STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

STEVEN DAROCHA	)	
	)	
VS.	)	W.C.C. 2013-05737
	)	
CENTREX DISTRIBUTORS, INC.	)	

AMENDED DECISION OF THE APPELLATE DIVISION

OLSSON, J. In accordance with Rule 1.11 of the Rules of Practice of the Workers' Compensation Court , an amended decision is hereby rendered in order to include the award of interest on the retroactive payment of benefits pursuant to Rhode Island General Laws § 28-35-12(c).

This matter is before the Appellate Division on the employee's claim of appeal from the decision and decree of the trial judge denying the employee's petition to review alleging that his weekly benefits were based upon an erroneous average weekly wage due to the incorrect calculation of his overtime pay. The employer averaged the employee's overtime earnings over a period of fifty-two (52) weeks despite the fact that the employee was disabled due to a prior work-related injury for a significant portion of that time. The employee contends that his overtime pay should be averaged over only the fourteen (14) weeks that he actually worked prior to his most recent work injury. After reviewing the record and relevant statute and case law, we agree with the employee's contention and reverse the trial judge's decision.

In lieu of presenting testimony in this matter, the parties submitted an Agreed Statement of Facts, with certain relevant documents attached, which we will summarize for purposes of this decision. The employee, Steven DaRocha, has been employed by Centrex Distributors, Inc. (Centrex), since 1991, working overtime on a regular basis during the entirety of his employment. On August 31, 2012, the employee suffered a work-related injury, a sprained right foot, which resulted in disability from September 7, 2012 through May 12, 2013. This injury was memorialized in a memorandum of agreement dated September 24, 2012. During this period of disability, the employee earned no wages or overtime pay from Centrex or any other employer. Mr. DaRocha returned to his regular job at Centrex on May 13, 2013 and executed a suspension agreement and receipt suspending his weekly compensation benefits.

The employee's average weekly wage for the August 31, 2012 injury, excluding overtime and bonuses, was Eight Hundred Twenty-seven and 54/100 ($827.54) Dollars. During the fifty-two (52) weeks preceding his August 31, 2012 injury, the employee received a bonus payment in the amount of One Thousand Five Hundred and 00/100 ($1,500.00) Dollars and overtime pay in the amount of Thirty-nine Thousand Two Hundred Seventy-seven and 10/100 ($39,277.10) Dollars. The employee's average weekly wage, inclusive of overtime and bonuses, was calculated to be One Thousand Six Hundred Eleven and 71/100 ($1,611.71) Dollars.

After the employee returned to his regular job duties on May 13, 2013, he suffered a second work-related injury, a strain of his left knee, on August 27, 2013, resulting in partial disability. This injury was memorialized in a memorandum of agreement dated September 16, 2013. Mr. DaRocha's average weekly wage for this injury, excluding overtime and bonuses, is Seven Hundred Fifty-eight and 78/100 ($758.78) Dollars. During the fifty-two (52) weeks preceding his August 27, 2013 injury, the employee received overtime payments in the amount

of Fourteen Thousand One Hundred Twenty-three and 90/100 ($14,123.90) Dollars and did not receive any bonus payments. The employer calculated the employee's average weekly wage, inclusive of overtime and bonuses, as One Thousand Fifty-seven and 39/100 ($1,057.39) Dollars by averaging his overtime payments over a period of fifty-two (52) weeks. These calculations are documented in a wage statement attached to the Agreed Statement of Facts.

The formula for calculating the average weekly wage is found in Rhode Island General Laws § 28-33-20(a)(1) which provides that the average weekly wage shall be calculated as follows:

> For full-time or regular employees, by dividing the gross wages, inclusive of overtime pay; *provided, that bonuses and overtime shall be averaged over the length of employment but not in excess of the preceding fifty-two (52) week period*, earned by the injured worker in employment by the employer in whose service he or she is injured during the thirteen (13) calendar weeks immediately preceding the week in which he or she was injured, by the number of calendar weeks during which, or any portion of which, the worker was actually employed by that employer, including any paid vacation time.

R.I. Gen. Laws § 28-33-20(a)(1)(emphasis added).

The dispute between the parties focused on the phrase "length of employment" in the statute. The trial judge concluded that the language of the statute was clear and unambiguous and did not support the employee's contention that "length of employment" meant the period of time the employee was actually working and earning wages. She accepted the employer's argument that the phrase "length of employment" was analogous to the phrase "length of service," which is defined by one source as "how long a person has worked at a company or has belonged to an organization. Longevity in a position; duration of service or employment." *The Law Dictionary*, featuring Black's Law Dictionary Free Online Legal Dictionary, 2nd Ed., http://thelawdictionary.org. Because Mr. DaRocha had not been terminated by the employer

during the period he was not working due to the prior work-related injury, the trial judge concluded that he was continuously employed. Consequently, the trial judge denied the employee's petition and concluded that the employer had properly averaged the overtime pay he earned from May 13, 2013 to August 27, 2013 over a period of fifty-two (52) weeks, rather than the fourteen (14) week period he had actually worked. The employee filed a claim of appeal from this decision.

The standard of review of the Appellate Division is very deferential to the findings and conclusions reached by the trial judge. Section 28-35-28(b) of the Rhode Island General Laws provides that "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." The parties in the present matter stipulated to the relevant facts of the case. Our focus is then whether the trial judge erred in her application of the terms of the statute to the stipulated facts when she concluded that the employee failed to prove that his weekly payments were based upon an erroneous average weekly wage.

The employee has filed a single reason of appeal arguing that the trial judge erred as a matter of law in construing the terms of § 28-33-20(a) to permit the employer to average the employee's overtime pay earned between May 13, 2013 and August 27, 2013 over a fifty-two (52) week period despite the fact that he was unable to work and have the opportunity to earn overtime pay for thirty-eight (38) weeks of the fifty-two (52) week period because he was disabled due to a prior work-related injury. The employee contends that the overtime pay should be averaged only over those weeks he actually worked for the employer prior to the most recent work injury. We agree.

The Rhode Island Supreme Court succinctly set forth guidelines for construing statutes in *Generation Realty, LLC v. Catanzaro*, 21 A.3d 253 (R.I. 2011).

> When construing a statute, "our ultimate goal is to give effect to the purpose of the act as intended by the Legislature." "We must 'determin[e] and effectuat[e] that legislative intent and attribute[e] to the enactment the most consistent meaning.'" "When the language of the statute is clear and unambiguous, it is our responsibility to give the words of the enactment their plain and ordinary meaning." The plain meaning approach, however, "is not the equivalent of myopic literalism," and "it is entirely proper for us to look to 'the sense and meaning fairly deducible from the context.'" Therefore, we must "consider the entire statute as a while; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections." Finally, under no circumstances will this Court "construe a statute to reach an absurd result."

Id. at 259 (citations omitted).

We begin with the premise that the formulas prescribed in § 28-33-20 for calculating an employee's average weekly wage are intended to arrive at a sum that will fairly and reasonably equate to the employee's earning capacity at the time of his work injury. *Bailey v. American Stores, Inc./Star Market*, 610 A.2d 117, 119 (R.I. 1992). In the section of the statute setting out the formulas for calculating the average weekly wage for full-time employees, the Legislature incorporated language to eliminate periods the employee was not working from the calculation. For example, gross wages earned during the thirteen (13) week period prior to the injury are divided "by the number of calendar weeks during which, or any portion of which, the worker was actually employed by that employer, including any vacation time." R.I. Gen. Laws § 28-33-20(a)(1). The statute further provides that "absence for seven (7) consecutive calendar days, although not in the same calendar week, shall be considered as absence for a calendar week." *Id*. If an employee begins work on a day other than the beginning of the week, that calendar week and the wages earned in that partial week are excluded from the calculation. *Id*.

The application of these provisions in the appropriate circumstances results in a more accurate and reasonable representation of the injured worker's lost wages and prevents the

unfairness of including periods when the employee was not working which would otherwise artificially reduce his average weekly wage. The Legislature also recognized that issues may arise when calculating the average weekly wage of an employee who has suffered a prior work-related injury.

> The fact that an employee has suffered a previous injury or received compensation for a previous injury shall not preclude compensation for a later injury or for death; but in determining the compensation for the later injury or death, his or her average weekly wages shall be *any sum that will reasonably represent his or her weekly earning capacity at the time of the later injury*, in the employment in which he or she was working at that time, and shall be arrived at according to, and subject to the limitations of, the provisions of this section. In computing the average weekly wages earned subsequent to the first injury, the time worked and wages earned prior to that injury shall be excluded.

R.I. Gen. Laws § 28-33-20(a)(1) (emphasis added). In *Bailey*, *supra*, the Rhode Island Supreme Court noted that despite the subsequent language stating that the average weekly wage shall be determined in accordance with the earlier provisions of the statute, the portion which we emphasized above "suggests that the Legislature attempted to tie the computation of the average weekly wage to an employee's actual earnings." *Id*. at 119.

In denying the employee's petition, the trial judge relied upon a definition of the phrase "length of service" to construe the phrase "length of employment" used in § 28-33-20(a) (1). We find that she erred in doing so. In *Black's Law Dictionary*, "employment" is defined as follows:

> Act of employing or state of being employed; that which engages or occupies; that which consumes time or attention; …. Activity in which person engages or is employed; normally on a day-to-day basis.

Black's Law Dictionary 471 (5th ed. 1979). The term "employ" is defined in the same volume as "[t]o engage one's service; to hire; to use as an agent or substitute in transacting business. . . . To make use of, to keep at work, to entrust with some duty." *Id*. Both of these terms involve action

or activity, rather than a state of disability or inactivity. We find, therefore, that the phrase "length of employment," as used in § 28-33-20(a) (1), means the period during which an individual has performed physical or mental labor for wages, not simply the period of time an individual was carried on the books of a company as an employee.

To conclude otherwise would produce an absurd or unreasonable result which would unfairly penalize an employee who has suffered a prior work injury. An individual may begin working for this employer on May 13, 2013, the same day Mr. DaRocha returned to work from his prior injury, and earn the same wages and overtime pay from May 13, 2013 to August 27, 2013 as Mr. DaRocha. Under the employer's interpretation of the statute, the overtime pay of Mr. DaRocha would be averaged over fifty-two (52) weeks because he has been an employee of the company in excess of one year; but the overtime pay of the new employee would be averaged over the number of weeks from May 13, 2013 to August 27, 2013, resulting in a higher average weekly wage than that of Mr. DaRocha. This hardly seems like a fair or reasonable result intended by the Legislature.

Consistent with the foregoing analysis, we find that the trial judge erred in concluding that the employee's overtime pay should be divided by fifty-two (52) weeks rather than the number of weeks he actually worked and earned wages after his return from his prior work-related injury. We therefore grant the employee's claim of appeal and reverse the decision and decree of the trial judge. The employer shall include in the calculation of the employee's average weekly wage the overtime pay earned by the employee from May 13, 2013 to August 27, 2013 and divided by the number of weeks in that period, which we calculate to be fifteen (15) weeks. 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, specifically a sprain of his right foot, on August 31, 2012, while employed by the employer, resulting in partial incapacity from September 7, 2012 through May 12, 2013.

2. That the employee returned to work for the employer in his usual and customary job on May 13, 2013 and continued to work until he sustained another work-related injury, specifically a strain of his left knee, on August 27, 2013, resulting in partial incapacity from that date and continuing.

3. That the employee earned overtime pay during the period from May 12, 2013 through August 27, 2013.

4. That the employee's weekly compensation rate for his August 27, 2013 work-related injury has been based upon an erroneous average weekly wage because the employer averaged his overtime pay over a period of fifty-two (52) weeks, which included the period he was disabled due to his prior work-related injury, rather than the fifteen (15) week period the employee worked and earned wages from May 12, 2013 through August 27, 2013.

It is, therefore, ordered:

1. That the employer shall re-calculate the employee's average weekly wage by dividing the amount of overtime pay received by the employee from May 12, 2013 through August 27, 2013 by fifteen (15) weeks.

2. That the employer shall pay to the employee weekly benefits for partial incapacity in accordance with the re-calculated average weekly wage from August 27, 2013 and continuing subject to any subsequent orders of this court or agreements entered into by the parties.

3. That the employer shall pay interest on the retroactive payment of benefits in accordance with Rhode Island General Laws § 28-35-12(c).

4. That the employer shall take credit for weekly benefits paid to the employee in accordance with the memorandum of agreement dated September 16, 2013.

5. That the employer shall reimburse Gary J. Levine, Esq., attorney for the employee, the sum of Forty-five and 00/100 ($45.00) Dollars for the fees associated with the filing of this petition and the employee's claim of appeal.

6. That the employer shall pay a counsel fee in the sum of Seven Thousand Five Hundred and 00/100 ($7,500.00) Dollars to Gary J. Levine, Esq., attorney for the employee, for services rendered from the filing of this petition through the successful prosecution of the employee's claim of appeal.

In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a new decree, a copy of which is enclosed, shall be entered on

Ferrieri, C.J. and Hardman, J., concur.

ENTER:

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Ferrieri, C.J.

_____
Olsson, J.

_____
Hardman, J.