STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

TECHNIC, INC.	)	
	)	
VS.	)	W.C.C. 2005-05066
	)	
BRENDA FERNANDES	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employer's appeal from the trial judge's denial of its petition to review alleging that the employee has returned to work at an average weekly wage equal to or in excess of that which she was earning at the time of her injury. After review of the pertinent statutes and consideration of the arguments of the parties, we deny and dismiss the employer's appeal and affirm the decision and decree of the trial judge.

The parties presented a stipulation of facts at trial which we have summarized for purposes of this decision. Pursuant to an amended decree entered in W.C.C. No. 2002-00955 on October 9, 2002, the employee was found to have sustained a work-related injury on November 29, 2001, consisting of urticaria, commonly known as hives. The employee's average weekly wage at the time of the injury was Five Hundred Ninety and 44/100 ($590.44) Dollars. The employer was ordered to pay weekly benefits for partial incapacity to the employee beginning November 29, 2001. In 2005, the employee returned to work for a temporary help service, NAEP/WESTAT, for about two (2) months and earned wages significantly less than her average weekly wage.

Eventually, the employee retrained herself as a licensed real estate agent and began working for DeFelice Realty around February 2005. As a real estate agent, her duties included obtaining clients, showing homes, negotiating sales, and attending closings, among other activities. The employee was not paid on an hourly or salary basis; rather, she was paid a commission consisting of a percentage of the sale price of the home that was sold. The commission is paid to her in one lump sum approximately ten (10) days after the closing on the property. Ms. Fernandes testified that she does not receive a check every week and the work she does to earn the commission is performed weeks or months before she receives payment.

The employee has faithfully reported her earnings for each week she received wages or commissions. The employer, through its workers' compensation carrier, has paid the employee her full weekly workers' compensation rate of Three Hundred Fifty-four and 00/100 ($354.00) Dollars for each week during which the employee did not receive any earnings. For those weeks during which she received wages or commissions less than her pre-injury average weekly wage of Five Hundred Ninety and 44/100 ($590.44) Dollars, the employer paid her varying partial compensation in accordance with R.I.G.L. § 28-33-18(a). When the employee received a commission payment in excess of Five Hundred Ninety and 44/100 ($590.44) Dollars, she did not receive any workers' compensation benefits.

The employee received real estate commissions in the following amounts over the course of more than four (4) months in 2005 for work performed at DeFelice Realty:

Week Ending	Earnings
5/25/05	$4,616.77
6/14/05	$6,820.95
6/22/05	$3,127.85
7/13/05	$2,424.00
8/4/05	$2,377.16
8/10/05	$4,435.86

10/5/05	$1,628.88

(Joint Ex. 1 at 3.)

Subsequent to the submission of the stipulation of facts to the trial judge, the employee received the following amounts prior to the close of the evidence:

Week Ending	Earnings
11/23/05	$2,934.26
12/14/05	$2,340.48
1/4/06	$4,378.35

In its petition to review, the employer alleges that Ms. Fernandes is earning wages equal to or in excess of her pre-injury average weekly wage; in other words, that she has regained her earning capacity and her weekly benefits should be terminated. The trial judge denied the petition, citing the Appellate Division decision in Cardillo v. SRS Communications, W.C.C. No. 2000-03832 (App. Div. 6/21/02), which held that an employee's weekly benefits cannot be discontinued simply because his post-injury earnings occasionally exceed his pre-injury average weekly wage. In Cardillo, the appellate panel noted that in order to discontinue the payment of weekly benefits, the employer must establish that the employee is capable of earning those wages on a regular basis. The trial judge in the present matter noted that the wage information produced by the employer "merely highlights the erratic nature of the employee's newfound livelihood," and "underscores the employee's inability to earn any *actual* wages for a majority of the weeks she spent working as a realtor." (Decision at 5.)

In reviewing a trial judge's decision, we are guided by the standard set forth in R.I.G.L. § 28-35-28(b), which 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." In the present matter, the essential

facts have been stipulated by the parties. Consequently, our focus is simply whether the pertinent law was properly applied to those facts by the trial judge.

The employer sets forth five (5) reasons of appeal, four (4) of which basically argue that the trial judge was clearly wrong to deny the petition to discontinue benefits when the evidence demonstrated that the employee's average weekly earnings exceeded her pre-injury average weekly wage. We have thoroughly examined the statute and cannot find any authority to grant the employer's request to discontinue benefits under the circumstances presented by this matter.

The employer filed a petition to review pursuant to R.I.G.L. § 28-35-45(a), which provides that a decree may be reviewed regarding any obligation established under the Workers' Compensation Act upon petition of either party at any time after entry of the decree. The employer seeks to discontinue the payment of weekly benefits to the employee on the grounds that she has regained her earning capacity, as demonstrated by the documentation of her earnings over the last year which when averaged over various periods of time, exceed her pre-injury average weekly wage.

Ms. Fernandes has been receiving weekly benefits for partial incapacity which are calculated as follows:

> While the incapacity for work resulting from the injury is partial, the employer shall pay the injured employee a weekly compensation equal to seventy-five percent (75%) of the difference between his or her spendable average weekly base wages, earnings, or salary before the injury as computed pursuant to the provisions of § 28-33-20 [sic], and his or her spendable weekly wages, earnings, salary, or earnings capacity after that . . . .

R.I.G.L. § 28-33-18(a). The statute utilizes the term "average" only with regard to the pre-injury wages, and makes no reference to the averaging of any post-injury earnings in calculating the amount of weekly compensation.

The employer argues that R.I.G.L. § 28-33-17.1(a) provides the basis for its request to permanently terminate the employee's weekly benefits; however, the employer's reliance on this provision is misplaced. The statute provides, in pertinent part, as follows:

> An employee shall not be entitled to compensation under chapters 29--38 of this title for any period during which the employee was gainfully employed or found capable of gainful employment at an average weekly wage equal to or in excess of the pre-injury average weekly wage, exclusive of overtime, which he or she was earning at the time of his or her injury, notwithstanding an existing agreement or decree to the contrary.

R.I.G.L. § 28-33-17.1(a). This provision and § 28-33-18.1(a) are referred to as the "double-dipping" statutes, and were discussed extensively by the Rhode Island Supreme Court in Rathbun v. Leesona Corp., 460 A.2d 931 (R.I. 1983).

It is well-settled that an employer cannot unilaterally modify or terminate a decree or memorandum of agreement regarding workers' compensation benefits. *See* Rathbun, 460 A.2d at 933. In order to cease payment permanently, an employer must affirmatively seek relief by employing one of the procedures provided by the Act which include (1) relief granted on a petition to review pursuant to R.I.G.L. §28-35-45, (2) filing of a suspension agreement and receipt executed by the employer and employee, and (3) authorization in accordance with R.I.G.L. §§ 28-35-46 through 28-35-51 after the employer sends notice to the employee and the court of its intention to discontinue, suspend, or reduce payments. Rathbun, 460 A.2d at 933 n.1. The Rathbun Court noted that the "double-dipping" statutes simply permit the employer to suspend or modify the payment of weekly benefits during those weeks that an employee has earnings, despite the existence of a decree or agreement ordering the payment of benefits. Id.

Section 28-33-17.1(a) merely gives an employer the authority, despite the existence of a memorandum of agreement or court order to the contrary, to withhold an employee's benefits for

any period in which he or she earns wages in excess of their pre-injury average weekly wage without being held in contempt of court. The employer's reliance on this statute to provide authority for the termination of the employee's benefits is clearly misplaced. This statute does not allow for a permanent change in the employee's weekly benefits due to continually earning in excess of his or her pre-injury average weekly wage, but merely allows the employer to suspend payments and to seek affirmative relief under the Act. American Insulated Wire v. Bettencourt, W.C.C. No. 1995-04462 (App. Div. 3/22/99) (citing Rathbun v. Leesona Corp., 460 A.2d 931 (R.I. 1983)).

The issue presented by the employer's petition to review is whether Ms. Fernandes has regained her earnings capacity based upon the commissions earned in her employment as a real estate agent. Section 28-29-2(3)(i) of the Rhode Island General Laws authorizes the court to establish an earnings capacity for an employee "based on evidence of ability to earn." The statute further provides that

> [i]n the event that an employee returns to light duty employment while partially disabled, an earnings capacity shall not be set based upon actual wages earned until the employee has successfully worked at light duty for a period of at least thirteen (13) weeks.

R.I.G.L. § 28-29-2(3)(i).

The Rhode Island Supreme Court considered this statute in the context of almost identical circumstances in the case of Wehr, Inc. v. Truex, 700 A.2d 1085 (R.I. 1997). The employee in Truex was partially disabled and found employment with a different employer after participating in a rehabilitation program. The employer requested that the court set an earnings capacity pursuant to § 28-29-2(3)(i) based upon the employee's earnings with the new employer. The trial judge granted the employer's request and set an earnings capacity based upon a thirteen (13) week average of the employee's earnings. The Appellate Division reversed the trial judge,

concluding that the calculation of the employee's partial disability benefits should be based upon her actual earnings since she was still working, rather than a theoretical earnings capacity. The employer filed a petition for certiorari.

The Rhode Island Supreme Court acknowledged that if a partially disabled employee is not working or has refused an offer of suitable alternative employment, the setting of an earnings capacity is appropriate. Id. at 1087. In the case of an employee who continues to work, however, the Court reasoned that the employee's actual wages were a more appropriate measure.

> If, as Wehr suggests, a fixed amount was utilized on the basis of Truex's theoretical earnings capacity, that sum could differ significantly from the amount of postinjury wages actually earned. Simply because § 28-29-2(3)(i) allows earnings capacity to be based on actual wages if an employee has worked at light duty for at least thirteen weeks does not alter the analysis that actual wages constitute a more accurate means of comparison than earnings capacity.

Id. The concern is that actual wages earned while an employee continues to work may fluctuate from week to week and therefore, the amount paid for partial incapacity benefits should fluctuate as well. If an earnings capacity is set for an employee who continues to work, the employee would receive a higher amount of benefits than she is entitled to in those weeks in which the employee earns wages in excess of the established earnings capacity. We do not believe that the Legislature intended such a result.

The employer points out in his reasons of appeal that if the employee's post-injury wages are calculated in the same way that the pre-injury average weekly wage is calculated, then her post-injury wages would exceed her pre-injury average weekly wage. We agree with the trial judge in his assertion that although R.I.G.L. § 28-33-20(1) sets out the calculation for pre-injury average weekly wage, "the Act suffers from a dearth of guidance for computing an employee's post-injury average weekly wage." (Decision at 4.) There is nothing in the Workers'

Compensation Act setting forth a method for calculating an employee's post-injury average weekly wage for the purpose of setting an earnings capacity while the employee continues to earn actual wages. We find no rationale for attempting to utilize § 28-33-20(1) for this purpose. *See* Brown & Sharpe Mfg. Co. v. Dean, 89 R.I. 108, 151 A.2d 354 (1959) (overruling trial judge who calculated post-injury earnings from commissions by averaging them over a 13-week period).

The employer further argues that the trial judge's holding, in effect, makes it impossible for an employee working strictly on commissions to ever regain her earnings capacity simply because she does not receive compensation on a regular basis, even if the employee has greatly exceeded her pre-injury average weekly wage in certain weeks. There is simply no procedure set forth to determine whether an employee working strictly on commissions has regained her earnings capacity. Although we are sympathetic to the employer's concerns because in this particular case the amounts received as commissions in nine (9) weeks in 2005 were substantial, we cannot simply create a remedy to address these specific facts; that is the function of the Legislature.

Lastly, the employer argues that the trial judge applied the wrong standard because in his initial finding contained in the decision and the decree, he states that "[t]he employer failed to prove by a fair preponderance of the credible evidence that the employee returned to work at an average weekly wage equal to or in excess of that which she was earning at the time *of trial.*" (Decision at 6. (emphasis added)) The correct figure for comparison is the average weekly wage at the time of *injury*. In light of the trial judge's numerous references to the pre-injury average weekly wage throughout his decision, we have no doubt that the misstatement of the standard in

the initial finding of fact was harmless error. The trial judge clearly evaluated the employer's allegation utilizing the appropriate standard.

Based upon the foregoing, the employer's reasons of appeal are denied and dismissed; however, in order to correct the record, we will enter a new decree amending the first finding of fact as follows:

1. The employer failed to prove by a fair preponderance of the credible evidence that the employee returned to work at an average weekly wage equal to or in excess of that which she was earning at the time of the injury.

2. The employee did receive the following amounts as commissions for work performed at DeFelice Realty: Four Thousand Six Hundred Sixteen and 77/100 ($4,616.77) Dollars, Six Thousand Eight Hundred Twenty and 95/100 ($6,820.95) Dollars, Three Thousand One Hundred Twenty-seven and 85/100 ($3,127.85) Dollars, Two Thousand Four Hundred Twenty-four ($2,424.00) Dollars, Two Thousand Three Hundred Seventy-seven and 16/100 ($2,377.16) Dollars, Four Thousand Four Hundred Thirty-five and 86/100 ($4,435.86) Dollars, One Thousand Six Hundred Twenty-eight and 88/100 ($1,628.88) Dollars, in weeks ending May 25, 2005, June 14, 2005, June 22, 2005, July 13, 2005, August 4, 2005, August 10, 2005, and October 5, 2005, respectively.

It is, therefore, ordered:

1. That the employer make payments to the employee for partial incapacity for any weeks that the employee earns less than her pre-injury average weekly wage of Five Hundred Ninety and 44/100 ($590.44) Dollars.

2. That the employer is entitled to a credit for any week that the employee has earnings or earns more than her pre-injury average weekly wage of Five Hundred Ninety and 44/100 ($590.44) Dollars.

3. That the employer shall pay a counsel fee to Jack R. DeGiovanni, Jr., Esq., in the amount of Two Thousand Four Hundred ($2,400.00) Dollars for services rendered at the trial stage and an additional counsel fee in the amount of Two Thousand ($2,000.00) Dollars for the successful defense of the employer's appeal.

4. That the employer shall take credit for any payments made to the employee and her attorney, Jack R. DeGiovanni, Jr., Esq., pursuant to the trial decree entered on January 25, 2007.

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

Morin and Connor, JJ., concur.

ENTER:

_____
Olsson, J.

_____
Morin, J.

_____
Connor, J.

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	)	
BRENDA FERNANDES	)	

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 January 25, 2007. Upon consideration thereof, and in order to correct the wording of the trial decree in accordance with the decision of the Appellate Division, the following findings of fact are made:

1. The employer failed to prove by a fair preponderance of the credible evidence that the employee returned to work at an average weekly wage equal to or in excess of that which she was earning at the time of the injury.

2. The employee did receive the following amounts as commissions for work performed at DeFelice Realty: Four Thousand Six Hundred Sixteen and 77/100 ($4,616.77) Dollars, Six Thousand Eight Hundred Twenty and 95/100 ($6,820.95) Dollars, Three Thousand One Hundred Twenty-seven and 85/100 ($3,127.85) Dollars, Two Thousand Four Hundred Twenty-four ($2,424.00) Dollars, Two Thousand Three Hundred Seventy-seven and 16/100 ($2,377.16) Dollars, Four Thousand Four Hundred Thirty-five and 86/100 ($4,435.86) Dollars, One

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4. That the employer shall take credit for any payments made to the employee and her attorney, Jack R. DeGiovanni, Jr., Esq., pursuant to the trial decree entered on January 25, 2007.

Entered as the final decree of this Court this day of

PER ORDER:

_____

John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Morin, J.

_____
Connor, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Berndt W. Anderson, Esq., and Jack R. DeGiovanni, Jr. Esq., on

_____