a plan to secure the employee's services until the date of his retirement which was established as August 6, 1997. (Respondent's Ex. 1, ¶ 2.) The agreement notes that if the employee remains in service for the company, he will be entitled to an annual payment at the time of his retirement. More significantly, the document also addresses the employee's right to periodic payments in the event that he becomes disabled prior to the established retirement date. (Respondent's Ex. 1, ¶ 8.) In effect, this clause memorializes an agreement between the parties to provide periodic payments to the employee in the event he becomes disabled prior to the established retirement date.

The language of this agreement, in our opinion, supports the premise that the payments made to the employee pursuant to the agreement cannot be viewed as retirement payments and, therefore, may not be offset against his workers' compensation payments. Initially, the salary continuation agreement establishes the standard the employee must meet in order to qualify for a disability payment. It notes that such payments will be made only when Mr. Letendre "shall become disabled to such an extent that as a result of accidental bodily injury or sickness he becomes wholly and continuously prevented from engaging in and performing his normal work for the Corporation, . . ." (Respondent's Ex. 1, ¶ 8.) Moreover, it establishes that the Board of Directors of the company will be the exclusive arbiter of this issue. It seems clear that the payments made to the employee under the explicit language of this paragraph are strictly on account of a disability and not a voluntary service retirement. Further, since this decision was made by the Board of Directors, it probably constitutes a binding admission of that precise fact.

Once it is determined that the payments made to the employee under this agreement are for disability rather than for retirement, we must return to R.I.G.L. § 28-33-21 to gauge their

legal effect. In our opinion, this section unequivocally bars such payments from consideration in determining the right to compensation. The salary continuation agreement sets forth independent consideration for Mr. Letendre's continued service. It contains penalties if he engages in impermissible competition and it defines the terms and conditions to qualify for a disability payment. Since the disability payments are unquestionably the result of a bargained for exchange, we are convinced that they are completely independent of the Workers' Compensation Act and may not be utilized in determining the amount of weekly workers' compensation benefits.

For the reasons set forth above, we affirm the decision and decrees of the trial judge and deny and dismiss the employer's reasons of appeal. In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, final decrees, copies of which are enclosed, shall be entered on

Bertness and Sowa, JJ. concur.

ENTER:

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Healy, C. J.

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Bertness, J.

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Sowa, J.

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PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

RHODE ISLAND MACK SALES )
)
VS. ) W.C.C. 01-06562
)
ROGER LETENDRE )

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the petitioner/employer and upon consideration thereof, the appeal is 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 March 21, 2002 be, and they hereby are, affirmed.

2. The employer shall pay a counsel fee in the amount of Two Thousand and 00/100 ($2,000.00) Dollars to Albert Lepore, Esq., attorney for the employee, for the successful defense of the appeal.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Healy, C. J.

_____
Bertness, J.

_____
Sowa, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Ann Marie Paglia, Esq., and Albert Lepore, Esq., on

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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

ROGER LETENDRE )
)
VS. ) W.C.C. 01-04657
)
RHODE ISLAND MACK SALES )

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the petitioner/employer and upon consideration thereof, the appeal is 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 March 21, 2002 be, and they hereby are, affirmed.

2. The counsel fee for the successful defense of this appeal is incorporated in the amount awarded in the companion case, W.C.C. No. 01-06562.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Healy, C. J.

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Bertness, J.

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Sowa, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Ann Marie Paglia, Esq., and Albert Lepore, Esq., on

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