STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

MARK BARRETT	)	
	)	
VS.	)	W.C.C. 07-07224
	)	
TOWN OF COVENTRY	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employer's appeal from the decision and decree of the trial judge, which ordered the employer to pay weekly benefits for partial incapacity pursuant to R.I.G.L. § 28-33-18(a). This was despite the fact that the employee returned to work at wages in excess of his pre-injury average weekly wage exclusive of overtime pay. The employer argues that the employee is not entitled to weekly benefits according to the provisions of R.I.G.L. § 28-33-17.1(a). After review of the pertinent statutory amendments and consideration of the arguments of the parties, we grant the employer's appeal and reverse the decision of the trial judge.

The parties stipulated to the following facts:

> 1. The employee, Mark A. Barrett, (hereinafter "Employee") injured his right shoulder while working for the Town of Coventry on June 4, 2007.
>
> 2. Prior to the date of injury, Employee's Average Weekly Wage (hereinafter "AWW") *including* overtime was $785.32.
>
> 3. Prior to the date of injury, Employee's AWW *excluding* overtime was $718.00.

> 4. From September 17, 2007 through December 5, 2007 Employee returned to work for the Town of Coventry.
>
> 5. From September 17, 2007 through December 5, 2007 Employee's AWW was $746.80.

Ct. Exh. 1.

Thus, the only issue for the trial judge to decide was whether the employee was entitled to benefits for partial incapacity during the period mentioned above. The employer argued at trial that R.I.G.L. § 28-33-17.1(a) applies in this case. The relevant part of the section states:

> 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 language specifically excludes overtime from the calculation of the pre-injury average weekly wage when comparing it to weekly wages earned from gainful employment after the injury in order to determine if the employee is entitled to any weekly benefits.

Mr. Barrett was earning Seven Hundred Eighteen and 00/100 ($718.00) Dollars per week, exclusive of overtime, prior to his injury. He returned to work after the injury and earned Seven Hundred Forty-six and 80/100 ($746.80) Dollars per week, which is clearly in excess of his pre-injury weekly wage. Therefore, if this section of the Act (§ 28-33-17.1(a)) is applied to the present case, the employee is not entitled to any compensation benefits for the period in question.

Conversely, the employee argued to the trial judge that R.I.G.L. § 28-33-18(a) should be applied in this case. The relevant part of the section states:

> 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 § 28-38-20 [sic], and his or her spendable weekly wages, earnings, salary or earnings capacity after that, ...

R.I.G.L. § 28-33-18(a) (the correct reference in the statute should be § 28-33-20). Section 28-33-20(a)(1) of the Rhode Island General Laws provides that the calculation of an employee's average weekly wage shall include overtime pay.

Mr. Barrett's average weekly wage prior to his injury was Seven Hundred Eighty-five and 32/100 ($785.32) Dollars, including overtime, and, as previously stated, Seven Hundred Forty-six and 80/100 ($746.80) Dollars per week upon his return to work after the injury. Both parties agree that his disability was partial during the period he returned to work from September 17, 2007 through December 5, 2007. If this section of the Act (§ 28-33-18(a)) is applied to the present case, the employee is paid compensation equal to seventy-five percent (75%) of the difference between his pre-injury wages including overtime and his post-injury wages, the opposite result of the scenario put forth by the employer.

In determining which provision to apply in this case, the trial judge relied on the premise that the Workers' Compensation Act should be liberally construed in order to effectuate its benevolent purpose and, in particular, any ambiguity in the statute should be construed in favor of the employee. *See* Trant v. Lucent Techs., 896 A.2d 710, 712-13 (R.I. 2006); Smith v. Colonial Knife Co., 731 A.2d 724, 725 (R.I. 1999). In order to resolve the perceived ambiguity in the two (2) statutory provisions in favor of the employee, the trial judge applied R.I.G.L. § 28-33-18(a) and found that the employee was entitled to partial incapacity benefits. The trial judge also noted that to apply R.I.G.L. § 28-33-17.1(a), and bar the employee from receiving benefits,

would create a situation where the employee received less money by returning to work than if he remained out of work and received his full compensation benefits. The employer filed a claim of appeal from this decision.

Typically, when the Appellate Division reviews a trial decision, the trial judge's findings on factual matters are final unless found to be clearly erroneous. *See* R.I.G.L. § 28-35-28(b); Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996). In this case, the parties have stipulated to the facts. Consequently, our review will focus on whether the trial judge correctly applied the law to those facts.

The employer presents four (4) reasons of appeal, essentially alleging that there is no ambiguity in the language of R.I.G.L. § 28-33-17.1(a), and that the trial judge misconstrued R.I.G.L. §§ 28-33-18(a) and 28-33-20(a)(1). We would agree that there is no ambiguity in the language of the statute itself, but rather a lack of direction as to which section should be applied in a situation like the one presented by Mr. Barrett's case. In order to ascertain the intent of the legislature in this regard, we looked back at the legislative history of these statutes and found the direction we were seeking.

In 1998, the legislature passed duplicate bills which amended the two (2) sections in question, as well as several others, regarding the exclusion and inclusion of overtime in calculating pre-injury and post-injury wages and benefits. *See* P. L. 1998, ch. 105, § 1 *et seq*.; P. L. 1998, ch. 404, § 1 *et seq*. First, a new subsection was added to the definition of "earnings capacity" which states:

> In the event that an employee returns to employment at an average weekly wage equal to the employee's pre-injury earnings exclusive of overtime, the employee will be presumed to have regained his/her earning capacity.

R.I.G.L. § 28-29-2(3)(iii)(emphasis added). Because the payment of weekly compensation

benefits is based upon a loss of earning capacity, this section would operate to preclude the employee from receiving weekly benefits.

Section 28-33-17.1(a) provided that an employee was not entitled to weekly benefits if he was gainfully employed at an average weekly wage equal to or in excess of his average weekly wage at the time of his injury. The amendment to this section in 1998 provided that the comparison should be between his current wages and his pre-injury average weekly wage exclusive of overtime in determining his entitlement to benefits after returning to work.

Prior to 1998, the calculation of an employee's average weekly wage pursuant to R.I.G.L. § 28-33-20 specifically excluded overtime pay. As part of the comprehensive bills enacted in 1998, overtime pay is now included in the calculation of the average weekly wage, which forms the basis for determining the amount of weekly benefits paid to an employee. To correspond with this change, R.I.G.L. §§ 28-33-17(a)(1) and 28-33-18(a), regarding the amounts paid for total and partial incapacity, were amended to refer to the calculation of the average weekly wage pursuant to § 28-33-20, including overtime pay, whereas these sections had previously excluded overtime pay from the calculation of benefits.

The addition of all of these changes to the various statutes regarding the inclusion and exclusion of overtime pay demonstrate a comprehensive legislative scheme. Clearly, the intent was to include overtime in the pre-injury average weekly wage, but to exclude it when an employee goes back to work at his or her regular weekly wage. The intent behind this scheme is that the employee would reap the benefit of an increased average weekly wage when the compensation amount is computed by including overtime pay. However, by excluding overtime pay from the post-injury average weekly wage when an employee is gainfully employed, the legislature also addressed the concern that an employee would simply decline overtime in order

to continue receiving some varying partial weekly benefit payments. In addition, these amendments address the situation where overtime may be seasonal or otherwise not available when the employee returns to work.

The legislature expressed a cohesive plan when it incorporated the amendments to all of these statutes into one (1) bill. We must assume that the legislature would not enact conflicting amendments. Consequently, in order to reconcile these statutes and give meaningful application to all of them, in particular §§ 28-29-2(3)(iii) and 28-33-17.1(a), we conclude that Mr. Barrett is not entitled to weekly benefits during the period in question. We are mindful of the general policy of liberal construction applied to the Workers' Compensation Act; however, that principle should not be employed to thwart the clear intent of the legislature. Craven v. U. S. Rubber Co., 103 R.I. 126, 130, 235 A.2d 85, 87 (1967).

In the situation where the employee has returned to some gainful employment, R.I.G.L. § 28-33-17.1(a), in conjunction with § 28-29-2(3)(iii), delineates in the first instance which employees are entitled to compensation and which are not. If the employee is earning equal to or in excess of his pre-injury average weekly wage, exclusive of overtime, then he is not entitled to the payment of any weekly benefits, despite the fact that he may remain physically partially disabled. If the employee is not earning sufficient wages, then he is entitled to some amount of weekly benefits for partial incapacity as calculated pursuant to § 28-33-18(a). Here, the employee meets the criteria set forth in § 28-33-17.1(a), that is, his post-injury wage is in excess of his pre-injury average weekly wage exclusive of overtime. Therefore, we find that the employee is not entitled to benefits, and there is no need to consider the application of § 28-33-18(a).

The employee further argues that depriving him of partial incapacity benefits by the application of § 28-33-17.1(a) would leave him with less money in his pocket once he returned to work, such that he would be better off to remain out of work and receive full benefits. The trial judge also referred to this situation as creating a disincentive for employees to return to light duty work while they are still physically partially disabled. Closer scrutiny of the pay stubs submitted in support of this argument reveal that it is without merit.

Prior to returning to work, Mr. Barrett was receiving a weekly compensation benefit check in the amount of Five Hundred Ten and 51/100 ($510.51) Dollars. He returned to work after the injury at a gross weekly wage of Seven Hundred Forty-six and 80/100 ($746.80) Dollars. After deductions for state and federal income taxes, FICA, Medicare and TDI, his net weekly pay would be Five Hundred Ninety-three and 02/100 ($593.02) Dollars, which is clearly in excess of his weekly workers' compensation check. Mr. Barrett's actual net pay of Four Hundred Eighty-eight and 47/100 ($488.47) Dollars was less than the benefit check only because of deductions for his pension, health insurance, disability insurance and union dues. These are all benefits provided to the employee which are not available when he is not working. Consequently, the argument that the employee was less well off financially when he returned to work than he was while out of work receiving compensation benefits is simply not valid.

Based on the foregoing, the Court finds that the employee is not entitled to benefits for the period of September 17, 2007 through December 5, 2007 because his post-injury earnings were greater than his pre-injury average weekly wage, exclusive of overtime. Thus, pursuant to §§ 28-29-2(3)(iii) and 28-33-17.1(a), he had regained his earning capacity. The employer's appeal is granted and the decision and decree of the trial judge are vacated. In accordance with our decision, a new decree shall enter containing the following findings and orders:

1. That the employee sustained a work-related injury to his right shoulder on June 4, 2007 while employed by the Town of Coventry.

2. That the employee returned to work for the Town of Coventry from September 17, 2007 through December 5, 2007 earning weekly gross wages of Seven Hundred Forty-six and 80/100 ($746.80) Dollars.

3. That the employee's average weekly wage calculated pursuant to R.I.G.L. § 28-33-20, but excluding overtime, is Seven Hundred Eighteen and 00/100 ($718.00) Dollars.

4. That, pursuant to the provisions of R.I.G.L. §§ 28-29-2(3)(iii) and 28-33-17.1(a), the employee is not entitled to the payment of weekly benefits for partial incapacity during the period from September 17, 2007 through December 5, 2007, despite the fact that his gross weekly earnings during that period were less than his pre-injury average weekly wage, including overtime.

It is, therefore, ordered:

1. That the employer's claim of appeal is granted.

2. That the employee's petition to review is denied and dismissed.

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.

Connor and Hardman, JJ. concur.

ENTER:

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Olsson, J.

_____
Connor, J.

_____
Hardman, 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 respondent/employer from a decree entered on May 19, 2008.

Upon consideration thereof, the appeal of the respondent/employer 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 to his right shoulder on June 4, 2007 while employed by the Town of Coventry.

2. That the employee returned to work for the Town of Coventry from September 17, 2007 through December 5, 2007 earning weekly gross wages of Seven Hundred Forty-six and 80/100 ($746.80) Dollars.

3. That the employee's average weekly wage calculated pursuant to R.I.G.L. § 28-33-20, but excluding overtime, is Seven Hundred Eighteen and 00/100 ($718.00) Dollars.

4. That, pursuant to the provisions of R.I.G.L. §§ 28-29-2(3)(iii) and 28-33-17.1(a), the employee is not entitled to the payment of weekly benefits for partial incapacity during the period from September 17, 2007 through December 5, 2007, despite the fact that his gross

weekly earnings during that period were less than his pre-injury average weekly wage, including overtime.

It is, therefore, ordered:

1. That the employer's claim of appeal is granted.

2. That the employee's petition to review is denied and dismissed.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Connor, J.

_____
Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Mark P. McKenney, Esq., and Domenic J. Carcieri, Esq., on

_____