STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

CITY OF PROVIDENCE	)	
	)	
VS.	)	W.C.C. 2010-04532
	)	
DAVID THIBAULT	)	
DAVID THIBAULT	)	
	)	
VS.	)	W.C.C. 2010-04489
	)	
CITY OF PROVIDENCE	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. These two (2) matters were consolidated by the trial judge for hearing and decision and remain consolidated for decision by the Appellate Division. The question before the trial judge was whether the court has the authority to correct or amend a memorandum of agreement issued by the employer which allegedly contained an incorrect date of injury. This alleged error has resulted in the employee receiving workers' compensation benefits beyond the 312 week limitation set forth in R.I.G.L. § 28-33-18(d) for a single work-related injury. After our review of the record in this case, as well as the relevant case law, we deny the employer's appeal and affirm the decision and decrees of the trial judge.

The alleged error was brought to light when the employee, David Thibault, filed a petition to review alleging that his incapacity had returned as of June 3, 2010 or, in the alternative, as of October 19, 2009, due to the effects of a work-related injury he sustained on August 28, 2000. A pretrial order was entered on September 13, 2010 in W.C.C. No. 2010-04489 which granted the petition, finding that the employee was partially incapacitated as of March 17, 2003 and continuing due to the effects of the work-related injury he sustained on August 28, 2000. The employer, City of Providence (City), was ordered to pay weekly benefits for partial incapacity beginning June 3, 2010, which represented the day after the City terminated the payment of partial incapacity benefits after the expiration of a period of 312 weeks. Those payments had been made pursuant to a memorandum of agreement which contained an injury date of September 4, 2002. Both parties filed claims for trial from this pretrial order.

While that matter was pending, the City filed a "Petition to Determine a Controversy and to Reform/Correct Documents" in W.C.C. No. 2010-04532. In that petition, the City contends that the employee has only sustained one work-related injury, which occurred on August 28, 2000, and that numerous references in certain binding documents issued by the employer, and in certain orders and decrees of the court, to other injury dates are erroneous and should be corrected by the court under its equitable powers. In addition, the City alleges that the employee has been paid weekly benefits for partial incapacity for 312 weeks regarding the August 28, 2000 injury and therefore the City has no further liability to the employee. This petition was denied at the pretrial conference and the employer filed a claim for trial.

The record in this matter consists of the testimony of the employee, numerous legal documents issued by the City and entered by the court, the affidavits and records of Drs. Christopher W. DiGiovanni and Henry S. Urbaniak, and an affidavit of Kenneth B. Chiavarini,

Esq., the Senior Assistant City Solicitor. The chronology of events established by the testimony and documents is necessary to understand the issues and arguments put forth by the parties.

The employee testified that he was employed as a laborer in the Parks Department of the City of Providence and worked at Roger Williams Park Zoo. One of his duties was cutting grass using a riding mower. On August 28, 2000, he severely cut his right foot when it slipped under the rotating blades of the mower while he was working. He was twenty-one (21) years old at the time. The employee underwent three (3) surgeries on his foot during the week following the incident. He was treated by Dr. Peter S. Trafton and also Dr. Craig P. Eberson. Mr. Thibault began receiving weekly benefits for total incapacity pursuant to a memorandum of agreement issued by the City on September 11, 2000 which listed the date of injury as August 28, 2000.

The employee filed a petition for specific compensation benefits for disfigurement in W.C.C. No. 2001-06828 in which the August 28, 2000 injury was noted. In the heading of the pretrial order dated November 28, 2001, the injury date was listed as August 28, 2000, although in the body of the order it was noted as August 12, 1999. The employee was awarded 250 weeks of specific compensation for the scars resulting from the surgery and atrophy. Shortly thereafter, the parties signed a suspension agreement and receipt on January 23, 2002, which indicated that weekly benefits would be stopped on January 22, 2002 regarding the August 28, 2000 injury. Apparently the employee did not return to work on that date as a second suspension agreement and receipt was signed by the parties on March 14, 2002 stating that benefits would stop on March 10, 2002. Mr. Thibault eventually did return to his regular job on March 11, 2002.

The employee filed a second petition for specific compensation, this time for loss of use, regarding the August 28, 2000 injury. A pretrial order was entered in W.C.C. No. 2002-03129 on May 28, 2002 which awarded benefits for eighteen percent (18%) loss of use of his right

lower extremity due to the August 28, 2000 injury. On January 14, 2003, a decree was entered by the court in W.C.C. No. 2002-04902 which awarded 25 weeks of specific compensation for a disfiguring limp caused by the August 28, 2000 injury.

Mr. Thibault testified that in the fall of 2002, while working for the City in his regular job, he slipped getting out of a truck and fell to the ground on his back and struck his head. He asserted that he also twisted his right foot. He reported the incident to Robert Rastelli, the deputy director, with whom he had a close relationship. The employee was treated at the Garden City Treatment Center. He indicated that he missed a few days from work due to the incident. Although he returned to work, he asserted that his right foot was worse after the fall from the truck.

In his affidavit, Mr. Chiavarini acknowledges that Mr. Thibault reported to the City that he slipped off of a large truck in the rain and bruised his right foot on September 4, 2002. The affidavit states that the employee did not lose any time from work immediately following the incident. Mr. Chiavarini also averred that the employee was suspended from his employment without pay on October 30, 2002, and, after a hearing on July 14, 2004, he was terminated effective November 4, 2004.

The records of Dr. DiGiovanni reflect that he saw the employee for the first time on December 19, 2002 on referral from Dr. Trafton. The intake sheet filled out by Mr. Thibault states he had severe pain for two (2) to three (3) months and was having a problem with the metal plates in his toes and upper leg. It indicates that the problem began in October or November and is due to a work-related injury which occurred in August 2000. Dr. DiGiovanni recommended surgery, which he performed on March 21, 2003, including the removal of broken

plates and loose screws in the foot. On April 2, 2003, the doctor released the employee to light duty with certain restrictions which he subsequently indicated would be permanent.

The City began paying weekly benefits for partial incapacity to Mr. Thibault pursuant to a non-prejudicial agreement issued on April 4, 2003 which noted the date of injury as September 4, 2002 and that the incapacity was not a recurrence. The City subsequently issued a memorandum of agreement dated April 29, 2003, including the same information. On July 10, 2003, a pretrial order was entered in W.C.C. No. 2003-03916 awarding the employee benefits for total incapacity from March 21, 2003 to April 2, 2003 and for partial incapacity thereafter. On January 20, 2004, a pretrial order was entered in W.C.C. No. 2004-00011 awarding benefits for scarring and disfigurement. The petition filed by the employee alleged an injury date of August 28, 2000, but the pretrial order contained an injury date of March 17, 2003.

On August 23, 2006, a decree was entered in W.C.C. No. 2005-08139 which affirmed a pretrial order finding that the employee's condition resulting from a September 4, 2002 injury had reached maximum medical improvement. The City then filed a petition for reduction of his weekly benefits pursuant to R.I.G.L. § 28-33-18(b) which was granted effective April 26, 2007. On December 4, 2008, a pretrial order was entered in W.C.C. No. 2008-07080 suspending payment of the employee's weekly benefits as of September 5, 2008 because he was incarcerated. The date of injury noted in the pretrial order was September 4, 2002. When the employee was released from prison sometime in 2009, the City resumed the payment of his weekly benefits.

In a letter to the employee dated December 1, 2009, the City notified him that his weekly benefits would be terminated on June 2, 2010 pursuant to R.I.G.L. § 28-33-18(d), which limits the payment of partial incapacity benefits to a period of 312 weeks. The letter refers to a date of

injury of September 4, 2002 and a date of incapacity of March 17, 2003. The employee filed a petition to review seeking continuation of his weekly benefits beyond the 312 week limit pursuant to R.I.G.L § 28-33-18.3(a)(1). On June 16, 2010, a pretrial order was entered in W.C.C. No. 2010-03018 denying the employee's petition.

The medical reports of Drs. Urbaniak and DiGiovanni make no mention of an injury in 2002 and refer only to the August 28, 2000 work injury. The employee asserted that he told Dr. DiGiovanni about the incident at work in 2002.

After reviewing all of these documents, the trial judge concluded that there was no statutory authority which would allow him to correct a unilateral mistake or error made by the employer in issuing a memorandum of agreement in this situation. Consequently, the trial judge denied the City's petition requesting that the court make corrections to various legal documents, in particular the memorandum of agreement dated April 29, 2003. The trial judge then granted the employee's petition to review alleging a return of incapacity due to the August 28, 2000 injury and ordered the City to pay partial incapacity benefits beginning June 3, 2010. The City promptly filed claims of appeal in both matters.

In reviewing a trial decision, the appellate panel must afford great deference to the findings made by the trial judge. "The findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." R.I.G.L. § 28-35-28(b). Bearing in mind this very limited standard of review, we have thoroughly reviewed the record and considered the arguments of the parties in light of the relevant statutes and case law. Although the result may seem harsh to the employer, we must agree with the trial judge that the court lacks the authority to nullify or modify those binding documents unilaterally issued by the City which made the City liable for a September 4, 2002 injury.

The City has filed three (3) reasons of appeal. In its first reason of appeal, the City contends that the trial judge erred in concluding that he lacked equitable or statutory authority to alter, amend, and correct the memorandum of agreement dated April 29, 2003, when the evidence presented established that the employee did not sustain a compensable injury on September 4, 2002, the date of injury set forth in that memorandum of agreement. We find no merit in this argument.

Section 28-35-1 of the Rhode Island General Laws provides that an employer shall file a memorandum of agreement with the Department of Labor and Training upon making a payment of compensation benefits to an employee. Furthermore, upon unilaterally completing and filing this document, "the memorandum shall be as binding on the party filing the memorandum as a preliminary determination, order, or decree." R.I.G.L § 28-35-1(e). The statute provides only three (3) grounds for the employer to petition the court to nullify a memorandum of agreement, when the payment of compensation was procured by fraud, coercion, or mutual mistake of fact. *See* R.I.G.L. § 28-35-5. As noted by the trial judge, no evidence was presented that would support a finding of fraud, coercion, or mutual mistake of fact. The only potential mistake in this matter was a unilateral one made by the City when the date of injury on the April 29, 2003 memorandum of agreement was noted as September 4, 2002, the date of a reported incident which had not previously been disabling. Clearly, the City is not entitled to any relief under this provision of the Workers' Compensation Act.

The City also cites § 28-35-45 as providing the court with the authority to review and correct the date of injury in the April 29, 2003 memorandum of agreement. This statute provides for review of an agreement or decree by the court on its own motion or upon a petition filed by either party on the grounds that the:

> (i) Incapacity of the injured employee has diminished, ended, increased, or returned;
> (ii) Employee has recovered from the effects of his or her work-related injury and is disabled only as a result of a preexisting condition;
> (iii) Employee is able to return to the same work which he or she performed at the time of his or her injury;
> (iv) Employee has refused an offer of suitable employment; or
> (v) Weekly compensation payments have been based upon an erroneous average weekly wage; or
> (2) Regarding any other obligation established under chapters 29—38 of this title.

Clearly, the circumstances of this matter do not fall within any of the first five (5) categories of the statute. Rather, the employer relies upon the catch-all provision contained in subsection (2) above to argue that the trial judge had the authority to change the date of injury on the memorandum of agreement dated April 29, 2003 from September 4, 2002 to August 28, 2000. We do not believe this provision can be so broadly construed.

First, we would note that the employer did not file a petition to review "upon forms prescribed by the court." R.I.G.L. § 28-35-45(a). Instead, the employer filed a document entitled "Petition to Determine a Controversy and to Reform/Correct Documents." *See* W.C.C. No. 2010-04532. Despite this procedural error, we would still find that the relief sought by the employer is beyond the scope of review afforded under this statute.

The memorandum of agreement dated April 29, 2003 states an injury date of September 4, 2002. It is acknowledged by the City that the employee did report an incident at work occurring on that date in which he bruised his right foot, which he had previously injured on August 28, 2000. *See* Er's N. The City did not pay any weekly benefits at the time and no litigation ensued to establish a work-related injury because the employee did not lose more than three (3) days from work. When the employee became disabled in March of 2003 as a result of surgery on his right foot, the City issued a non-prejudicial agreement stating an injury date of

September 4, 2002 on April 4, 2003, and then the memorandum of agreement on April 29, 2003, accepting liability for the incapacity beginning March 17, 2003 resulting from the incident on September 4, 2002. The City also specifically indicated on the form that this incapacity was not a recurrence of a prior injury.

Changing the date of injury on the memorandum of agreement more than eight (8) years later would nullify the City's liability for the September 4, 2002 injury, which it unilaterally accepted, mistakenly or not. This is not a case in which there was a typographical error in the date; the City acknowledged the report of an incident at work on September 4, 2002. In its letter to the employee advising him that his benefits were being terminated on June 2, 2010 because he had received partial incapacity benefits in excess of 312 weeks, the City referenced the September 4, 2002 injury date. The City had obviously calculated the 312 weeks from the March 17, 2003 incapacity accepted in the memorandum of agreement and actually overpaid that period. At this point, the employee would be significantly prejudiced by the modification requested by the employer because he would be precluded from filing a petition to attempt to establish that the surgery and disability in March 2003 were the result of the September 4, 2002 incident. *See* R.I.G.L. § 28-35-57(a). Interpreting the so-called "catch-all" provision of § 28-35-45(a)(2) to allow the court to modify a memorandum of agreement in this way could not have been the Legislature's intention.

The City also asserts that the trial judge had the inherent authority to modify the memorandum of agreement in the interests of fairness and equity. In support of this argument, the City repeatedly states that the evidence clearly establishes that the employee sustained only one compensable injury, on August 28, 2000; however, the City overlooks the fact that the compensability of the September 4, 2002 injury was not the subject of the litigation of the two

(2) petitions before the trial judge. The trial judge was not in a position to determine whether the employee sustained a work-related injury and disability on September 4, 2002 and it was not the employee's burden in the context of these two (2) petitions to prove that he sustained a new injury or an aggravation of a preexisting condition on September 4, 2002.

We do not find the City's plea for equitable relief to be persuasive in this situation. As noted by the Rhode Island Supreme Court:

> "The maxims, that every right has a remedy, and that where the law does not give redress equity will afford relief, however just in theory, are subordinate to positive institutions, and cannot be applied either to subvert established rules of law, or to give the courts a jurisdiction hitherto unknown."

Ruggiero v. City of Providence, 889 A.2d 691, 698 (R.I. 2005) *quoting* Greene v. Keene, 14 R.I. 386, 395 (1884). The application of principles of equity to afford relief is not without limitation. "Equity does not grant relief to a party on the ground of accident or mistake, if the accident or mistake has arisen from his own gross negligence, or want of reasonable care, and especially if relief to him will harm another." Torek v. Butler, 50 R.I. 347, 350, 147 A. 872, 873 (1929). In the present matter, the City asserts that it made a mistake in recording the date of injury as September 4, 2002 on the April 29, 2003 memorandum of agreement. No explanation was offered as to how or why the mistake occurred and there was no allegation that it was due to any action or representation of the employee. As noted previously, granting the relief requested by the City at this juncture would significantly prejudice the employee. Under these circumstances, we find that the trial judge properly declined to invoke the principles of equity to afford the relief requested by the City.

In its second reason of appeal, the City argues that the trial judge's decision to award the employee continuing partial incapacity benefits violates R.I.G.L. § 28-33-18(d) which limits the

receipt of partial incapacity benefits for a single work-related injury to a period of 312 weeks. The premise of this argument is that the evidence presented by the City in this matter establishes that the only compensable injury sustained by the employee was on August 28, 2000. This argument ignores the fact that the City voluntarily issued a memorandum of agreement accepting liability for an injury which occurred on September 4, 2002 resulting in incapacity beginning March 17, 2003. As noted previously, the subject matter of this litigation was not whether or not the employee sustained a compensable injury on September 4, 2002; the memorandum of agreement established that fact. The fact that the employee has received 312 weeks of partial incapacity benefits for that injury does not preclude him from receiving 312 weeks of partial incapacity benefits for the injury which occurred on August 28, 2000. *See* R.I.G.L. § 28-33-18(d); Hannon v. General Dynamics, W.C.C. No. 2009-01642 (App. Div. 4/13/12). Consequently, we find no merit in the employer's argument.

In the third reason of appeal, the City contends that the trial judge erred by failing to conclude that the employee was equitably estopped from asserting that he is entitled to continuing benefits for the August 28, 2000 injury. In support of this argument the City points to a petition for scarring filed by the employee in January 2004, after the surgery in March 2003, in which he refers to the August 28, 2000 injury. In addition, the City notes that the employee testified that he believed he was receiving benefits due to the August 28, 2000 injury to his right foot. We have thoroughly reviewed the record and find no grounds for applying the doctrine of estoppel against the employee.

The City asserts that "[a]t all times, the City believed, and was led to believe by his representations, that Mr. Thibault knew he was receiving benefits for his August 28, 2000 injury." Er's Mem. to App. Div. at 16. This assertion flies in the face of the fact that the City

issued the memorandum of agreement with the September 4, 2002 injury date. It also obtained relief on three (3) employer's petitions to review in which pretrial orders entered referencing the September 4, 2002 injury date. *See* W.C.C. Nos. 2005-08139, 2006-06500, 2008-07080. The City referenced the September 4, 2002 injury date in its letter to the employee advising him that his partial incapacity benefits were being terminated because he had received benefits for 312 weeks. Furthermore, there is no evidence in the record that the City sent a copy of the April 29, 2003 memorandum of agreement to the employee or his attorney as required by R.I.G.L. § 28-35-1(c). In fact, the employee testified that he had never seen the document.

The record in this matter reflects that the City, by its own actions, perpetuated the theory that it accepted liability for the incident on September 4, 2002 as an aggravation of a preexisting condition because the fall that day caused a problem with the hardware in the employee's right foot, ultimately resulting in the surgery in March 2003. With the employee's limited knowledge of the workers' compensation law, his understanding was simply that his problems with his right foot all stemmed from the August 28, 2000 incident. Based upon our review of the record, we find no error on the part of the trial judge in declining to invoke the doctrine of equitable or judicial estoppel against the employee.

In summary, we have reviewed the record in this matter and find no error in the trial judge's reasoning and conclusions. Consequently, we deny and dismiss the appeals of the employer in both matters and affirm the decision and decrees of the trial judge. 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 in these matters on

Salem and Hardman, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Salem, J.

_____
Hardman, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

DAVID THIBAULT	)	
	)	
VS.	)	W.C.C. 2010-04489
	)	
CITY OF PROVIDENCE	)	

FINAL DECREE OF THE APPELLATE DIVISION

This matter came on to be heard by the Appellate Division upon the claim of appeal of the respondent/employer and upon consideration thereof, the employer's 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 June 14, 2011 be and they hereby are, affirmed.

2. That the employer shall pay a counsel fee in the amount of Four Thousand Five Hundred and 00/100 ($4,500.00) Dollars to Alfredo T. Conte, Esq., attorney for the employee, for his successful defense of the employer's appeal in this matter as well as the companion case, W.C.C. No. 2010-04532.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A, Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Salem, J.

_____
Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Nicholas R. Mancini, Esq., and Alfredo T. Conte, Esq., on

_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

CITY OF PROVIDENCE)
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VS.) W.C.C. 2010-04532
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DAVID THIBAULT)

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ORDERED, ADJUDGED, AND DECREED:

1. That the findings of fact and the orders contained in a decree of this Court entered on June 14, 2011 be and they hereby are, affirmed.

2. That the employer shall pay a counsel fee as ordered in the companion case, W.C.C. No. 2010-04489 to Alfredo T. Conte, Esq., attorney for the employee, for his successful defense of the employer's appeal in this matter as well as the companion case.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Salem, J.

_____
Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Nicholas R. Mancini, Esq., and Alfredo T. Conte, Esq., on

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