STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

AUTOCENTER ENTERPRISES	)	
	)	
VS.	)	W.C.C. 03-03122
	)	
GEORGE LOOMIS	)	

DECISION OF THE APPELLATE DIVISION

SOWA, J. This matter came on to be heard before the Appellate Division upon an appeal of the petitioner/employer from a decision and decree of the trial judge that was entered on August 10, 2004. The matter was filed in the nature of an Employer's Petition to Review, pursuant to R.I.G.L. § 28-33-18(b), seeking a reduction in the employee's compensation rate by thirty percent (30%) as a result of the employee having reached maximum medical improvement.

The decision of the trial judge contained the following finding of fact:

> "1. The delay in the implementation of the reduction was in conformance with the language in 28-33-18(b) and not an abuse thereof."

The decree of the trial court, which is the subject of this appeal, contained the following:

> "1. That the petition be denied and dismissed."

The trial judge, in rendering his bench decision, did state, at the end of the hearing:

> "Let the record reflect that the Court stands by its bench decision issued this day wherein the Court's order of August 5, 2003 shall remain in full force and effect." (Tr. p. 12)

The apparent inconsistency between the findings of fact and the decree is rendered moot by this decision.

A timely claim of appeal was filed by the petitioner/employer. In support thereof, three (3) reasons of appeal were filed, arguing:

> "1. The trial court abused its discretion and committed a clear error of law in failing to immediately implement the 30% reduction in the employee's benefits provided for in R.I.G.L § 28-33-18(b), where the employee failed to produce any evidence that he was actively seeking employment.
>
> "2. The trial court ignored the decisions of the Appellate Division in Rhode Island Hospital v. Seeley Brown, W.C.C. No. 1994-00203 (App. Div. 1995) and Ann & Hope v. Rosiak, W.C.C. No. 1995-04932 (App. Div. 1995). Both cases establish that the 30% reduction in the employee's benefits provided for in RIGL §28-33-18(b) shall be implemented where it is demonstrated that the employee has not met his or her burden to actively seek employment.
>
> "3. The trial court committed an error of law in entering a decree denying and dismissing the employer's petition. It is evident from the wording of the court's decree and from the record that the intention of the trial court was not to deny and dismiss the employer's petition, but rather, to affirm its pre-trial order, which granted the employer's prayer for a 30% reduction in the employee's benefits, but delay such implementation by a period of four months."

Pursuant to R.I.G.L. § 28-35-28(b), the appellate panel is charged with the initial responsibility to review the record to determine whether the decision and decree properly respond to the merits of the controversy. The role of the Appellate Division in reviewing factual matters is, however, sharply circumscribed. Rhode Island General Laws § 28-35-28(b) states, "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." The Appellate Division is entitled to conduct a *de novo* review of the evidence only when a finding is made that the trial judge was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996); Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986). Such review, however, is limited to the record made at the trial level. Whittaker v. Health-Tex, Inc., 440 A.2d 122 (R.I. 1982).

Cognizant of this legal duty imposed upon us, we have reviewed the entire record and hereby grant the employer's appeal.

This matter was filed as an employer's petition to review seeking implementation of R.I.G.L. § 28-33-18(b) with a reduction of benefits by thirty percent (30%). The employee had sustained a right rotator cuff strain on July 10, 2000, which was memorialized by a memorandum of agreement dated August 21, 2000. That memorandum of agreement was presented at the pretrial conference and was marked as Employer's Exhibit 1 at trial. A pretrial order entered on March 21, 2003 in W.C.C. 03-01465, which found that the employee's condition had reached maximum medical improvement, was marked as Employer's Exhibit 2. The pretrial order of the trial judge in the present matter was marked as Employer's Exhibit 3. That pretrial order resulted in a reduction in benefits pursuant to R.I.G.L § 28-33-18(b), but implementation was delayed until December 31, 2003.

No other evidence was presented at trial and both sides rested.

Rhode Island General Laws § 28-33-18(b) reads as follows:

> "For all injuries occurring on or after September 1, 1990, where an employee's condition has reached maximum medical improvement and the incapacity for work resulting from the injury is partial, while the incapacity for work resulting from the injury is partial, the employer shall pay the injured employee a weekly compensation equal to seventy percent (70%) of the weekly compensation rate as set forth in subsection (a) of the section. The court may, in its discretion, take into consideration the performance of the employee's duty to actively seek employment in scheduling the implementation of the reduction. The provisions of this subsection are subject to the provisions of § 28-33-18.2."

The Rhode Island Supreme Court, in the case of Gilbane Co. v. Poulas, 576 A.2d 1195 (R.I. 1990), stated as follows:

> "When charged with the duty of statutory construction, one must read the language so as to effectuate the legislative intent behind its enactment. (Citation omitted) If the language is clear on its face, then the plain meaning of the statute must be given effect." Id. at 1196.

Similarly, the Court in the case of Krikorian v. R.I. Dept. of Human Services, 606 A.2d 671 (R.I. 1992), stated as follows:

> "In construing a statute, this court attempts to ascertain the intent of the Legislature by considering the act in its entirety and by viewing it in light of circumstances and purposes that motivated its passage. Legislative intent is determined 'through an examination of the language of the statute itself, giving the words of the statute their plain and ordinary meaning.' McGee v. Stone, 522 A.2d 211, 216 (R.I. 1987)." Id. at 675.

The wording of R.I.G.L. § 28-33-18(b) contains mandatory language regarding the implementation of the reduction to seventy percent (70%); ". . . the employer shall pay the injured employee a weekly compensation equal to seventy percent (70%) . . . ." (Emphasis added.)

The record in this case contains no evidence that the employee actively sought employment. The requirement to actively seek employment is a prerequisite to the court even considering an exercise of its discretion. By the employee's failure or refusal to engage in the required activity, the court is prohibited from exercising the discretion referred to in § 28-33-18(b). See Rhode Island Hospital v. Seeley Brown, W.C.C. 94-00203 (App. Div. 1995).

As a result, we find merit in the employer's appeal. The decision and decree of the trial judge is reversed and the decree entered on August 10, 2004 is vacated. In accordance with our decision, a new decree shall enter containing the following findings and orders:

1. That the employee's condition resulting from a work-related injury he sustained on July 10, 2000 reached maximum medical improvement on March 21, 2003.

2. That the employee has failed to actively seek employment since that date.

It is, therefore, ordered:

1. That the employer shall reduce the employee's weekly benefits to seventy percent (70%) of his weekly compensation rate pursuant to R.I.G.L. § 28-33-18(b) as of August 5, 2003.

2. That the employer's petition to review is granted.

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.

Olsson and Connor, JJ. concur.

ENTER:

_____
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 August 10, 2004.

Upon consideration thereof, the appeal of the employer is sustained, and in accordance with the Decision of the Appellate Division, the following findings of fact are made:

1. That the employee's condition resulting from a work-related injury he sustained on July 10, 2000 reached maximum medical improvement on March 21, 2003.

2. That the employee has failed to actively seek employment since that date.

It is, therefore, ordered:

1. That the employer shall reduce the employee's weekly benefits to seventy percent (70%) of his weekly compensation rate pursuant to R.I.G.L. § 28-33-18(b) as of August 5, 2003.

2. That the employer's petition to review is granted.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Sowa, J.

_____
Connor, J.

I hereby certify that copies were mailed to Bruce Balon, Esq., and Thomas R. Ricci, Esq. on

_____