STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

STEPHEN STAMP	)	
	)	
VS.	)	W.C.C. 02-02984
	)	
PROVIDENCE GAS COMPANY	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the appeal of the petitioner/employee from the decision and decree of the trial judge denying the employee's petition to enforce in which he alleged the non-payment of the weekly benefits awarded by the decree entered in W.C.C. No. 96-00465 on March 13, 2002. After careful review of the record and consideration of the arguments of the parties, we grant the appeal and reverse the decision and decree of the trial judge.

In W.C.C. No. 96-00465, an original petition, the employee was awarded weekly benefits for partial incapacity from January 9, 1996 to July 29, 1996, for total incapacity from July 30, 1996 to October 14, 1996, and for partial incapacity again from October 15, 1996 through July 20, 1998. During these periods, the employee received some Temporary Disability Insurance (hereinafter "TDI") benefits and also worked for the employer. This led to some rather complex calculations as to the amount of benefits owed to the employee.

At the pretrial conference, the trial judge granted the petition to enforce and awarded the employee One Thousand Six Hundred Twenty-two and 72/100 ($1,622.72) Dollars in additional

weekly benefits because the insurer had improperly taken credit for wage continuation payments made to the employee during a six (6) month period in early 1996. The trial judge also awarded a twenty percent (20%) penalty to be paid to the employee on the amount owed. The employee claimed a trial.

Richard Lento, the adjuster of the employee's claim against the employer, testified that Thirty-nine Thousand Seven Hundred Forty-six and 90/100 ($39,746.90) Dollars was paid to the employee in weekly benefits, and Six Thousand One Hundred Fifty and 33/100 ($6,150.33) Dollars was reimbursed to the Temporary Disability Insurance Fund. He calculated the amount of weekly benefits to be paid each week based on wage information provided by the employer. Several documents were introduced into evidence showing his calculations. It was the insurer's position that no further money was owed to the employee.

The employee testified that he had reviewed the documents from Mr. Lento and was not in agreement with his calculations. He contended that the insurer credited payments made to him for sick leave as wages. Mr. Stamp believed that there was still a TDI lien in the amount of Eight Thousand Two Hundred Eighteen and 00/100 ($8,218.00) Dollars to be reimbursed. Mr. Stamp made his own calculations using the documents provided by the insurer and employer and subtracted what he believed was his sick leave pay and the TDI lien, as well as the benefits he had already received. He concluded that he was still owed Eight Thousand Three Hundred Eleven and 85/100 ($8,311.85) Dollars. He submitted a document with his handwritten calculations on it.

It was determined at trial that all the calculations presented, both from Mr. Lento and the employee, were based on payments made prior to the pretrial order compelling additional payments to be made to the employee and did not include those payments as having been made.

The parties rested and the matter was scheduled for a bench decision. Prior to that date, the employee filed a motion to re-open in order to provide him the opportunity to seek records from his employer documenting his hours worked and hours of sick leave for the relevant time periods. The employee believed that there was some discrepancy between the figures used by Mr. Lento and his actual time records but he could not specify the basis for his belief or where he thought the discrepancy might lie. The trial judge denied the motion to re-open.

The trial judge, utilizing the information provided by the parties, made his own calculation of the amount of benefits the employee should have been paid each week and compared that to the amount paid by the insurer. He concluded that the amount requested by the employee, Eight Thousand Three Hundred Eleven and 85/100 ($8,311.85) Dollars, was not correct. Based upon his own calculations, he stated in his bench decision that he believed the employee was owed Six Thousand Three Hundred Six and 07/100 ($6,306.07) Dollars. However, he then found that because the employee's calculation of what he was owed was incorrect, the employee had failed to prove the allegations of his petition and the petition must be denied. The employee then duly filed this claim of appeal.

Pursuant to R.I.G.L. § 28-35-28(b), a trial judge's findings on factual matters are final unless found to be clearly erroneous. See Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996). The Appellate Division is entitled to conduct a *de novo* review only when a finding is made that the trial judge was clearly wrong. Id.; Grimes Box Co., Inc. v. Miguel, 509 A.2d 1002 (R.I. 1986). Such review however, is limited to the record made before the trial judge. Vaz, supra, citing Whittaker v. Health-Tex, 440 A.2d 122 (R.I. 1982). Based upon our review of the record and the trial judge's bench decision, we find that his conclusion that the employee failed to prove the allegations of his petition was clearly wrong.

The employee has filed six (6) reasons of appeal. The first three (3) reasons are general recitations that the trial judge's decision is against the law and the evidence. Our statute and the relevant case law requires that the appellant state with specificity the errors allegedly committed by the trial judge. R.I.G.L. § 28-35-28; Falvey v. Women and Infants Hosp., 584 A.2d 417, 420 (R.I. 1991); Bissonnette v. Federal Dairy Co., Inc., 472 A.2d 1223, 1226 (R.I. 1984). Therefore, these three (3) reasons of appeal are denied and dismissed.

In the fourth reason of appeal, the employee argues that the trial judge was clearly wrong to deny the employee's petition when the trial judge found that the employee, based upon the trial judge's calculations, had in fact been underpaid. The party asserting the affirmative in a worker's compensation petition bears the burden of establishing the essential elements entitling him to relief under the statute. Star Enterprises v. Delbarone, 746 A.2d 692, 697 (R.I. 2000), citing Leviton Mfg. Co. v. Lillibridge, 120 R.I. 283, 387 A.2d 1034 (1978). In this case, the allegation in the employee's petition to enforce is that the insurer has not made payments in accordance with the decree in W.C.C. No. 96-00465. He did not claim a specific amount was owed to him. During his testimony, he stated what he believed he was owed based upon his own calculations. However, that testimony did not bind him to proving that exact number in order to obtain relief on his petition.

The employee produced some documents and calculations indicating that he had been underpaid by the insurer. Utilizing the wage records obtained from the employer, the trial judge was able to apply the formula provided in the Workers' Compensation Act to calculate the weekly benefits the employee should have been paid for each week of his incapacity. This is part of his duty as the fact finder. When he compared that figure to what the insurer had actually paid, it was clear that the employee was underpaid, just as he had alleged. The employee

sustained his burden of proof and was entitled to an order compelling the insurer to pay whatever the deficit was in the amount he was owed. We find that it was error for the trial judge to find that the employee did not successfully prosecute his petition to enforce because he did not prove that he was owed the exact amount he mentioned in his testimony. If we were to uphold the trial judge's position in this matter, the employee would be left to file his petition to enforce again and allege the newly calculated amount in order to be paid the benefits to which he is entitled. This would involve unnecessary expenditure of valuable judicial time and resources. Consequently, we reverse the trial judge and will enter a new decree ordering the payment of Six Thousand Three Hundred Six and 07/100 ($6,306.07) Dollars to the employee plus a twenty percent (20%) penalty.

In light of our decision regarding the employee's fourth reason of appeal, we need not address his final reason of appeal.

In accordance with our decision, a new decree shall enter containing the following findings and orders:

1. That the employee has established by a fair preponderance of the credible evidence that the respondent has failed to pay the proper amount of weekly benefits in accordance with the decree entered in W.C.C. No. 96-00465 on March 13, 2002.

2. That the employee is owed the sum of Six Thousand Three Hundred Six and 07/100 ($6,306.07) Dollars in weekly benefits.

3. That a penalty equal to twenty percent (20%) of the amount owed is assessed against the respondent and shall be paid in conjunction with the benefits due to the employee.

It is, therefore, ordered:

1. That the employer shall pay to the employee the sum of Six Thousand Three Hundred Six and 07/100 ($6,306.07) Dollars plus a penalty equal to twenty percent (20%) of that amount.

2. That the employer shall reimburse the employee's counsel the sum of Twenty-five and 00/100 ($25.00) Dollars for the appellate filing fee and One Hundred Seventy-five and 00/100 ($175.00) Dollars for the cost of obtaining the transcript of the trial proceedings upon presentation of the amount of such cost and proof of payment of the same.

3. That the employer shall pay a counsel fee in the sum of One Thousand Five Hundred and 00/100 ($1,500.00) Dollars to Stephen J. Dennis, Esq., attorney for the employee, for services rendered in this matter at the trial level.

4. That the employer shall pay a counsel fee in the sum of One Thousand and 00/100 ($1,000.00) Dollars to Stephen J. Dennis, Esq., attorney for the employee, for the successful prosecution of the employee's appeal.

We have prepared and submit herewith a new decree in accordance with our 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.

Bertness and Connor, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Bertness, 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/employee from a decree entered on October 7, 2002.

Upon consideration thereof, the appeal of the employee is granted and in accordance with the decision of the Appellate Division, the following findings of fact are made:

1. That the employee has established by a fair preponderance of the credible evidence that the respondent has failed to pay the proper amount of weekly benefits in accordance with the decree entered in W.C.C. No. 96-00465 on March 13, 2002.

2. That the employee is owed the sum of Six Thousand Three Hundred Six and 07/100 ($6,306.07) Dollars in weekly benefits.

3. That a penalty equal to twenty percent (20%) of the amount owed is assessed against the respondent and shall be paid in conjunction with the benefits due to the employee.

It is, therefore, ordered:

1. That the employer shall pay to the employee the sum of Six Thousand Three Hundred Six and 07/100 ($6,306.07) Dollars plus a penalty equal to twenty percent (20%) of that amount.

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3. That the employer shall pay a counsel fee in the sum of One Thousand Five Hundred and 00/100 ($1,500.00) Dollars to Stephen J. Dennis, Esq., attorney for the employee, for services rendered in this matter at the trial level.

4. That the employer shall pay a counsel fee in the sum of One Thousand and 00/100 ($1,000.00) Dollars to Stephen J. Dennis, Esq., attorney for the employee, for the successful prosecution of the employee's appeal.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Olsson, J.

_____
Bertness, J.

_____
Connor, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq., and James T. Hornstein, Esq., on

_____