STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

WILLIAM HANNON	)	
	)	
VS.	)	W.C.C. 2009-01642
	)	
GENERAL DYNAMICS	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employer's claim of appeal from the decision and decree of the trial judge granting the employee's petition to enforce. The issue before the trial judge was whether the three hundred and twelve (312) week limitation on the payment of partial incapacity benefits runs consecutively or concurrently in a case where the employee sustained three (3) distinct work-related injuries resulting in overlapping periods of incapacity. After reviewing the pertinent statutory and case law, and considering the arguments of the respective parties, we agree with the trial judge's conclusion that the limitation period runs consecutively and we deny the employer's appeal.

The parties submitted a stipulation of facts with attached exhibits which we will summarize as follows. On June 11, 2001, the employee sustained an injury to his low back during the course of his employment. The parties entered into a consent decree in W.C.C. No. 2002-05809 on November 21, 2002 which provided for the payment of weekly benefits for total incapacity from June 14, 2001 through August 26, 2001. The parties also agreed upon an average weekly wage of Nine Hundred Five and 93/100 ($905.93) Dollars. On August 27, 2001,

the employee returned to work for the employer in a light duty job, earning the same wages as he did prior to his injury.

On March 12, 2002, while working in the light duty job, Mr. Hannon sustained an injury to his left leg, but he continued to work. On April 16, 2002, while continuing to work, Mr. Hannon sustained an injury to his neck. The employee stopped working on May 2, 2002 and, pursuant to the aforementioned consent decree, began receiving weekly benefits for partial incapacity as of that date. Pursuant to R.I.G.L. § 28-33-20.1(a), his average weekly wage was recalculated to Eight Hundred One and 04/100 ($801.04) Dollars.

On March 31, 2004, a pretrial order was entered in W.C.C. No. 2004-01839 finding that the employee sustained a work-related injury to his neck on April 16, 2002 resulting in partial incapacity beginning April 17, 2002 and continuing. The employee's average weekly wage was recorded as Nine Hundred Five and 93/100 ($905.93) Dollars. A notation was made on the pretrial order stating that the employee was not entitled to compensation because he was receiving weekly benefits pursuant to the aforementioned consent decree regarding the back injury.

On December 2, 2005, the parties entered into a consent decree in W.C.C. No. 2005-00823 stating that the employee sustained a work-related injury to his left leg on March 12, 2002 resulting in partial incapacity beginning February 7, 2003. Again, his average weekly wage was stated as Nine Hundred Five and 93/100 ($905.93) Dollars. The consent decree also contains a finding and order that the employee is not entitled to the payment of weekly benefits because he is currently receiving benefits for a different work injury.

On August 19, 2008, the employer sent three (3) separate notices to the employee. One notice informed Mr. Hannon that the employer had paid in excess of 312 weeks of partial

disability benefits for his June 11, 2001 back injury and would therefore be terminating payments twenty-six (26) weeks from the date of the letter in accordance with R.I.G.L. § 28-33-18(d). The second notice advised the employee that the employer had paid in excess of 312 weeks of partial disability benefits for his April 16, 2002 neck injury and would therefore be terminating those benefits twenty-six (26) weeks from the date of the notice. The third notice stated that the employer will have paid 312 weeks of partial disability benefits as of February 7, 2009 for his March 12, 2002 left leg injury, and intended to terminate his benefits as of that date. The employer actually stopped paying benefits to Mr. Hannon as of February 28, 2009.

On March 18, 2009, the employee filed a petition to enforce alleging that because he was no longer receiving weekly benefits for partial incapacity for his back injury in accordance with the consent decree entered in W.C.C. No. 2002-05809, the employer was now obligated to pay him weekly benefits for partial incapacity for his neck injury in accordance with the pretrial order entered in W.C.C. No. 2004-01839 beginning on February 28, 2009, the last date he received a payment. On June 4, 2009, a pretrial order was entered finding that the 312 week period expired regarding the back injury as of May 2, 2008 and that the employer had made payments regarding the neck injury from May 3, 2008 to February 28, 2009. The employer was ordered to resume the payment of partial incapacity benefits from February 29, 2009 and continuing pursuant to the pretrial order entered in W.C.C. No. 2004-01839. Both parties filed a claim for trial from this order.

The appellate standard of review is clearly delineated in R.I.G.L. § 28-35-28(b) – "The findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." The parties have stipulated to the pertinent facts in the present matter. Consequently, our review is limited to whether the law was properly applied in this factual

situation. After reviewing the trial judge's well-reasoned decision addressing this case of first impression, we find no error in his conclusions and deny the employer's appeal.

The employer has filed four (4) reasons of appeal basically arguing that the trial judge was wrong to conclude that the 312 week limitation on partial incapacity benefits runs consecutively when an employee sustains successive separate injuries resulting in overlapping periods of incapacity. The employer contends that extending the 312 week limitation to consecutive periods of 312 weeks for each injury is contrary to the intent of the statute because the injuries resulted in one (1) incapacity. Although we acknowledge that this case presents an unusual situation and an unusual result, we find that to apply the statute in the manner requested by the employer would not be consistent with the provisions of the Workers' Compensation Act as a whole.

The employee has been receiving weekly benefits for partial incapacity pursuant to R.I.G.L. § 28-33-18(a) since May 2, 2002, when he left his light duty position with the employer. Section 28-33-18(d) sets forth the limitation on the payment of partial disability benefits and the notification requirements for terminating benefits.

> In the event partial compensation is paid, in no case shall the period covered by the compensation be greater than three hundred and twelve (312) weeks. . . . At least twenty-six (26) weeks prior to the expiration of the period, the employer or insurer shall notify the employee and the director of its intention to terminate benefits at the expiration of three hundred and twelve (312) weeks and advise the employee of the right to apply for a continuation of benefits under the terms of § 28-33-18.3. In the event that the employer or insurer fails to notify the employee and the director as prescribed, the employer or insurer shall continue to pay benefits to the employee for a period equal to twenty-six (26) weeks after the date the notice is served on the employee and the director.

R.I.G.L. § 28-33-18(d). In the present matter, the 312 week period regarding the employee's back injury would have expired on May 2, 2008. Apparently, the employer neglected to send out

the notification of termination of benefits until August 19, 2008, thereby resulting in the employer paying an additional twenty-six (26) weeks of benefits (until February 27, 2009) regarding the back injury.

It is well-settled that weekly payments to an injured worker cannot exceed the maximum statutory amount in the case of consecutive, overlapping injuries or a single injury while working for multiple employers. *See* Lupo v. Nursery Originals, Inc., 400 A.2d 950 (R.I. 1979) (employee not entitled to full amount of weekly benefits from two employers when injured while performing work for both); Scialo v. Luisi, 91 R.I. 86, 161 A.2d 194 (1960) (employee not entitled to full amount of weekly benefits for consecutive distinct injuries with same employer when one results in partial incapacity and the second results in total incapacity). The rationale for this determination is discussed in Larson's treatise on workers' compensation.

> There is both a theoretical and a practical reason for the holding that awards for successive or concurrent permanent injuries should not take the form of weekly payments higher than the weekly maxima for total disability. The theoretical reason is that, at a given moment in time, a person can be no more than totally disabled. The practical reason is that if the worker is allowed to draw weekly benefits simultaneously from a permanent total and a permanent partial award, it may be more profitable for him or her to be disabled than to be well – a situation which compensation law studiously avoids in order to prevent inducement to malingering.

5 Larson's Workers' Compensation Law, § 92.01 (2000) (Rev. 2011).

This reasoning does not apply in the situation currently before the panel because there is no concern that benefits paid in a given week will exceed pre-injury wages.

> The only question is whether, when a claimant receives, concurrently or successively, injuries entitling him or her to separately designated periods of benefits, the maximum allowances for these injuries can, so to speak, be laid end-to-end. The great majority of decisions have held that they can.

Id. at § 92.02. We are persuaded to join the majority of jurisdictions which have ruled that in the case of successive or concurrent injuries, the limitation on the maximum number of weeks compensation shall be paid is applied consecutively to one injury at a time.

The employer takes the position that each weekly benefit payment should be credited towards the 312 week maximum for all of the injuries contributing to his disability. This would allow the employer to count a single weekly benefit payment three (3) times while the employee is disabled due to the three (3) different injuries. *See* E.I. Du Pont De Nemours v. Eggleston, 264 Va. 13, 563 S.E.2d 685 (2002). We are not aware of any provision of the Workers' Compensation Act which would allow such a result.

In the present matter, the employee sustained three (3) distinct injuries in a little less than a year while working for the same employer. The employee was precluded from receiving weekly benefits for the second and third injuries while receiving benefits for the first injury. So long as he remained disabled due to the second or third injuries, he cannot be foreclosed from receiving benefits for those injuries after receiving the maximum allowed for the first injury. If the employee had received 312 weeks of benefits for the first injury, returned to work and sustained a second injury, he would obviously be entitled to receive up to 312 weeks of partial incapacity benefits for the second injury. We find no reason to deviate from this reasoning simply because the disabilities from the successive injuries overlap.

The employer argues that the trial judge's decision allows the employee to collect partial incapacity benefits for eighteen (18) years which is an absurd result. The employer, however, overlooks the fact that it has many tools at its disposal to limit the benefits paid out. For example, the employer is entitled to have the employee examined to determine if, in fact, he remains disabled due to the second and third injuries, or if those conditions have reached

maximum medical improvement thereby subjecting the employee to a potential thirty percent (30%) reduction in his weekly benefits in the future. The trial judge did not order the payment of eighteen (18) years of benefits; he simply held that the employee is entitled to up to 312 weeks of partial incapacity benefits for each injury separately and the employer cannot credit one (1) weekly payment against that period for more than one (1) injury at a time. We find that his decision is entirely consistent with the statute.

Based upon the foregoing discussion, the employer's claim of appeal is denied and dismissed and the decision and decree of the trial judge are affirmed. 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

Hardman and Ferrieri, JJ., concur.

ENTER:

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Olsson, J.

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Hardman, J.

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Ferrieri, J.

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the claim of appeal of the respondent/employer and upon consideration thereof, the appeal is denied and dismissed, and it is

ORDERED, ADJUDGED, AND DECREED:

1. That the findings of fact and the orders contained in a decree of this Court entered on February 26, 2010 be, and they hereby are, affirmed.

2. That the employer shall pay a counsel fee in the sum of Two Thousand Five Hundred and 00/100 ($2,500.00) Dollars to John M. Harnett, Esq., attorney for the employee, for the successful defense of the employer's claim of appeal.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

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Olsson, J.

_____
Hardman, J.

_____
Ferrieri, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Conrad M. Cutcliffe, Esq., and John M. Harnett, Esq., on

_____