STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

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| GAZMEND RASHITI | ) | |
| | ) | |
| VS. | ) | W.C.C. No. 2013-04379 |
| | ) | |
| NARRAGANSETT IMPROVEMENT COMPANY | ) | |

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 original petition and denying credit to the employer for the weekly indemnity payments made to the employee prior to the pretrial. The issue before the trial judge was whether the employer was entitled to credit for payments made to the employee when the employer failed to file a memorandum of agreement within ten (10) days of making the first payment pursuant to R.I. Gen. Laws § 28-35-1(d), but did so after the employee filed an original petition without sending a twenty-one (21) day demand letter. After reviewing the pertinent statutory and case law, and considering the respective arguments of the parties, we deny the employer's appeal.

In lieu of presenting testimony in this case, the parties submitted a document titled "Partial Agreed Statement of Facts Regarding Application of RIGL § 28-35-9" in which they agreed to the facts relevant to this matter. We will be limited to these facts and will summarize the applicable facts for purposes of our decision. On September 11, 2012, the employee,

Gazmend Rashiti, was injured during the course of his employment with the employer, Narragansett Improvement Company. From September 21, 2012 to August 21, 2013 and beyond, the employer, through its insurer, paid weekly indemnity benefits to the employee; however, the employer failed to file a memorandum of agreement or a non-prejudicial agreement. On July 23, 2013, the employee filed an original petition with the Workers' Compensation Court seeking to memorialize the injury. Prior to filing the original petition, the employee did not send a twenty-one (21) day demand letter to the employer requesting that the employer file a memorandum of agreement. Upon receiving notice of the pretrial conference regarding the original petition, the employer filed a memorandum of agreement which was received by the Department of Labor and Training, Division of Workers' Compensation (the "Department"), on August 8, 2013.

At the pretrial conference on August 21, 2013, the trial judge entered an order granting the original petition and awarding partial incapacity benefits to the employee from September 12, 2012 and continuing. The trial judge also found that the employer was not entitled to credit for the payments made to the employee prior to the pretrial conference. The employer filed a timely claim for trial and advanced three (3) arguments at trial. First, the employer argued that the filing a memorandum of agreement within ten (10) days of making the first payment is a statutory obligation pursuant to § 28-35-12(a) which can only be enforced after the employee sends a twenty-one (21) day demand letter. Second, the employer contended that, once a memorandum of agreement was filed, the trial judge did not have the authority to "award compensation" within the meaning of § 28-35-9(a), as the employee's right to compensation was

thereby already established.[1] Lastly, the employer claimed that the denial of a credit is unfair and inequitable because the employee was not financially harmed by the employer's failure to submit a timely memorandum of agreement.

The trial judge found that the employer failed to comply with the requirement that an employer file a memorandum of agreement within ten (10) days of the initial payment made by the employer or insurer. See § 28-35-1(d). Also, the trial judge found, pursuant to § 28-35-12, that the employee was not obligated to send a twenty-one (21) day demand letter prior to the filing of an original petition so long as the original petition was not filed within twenty-one (21) days of the injury. Consequently, the trial judge concluded that since the employer failed to file a timely memorandum of agreement, the employer was not entitled to credit for the payments made, pursuant to § 28-35-9(a). The trial judge also reasoned that the imposition of the credit penalty was not unfair and inequitable because the purpose of the penalty is to discipline employers who fail to comply with the Workers' Compensation Act (the "Act") by not filing a timely memorandum of agreement, rather than rewarding the employees. The employer filed a timely claim of appeal.

The appellate standard of review is clearly delineated in § 28-35-28(b). The Appellate Division will not disturb a finding of fact made by the trial judge unless it is found to be clearly erroneous. § 28-35-28(b). Since the parties have stipulated to the relevant facts, which are consistent with the trial judge's findings, our review is limited to whether the law was properly applied to the pertinent facts. The Appellate Division will engage in a de novo review of the law in which we "shall affirm, reverse, or modify the decree appealed from, and may itself take any further proceedings that are just[.]" § 28-35-28(a); see also Diocese of Providence, 679 A.2d

[1] At the time that this matter was heard, the specific language under R.I. Gen. Laws § 28-35-9(a) was found under § 28-35-9(b). Since that time, this statute has been amended. In order to remain consistent throughout this decision, we will refer to this statute as it exists in its current state located at § 28-35-9(a).

879, 881 (R.I. 1996). After a thorough review of the record and the relevant law, we find no error in the trial judge's conclusions and deny the employer's appeal.

The employer advances four (4) reasons of appeal contesting the denial of a credit for the payments made to the employee from September 21, 2012 to August 21, 2013. In its first and second reasons of appeal, the employer argues that the trial judge erred in concluding that the employee was not obligated to send a twenty-one (21) day demand letter requesting the filing of a memorandum of agreement prior to filing his original petition. The employer alleges that pursuant to § 28-35-12(a) where the Act imposes an "obligation," notice must be sent to the employer or insurer advising them of the failure to fulfill that obligation prior to the filing of a petition. The employer argues that the court does not have subject matter jurisdiction over the employee's original petition because the employee failed to send a twenty-one (21) day demand letter to the employer requesting that it file a memorandum of agreement prior to filing his original petition.

The employer's obligation to file a memorandum of agreement is set forth in § 28-35-1(a) of the Act, which provides in relevant part that "[i]f the employer makes payments of compensation to an employee * * * under chapters 29 – 38 of this title, a memorandum of that agreement signed by the employer or the employer's insurer shall be filed with the department which shall immediately docket it in a book kept for that purpose." The employer must file the memorandum of agreement "within ten (10) days of the initial payment by the employer or insurer." § 28-35-1(d). The Legislature has mandated that the payments and "the nature of the employee's injury be recorded" in a memorandum of agreement so that there is a "means by which an employee can preserve a clear record of agreement with respect to his or her legal

rights throughout his or her worker's compensation case." Caddick v. Bostitch/Div. of Textron, 519 A.2d 584, 585 (R.I. 1987).

The employer acknowledges that it failed to file a timely memorandum of agreement, in accordance with the Act, after initiating payments to the employee. However, the employer argues that the requirement of filing a memorandum of agreement within ten (10) days of making the first payment to the employee creates an "obligation" pursuant to § 28-35-12(a), which requires a twenty-one (21) day demand letter before filing a petition to enforce that obligation. Section § 28-35-12(a) provides in relevant part:

> "no petition shall be filed within twenty-one (21) days of the date of the injury and no petition regarding any other obligation established under chapters 29 – 38 of this title shall be filed until twenty-one (21) days after written demand for payment upon the employer or insurer or written notice to the employer or insurer of failure to fulfill the obligation[.]" (Emphasis added.)

The employer's argument that the requirement of filing a memorandum of agreement created an "obligation" that necessitates a twenty-one (21) day demand letter overlooks the plain and clear language of § 28-35-12(a). This court will "appl[y] the statute as written by giving the words their plain and ordinary meaning" when a statute contains clear and unambiguous language. Mullowney v. Masopust, 943 A.2d 1029, 1034 (R.I. 2008). Section 28-35-12(a) unambiguously describes the manner in which any person of interest can file an original petition and other petitions with the Workers' Compensation Court. The only requirement for the timing of the original petition, which also applies to all petitions not specifically excepted, is that it cannot be filed within twenty-one (21) days of the date of the injury. § 28-35-12(a). The purpose behind this waiting period is to allow the employer to investigate the employee's claim and possibly resolve the matter before litigation is initiated. In the present matter, the employee filed an original petition which sought to memorialize his injury, as well as other details of his

claim such as his average weekly wage and degree of disability. The employee abided by the only condition precedent for the filing of an original petition under the Act by filing it more than twenty-one (21) days after the date of injury.

After referring to the timing for the filing of an original petition, the statute provides an additional requirement for other petitions, by stating that "no petition regarding any other obligation established under chapters 29 -- 38 of this title shall be filed until twenty-one (21) days after written demand for payment upon the employer or insurer or written notice[.]"[2] § 28-35-12(a) (emphasis added). The employer's argument that the filing of a memorandum of agreement constitutes an "obligation" under this specific provision is unavailing because the employee filed an original petition, which falls under the previous provision and does not require a demand letter. Therefore, the Workers' Compensation Court was not divested of its jurisdiction to hear the employee's original petition seeking to memorialize the injury because a twenty-one (21) day demand letter is not required prior to the filing of an original petition.

The employer also contends that it was improper for the employee to file an original petition because the purpose of an original petition is to establish liability and liability in this instance was already conclusively established pursuant to § 28-35-9(a). Section § 28-35-9(a) provides in part:

> "[i]n the event that an employer or insurer makes payment of weekly benefits to an employee without filing a memorandum of agreement or a non-prejudicial memorandum of agreement with the department the payment shall constitute a conclusive admission of liability and ongoing incapacity and that the employee is entitled to compensation under chapters 29 – 38 of this title[.]" (Emphasis added.)

The employer overlooks the other purposes of an original petition, aside from memorializing liability and ongoing disability. Original petitions also serve the functions of

[2] Also, in addition to original petitions, "any petition alleging the non-payment or late payment of weekly compensation benefits" is excluded from the twenty-one (21) day demand letter requirement. § 28-35-12(a).

describing the injury, establishing the average weekly wage, and setting the degree of disability (whether partial or total). The employee, therefore, retains the right to have all of these features of his workers' compensation claim definitively established with the court through an original petition. The mere fact that the employer filed the memorandum of agreement prior to the date of the pretrial conference does not deprive the employee of the ability to file an original petition with the court and have the terms and conditions of his workers' compensation claim memorialized. See Caddick, 519 A.2d 584. As the trial judge noted, without the filing of the original petition in this matter, there would have been no document containing the details of the employee's injury for the court to review in any subsequent hearings.

Additionally, requiring the employee to send a twenty-one (21) day demand letter requesting the filing of the memorandum of agreement after the employer fails to abide by the ten (10) day time frame would be inconsistent with the strict time constraint for filing a memorandum of agreement under § 28-35-1(d). It is the employer's responsibility to file the memorandum of agreement within ten (10) days after making the first payment and the employer's failure to do so does not shift the responsibility onto the employee to obtain a memorandum of agreement.

In its third reason of appeal, the employer argues that the trial judge erred in denying the employer credit under § 28-35-9(a), because the penalty applies only if the employee is "awarded compensation" by the court, and in this instance, the court had no authority to "award compensation." The employer contends that the court was divested of its power to "award compensation" because the memorandum of agreement describing the arrangement to pay benefits to the employee was submitted prior to the pretrial conference, leaving nothing for the court to "award."

Section 28-35-9(a) provides in relevant part that if a memorandum of agreement is not timely filed then the employee "is entitled to compensation under chapters 29 – 38 of this title and the employer or insurer shall not be entitled to any credit for the payment if the employee is awarded compensation in accordance with these chapters." (Emphasis added.) If we accept the employer's argument that compensation has already been awarded, the penalty would never be imposed because an employer would simply file a memorandum of agreement, albeit late, as soon as it was notified of the filing of a petition. The employer would be able to completely escape the penalty by filing a memorandum of agreement at any time before the pretrial conference. If we allowed an employer to file a late memorandum of agreement and did not penalize the employer for its noncompliance, we would contradict the explicit language of § 28-35-9(a) and render the statute meaningless. See McCain v. Town of N. Providence, 41 A.3d 239, 243 (R.I. 2012) (noting that the Rhode Island Supreme Court "remains mindful of the longstanding principle that statutes should not be construed to achieve meaningless or absurd results" (quoting Ryan v. City of Providence, 11 A.3d 68, 71 (R.I. 2011))) (internal quotation marks omitted).

Section 28-35-9(a) explicitly provides for when an employer does not abide by the strict requirements of § 28-35-1(d); to give the employer immunity from the penalty merely because the employer eventually filed a memorandum of agreement detailing their compensation agreement would controvert the unambiguous language of § 28-35-9(a). Thus, the payments made after the injury, from September 21, 2012 to the date of the pretrial conference, were simply gratuitous in nature and are exempt from being credited because a timely memorandum of agreement was not filed. Natale v. Frito-Lay, Inc., 119 R.I. 713, 719, 382 A.2d 1313, 1315-16 (R.I. 1978) (when an employer or insurer makes payments to an employee without executing a

memorandum of agreement, the employer receives no credit for the payments and the payments made are considered to be a "gratuity").

Lastly, in its fourth reason of appeal, the employer argues that it is unfair and inequitable to impose such a substantial financial penalty on the employer, for "nothing more than a simple mistake." The employer contends that the trial judge's denial of the credit is unreasonable as the employee has suffered no harm since the employer has provided him with weekly benefits and all necessary medical treatment.

The Rhode Island Supreme Court "has held that in enacting the workers' compensation act the legislature intended that the procedures provided therein were to follow the practice in equity." Carr v. General Insulated Wire Works, Inc., 97 R.I. 487, 490, 199 A.2d 24, 26 (1964); see also Moulis v. Kennedy's, Inc., 82 R.I. 364, 367-68, 108 A.2d 512, 514 (1954). Considering the purpose of the statute, the trial judge's imposition of the penalty was fair and reasonable.

The Legislature's purpose in requiring employers to file a memorandum of agreement is to "assure the injured employee of the protection of his rights under the workers' compensation act." Carpenter v. Globe Indem. Co., 65 R.I. 194, 203, 14 A.2d 235, 240 (1940). A memorandum of agreement filed with the Department "acquires the full force and effect of a decree" and can only be altered by the specified procedures in the Act. See Olbrys v. Chicago Bridge & Iron Co., 89 R.I. 187, 190-91, 151 A.2d 684, 686 (1959). Therefore, the memorandum of agreement serves the essential purpose of protecting an injured employee from the termination of his payments based on the employer's unilateral determination that the employee's disability has ceased or that the employee is no longer entitled to benefits. See Carpenter, 65 R.I. at 203, 14 A.2d at 239-40. The primary intent of § 28-35-9(a) is to penalize the employer who fails to file a timely memorandum of agreement with the Department, not to provide a windfall to the

employee. It serves the function of deterring employers from failing to memorialize the injury with the State.

The Rhode Island Supreme Court has found that § 28-35-9(a) was specifically designed to protect employees by preventing "employers and insurance carriers from making compensation payments only until the expiration of the statute of limitations and thereby lulling the employee into inaction with respect to filing his claim for compensation until it was too late." Rickey v. R.I. Hosp. Trust Nat'l Bank, 114 R.I. 672, 675, 337 A.2d 528, 531(1975). This statute prevents an employee from believing that he or she would be provided with the proper weekly benefits based upon an informal agreement with the employer, when in reality, the employee would lack clear legal protections because a memorandum of that agreement documenting the injury and payments was not filed with the State. The employer would be able to arbitrarily stop providing benefits, and could even do so after the statute of limitations expired, which would essentially leave the employee with the "burden of having to prove such an agreement in order to obtain relief[.]" Id. This would be "unfair and contrary to the policies underlying the statutory scheme[.]" Id. Denying credit for payments made without a documented agreement provides greater incentive for employers to file a memorandum of agreement so that the injury and weekly benefits are recorded and the employer is unable to capriciously cut off the employee's benefits. Thus, the imposition of the penalty directly comports with the purpose of the statute; not giving effect to this statute would render it meaningless. See McCain, 41 A.3d at 243.

In conclusion, based on the foregoing reasons, we find no error in the trial judge's decision to impose the penalty denying credit for payments made due to the employer's failure to file a timely memorandum of agreement. Consequently, we deny and dismiss the employer's appeal and affirm the trial judge's decision and decree granting the employee's original petition.

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 in this matter on

Hardman and Ferrieri, JJ. concur.

ENTER:

/s/Olsson, Acting C.J.
Olsson, Acting C.J.

/s/Hardman, J.
Hardman, J.

/s/Ferrieri, J.
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 appeal of the employer/respondent 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 April 10, 2014 be, and they hereby are, affirmed.

2. That the employer shall pay a counsel fee in the amount of Three Thousand Five Hundred and 00/100 ($3,500.00) Dollars to Gregory Boyer, 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:

_____
Olsson, Acting C.J.

_____
Hardman, J.

_____
Ferrieri, J.

I hereby certify that a copy of the Decision and Final Decree of the Appellate Division was sent to Nicholas R. Mancini, Esq., and Gregory Boyer, Esq., on

_____