STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
JOSEPH SPREMULLI	)	
	)	
VS.	)	W.C.C. 2007- 03135
	)	
CITY OF PROVIDENCE	)	
CITY OF PROVIDENCE	)	
	)	
VS.	)	W.C.C. 2007-00971
	)	
JOSEPH SPREMULLI	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. These two (2) matters were consolidated at the trial level and remain consolidated for hearing and decision regarding the claims of appeal filed by the employee in both matters. The employee contends that the trial judge erred when she failed to address whether the employee was totally disabled pursuant to the common law "odd lot" doctrine. After careful consideration of the arguments of the respective parties and a thorough review of the record and the relevant statutes and case law, we grant the employee's appeals, vacate the decision and decrees of the trial judge, and remand the matters to the trial judge for further consideration.

The employee sustained a work-related injury to his right knee on February 24, 1992. He continued to work for the City of Providence until he underwent right knee replacement surgery on September 9, 2003. Pursuant to a pretrial order entered in W.C.C. No. 2003-06155 on December 3, 2002, the employee was awarded weekly benefits for total incapacity from September 9, 2003 to November 30, 2003, and partial incapacity benefits from December 1, 2003 and continuing. On January 3, 2006, a pretrial order was entered in W.C.C. No. 2005-07690, containing the finding that the employee's condition had reached maximum medical improvement.

On February 12, 2007, the employer filed a petition to review, W.C.C. No. 2007-00971, requesting a reduction in the employee's weekly benefits to seventy percent (70%) of his weekly compensation rate in accordance with R.I.G.L. § 28-33-18(b). The petition was denied at the pretrial conference and the employer claimed a trial. On May 14, 2007, the employee filed an employee's petition to review, W.C.C. No. 2007-03135, "seeking total disability pursuant to the 'ODD LOT DOCTRINE' SEC. 28-33-17(b)(2)." This petition was denied at the pretrial conference and the employee filed a claim for trial. The two (2) matters were then consolidated for hearing at the trial level.

During the trial, Mr. Spremulli testified, as well as two (2) vocational rehabilitation counselors, Albert Sabella and Edmond Calandra. The employer submitted reports of a private investigator along with recordings of surveillance of the employee. The parties introduced various medical records and reports by stipulation. After reviewing the evidence, the trial judge noted that the amendment to R.I.G.L. § 28-33-17(b)(2), which codified the "odd lot" doctrine, applies only to injuries which occurred after May 18, 1992. Consequently, she denied the employee's petition because his injury occurred on February 24, 1992. The trial judge then

granted the employer's petition to reduce the employee's weekly benefits to seventy percent (70%) of his weekly compensation rate because he was partially disabled, his condition had been determined to be at maximum medical improvement as of January 3, 2006, and he had not looked for any type of employment since he stopped working for the City of Providence. The employee promptly filed claims of appeal regarding both matters.

We would note that on June 12, 2009, the employee filed a petition to review "[s]eeking total disability pursuant to the 'Odd Lot Doctrine'" (W.C.C. No. 2009-00220). The trial judge appointed a vocational rehabilitation counselor and a physician to evaluate the employee and submit their findings to the court. After receiving their reports, a pretrial conference was held on August 25, 2009 at which the trial judge entered a pretrial order finding that the employee was totally disabled pursuant to the "odd lot" doctrine as of July 23, 2009 and granting the employee's petition. Neither party filed a claim for trial.

The employee has pursued these appeals because from February 12, 2008 to July 23, 2009, he received a reduced amount of benefits and he is seeking to recover that amount.

The parameters of the review of a trial judge's decision by the Appellate Division are very limited. Section 28-35-28(b) of the Rhode Island General Laws states that the findings of fact made by a trial judge are final unless the appellate panel determines that one or more of those findings are clearly erroneous. Only after arriving at the conclusion that the trial judge was clearly wrong may we embark upon a *de novo* review of the evidence. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). In the present matter, we find that the trial judge was clearly wrong in concluding that the employee could not pursue a determination of total disability under R.I.G.L. § 28-33-17(b)(2).

The employee has filed a five (5) page document entitled "Reasons of Appeal" in which he essentially argues that the trial judge was clearly wrong when she failed to address the common law "odd lot" doctrine. He asserts that the wording of his petition incorporated both the common law version and the statutory version and that the trial judge failed to recognize that he was asserting the common law "odd lot" doctrine as a defense to the employer's petition to reduce his benefits. Without commenting upon the validity of these arguments, we reverse the trial judge on other grounds.

The so-called statutory "odd lot" doctrine was enacted in 1992 as part of the sweeping reform of the Workers' Compensation Act. *See* P.L. 1992, ch. 31, § 5. The statute, R.I.G.L. § 28-33-17(b)(2), provides that:

> [I]n cases where manifest injustice would otherwise result, total disability shall be determined when an employee proves, taking into account the employee's age, education, background, abilities, and training, that he or she is unable on account of his or her compensable injury to perform his or her regular job and is unable to perform any alternative employment.

The reform legislation also addressed whether the various changes should be applied retroactively or prospectively. Public Laws 1992, ch.31, § 31 states in pertinent part:

> This act shall take effect upon passage and shall not abrogate or affect substantive rights or pre-existing agreements, preliminary determinations, orders or decrees, provided, however, that all procedural provisions, shall be applicable retroactively, regardless of the date of injury, to all employees, employers, insurers, and other parties or persons, except where otherwise specifically indicated. Except as specifically provided, amendments in this act to the following sections of chapters 28—33 and 28—34 shall apply only to those injuries occurring on or after the date of passage of this act: * * * (5) 28-33-17 (Weekly Compensation for Total Incapacity) * * *.

(Emphasis added.) *See also* Lombardo v. Atkinson-Kiewit, 746 A.2d 679, 685 n.4 (R.I. 2000). This act was passed on May 18, 1992.

The pretrial order entered in W.C.C. No. 2003-06155 on December 3, 2003 established that Mr. Spremulli sustained a work-related injury to his right knee on February 24, 1992. That order also established that his first day of incapacity resulting from that injury was September 9, 2003. Consequently, the first day the employee became eligible for workers' compensation benefits was September 9, 2003, over eleven (11) years later. This particular scenario raises the question whether the law in effect on the date of the injury or the first date of incapacity should be applied.

The Rhode Island Supreme Court has addressed a number of similar situations involving whether the law in effect on the date of injury or the date of incapacity should be applied. *See, e.g.,* Romano v. B. B. Greenberg Co., 108 R.I. 132, 273 A.2d 315 (1971); Fontaine v. Gorfine, 105 R.I. 174, 250 A.2d 361 (1969); Sherry V. Crescent Co., 101 R.I. 703, 226 A.2d 819 (1967); Ludovici v. American Screw Co. 99 R.I. 747, 210 A.2d 648 (1965). The Court's decision in Parkinson v. Leesona Corp., 115 R.I. 120, 341 A.2d 33 (1975), is particularly instructive in the present matter.

The employee in Parkinson sustained a work-related injury on May 9, 1969, but did not stop working until March 28, 1972. Subsequent to the injury, but prior to the employee's first day of incapacity, R.I.G.L. § 28-33-17, regarding compensation for total disability, was amended to increase the compensation rate to be paid to totally disabled employees. The employer argued that because the statute referred only to the date of injury, and not to the date of incapacity, the date of injury should determine the compensation rate. The Rhode Island Supreme Court, after referencing the cases cited above, reasoned as follows:

> Since an employee is not entitled to compensation benefits until there exists an incapacity for work which impairs the wage earning capacity, the time of injury for the purpose of §28-33-17 should not be the time of trauma but rather the time at which the

> incapacity manifests itself, which in many cases may be months or even years after the accident. * * *
>
> We hold, therefore, that in § 28-33-17 the word 'injury' means incapacity to work and that the phrase 'from the date of injury' means the actual date upon which the employee first became entitled to compensation.

Id. at 126-27, 341 A.2d at 37.

We believe that the reasoning utilized by the Court in Parkinson is applicable to Mr. Spremulli's case. His entitlement to compensation benefits under the Workers' Compensation Act did not arise until September 9, 2003, when he first suffered a loss of earning capacity due to his work-related injury. The statute in effect at the time his entitlement to benefits begins would determine the calculation and amount of his weekly benefit, as well as any other substantive rights. For example, as part of the 1992 amendments to the Act, the method of calculating the weekly benefit for total and partial incapacity was changed. *See* §§ 28-33-17(a)(1) and 28-33-18(a). Mr. Spremulli would be entitled to have his benefits calculated in accordance with the new formula. To conclude otherwise would yield a result which is inconsistent with the rulings of the Rhode Island Supreme Court in similar circumstances and the intent of the Act.

We find that the trial judge was clearly wrong to conclude that the amendment to § 28-33-17(b)(2), codifying the "odd lot" doctrine, was inapplicable to the employee's case. Consequently, we vacate the trial judge's decision and decree in W.C.C. No. 2007-03135 and remand the matter to the trial judge to review the record and render her decision regarding the employee's allegation that he is totally disabled pursuant to the provisions of § 28-33-17(b)(2). We also hereby vacate the trial judge's decision and decree in W.C.C. No. 2007-00971 regarding the reduction in the employee's weekly benefits pursuant to R.I.G.L. § 28-33-18(b) because if the employee is deemed to be totally disabled, he would not be subject to the reduction in

benefits. This matter is also remanded to the trial judge for reconsideration contingent upon her decision regarding the employee's petition.

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

Salem and Ferrieri, JJ. concur.

ENTER:

_____
Olsson, J.

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Salem, J.

_____
Ferrieri, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

JOSEPH SPREMULLI	)	
	)	
VS.	)	W.C.C. 2007-03135
	)	
CITY OF PROVIDENCE	)	

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division on the claim of appeal of the petitioner/employee from a decree entered on February 12, 2008. 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 sustained a work-related injury on February 24, 1992.

2. That his first date of incapacity resulting from that injury was September 9, 2003.

3. That because the employee's first date of incapacity occurred after May 18, 1992, the employee is eligible to apply for total disability pursuant to the 1992 amendment to R.I.G.L. § 28-33-17 which codified, with modifications, the "odd lot" doctrine.

It is, therefore, ORDERED:

1. That the employee's appeal is granted and the decision and decree of the trial judge are hereby vacated.

2. That the matter is remanded to the trial judge to review the record and render a decision addressing the merits of the employee's allegation that he is totally disabled pursuant to the provisions of R.I.G.L. § 28-33-17(b)(2).

3. That the employer shall reimburse Albert J. Lepore, Jr., Esq., the sum of Four Hundred and 00/100 ($400.00) Dollars for the cost of filing the claim of appeal and providing a transcript of the trial.

4. That the employer shall pay a counsel fee in the amount of Two Thousand Five Hundred and 00/100 ($2,500.00) Dollars to Albert J. Lepore, Jr., Esq., attorney for the employee, for his successful prosecution of the claim of appeal in this matter.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Salem, J.

_____
Ferrieri, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Albert J. Lepore, Jr., Esq., and George E. Furtado, Esq., on

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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

CITY OF PROVIDENCE	)	
	)	
VS.	)	W.C.C. 2007-00971
	)	
JOSEPH SPREMULLI		

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division on the claim of appeal of the respondent/employee from a decree entered on February 12, 2008. 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's appeal in the companion matter, W.C.C. No. 2007-03135, was granted and the matter remanded to the trial judge to determine whether the employee is totally disabled pursuant to the provisions of R.I.G.L. § 28-33-17(b)(2).

2. That if the trial judge determines that the employee is totally disabled pursuant to the provisions of R.I.G.L. § 28-33-17(b)(2), then the employee's benefits cannot be reduced pursuant to R.I.G.L. § 28-33-18(b) as requested by the employer in the present petition.

It is, therefore, ORDERED:

1. That the employee's appeal is granted and the decision and decree of the trial judge are hereby vacated.

2. That the matter is remanded to the trial judge to review the record in conjunction with the remand of the companion matter, W.C.C. No. 2007-03135, and render a decision consistent with the decision in that matter.

3. That the employer shall reimburse Albert J. Lepore, Jr., Esq., the sum of Twenty-five and 00/100 ($25.00) Dollars for the cost of filing the claim of appeal in this matter.

4. That all other appropriate costs and fees have been awarded in the final decree of the Appellate Division entered in the companion matter, W.C.C. No. 2007-03135.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Salem, J.

_____
Ferrieri, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Albert J. Lepore, Jr., Esq., and George E. Furtado, Esq., on

_____