

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

ELIZABETH NORTON

)

)

VS.

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W.C.C. 01-06012

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BROWN & SHARPE MFG.

)

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's appeal from a decision of the trial judge affirming the denial by the Department of Labor and Training of the employee's request for reinstatement. After reviewing the record and considering the arguments of the parties, we affirm the denial of the request for reinstatement, but on other grounds.

Ms. Norton began working for Brown and Sharpe in 1982. In 1999, she was employed full-time as a stock clerk in the electrical stockroom which supplied the electrical assembly area and the board area. Material would be delivered to the stockroom on pallets and she would have to unload the pallets and store the material on shelves in the stockroom which were up to seven (7) feet high. She would retrieve parts and materials from the shelves as needed, at times using a ladder to reach the higher shelves. The job involved lifting over twenty-five (25) pounds at times and repetitive overhead work.

On June 9, 1999, Ms. Norton injured herself when she walked into a rack at work. She continued to work with restrictions until July 27, 1999, when she stopped working apparently on her doctor's recommendation. She filed an original petition with the court, W.C.C. No. 99-

05420, alleging that she sustained injuries to her head, neck, and back on June 9, 1999 resulting in disability beginning July 28, 1999. At the pretrial conference, the petition was granted and the employee was awarded weekly benefits for partial incapacity from July 28, 1999 to September 13, 1999 as a result of a contusion to her forehead and a neck strain. Ms. Norton refused an offer of a light duty job in September and was then terminated by the company. The employee claimed a trial from the pretrial order.

The trial concluded on July 7, 2000 and the decree was entered on July 26, 2000. The trial judge found that the employee sustained neck and back strains and a forehead contusion on June 9, 1999 and that she did not refuse an offer of suitable alternative employment in September 1999. He ordered the respondent to pay weekly benefits for partial incapacity from July 27, 1999 to June 9, 2000.

The employee had treated with Dr. Mark A. Palumbo for her injuries. She last saw him on March 22, 2000 when he told her that she should avoid lifting over twenty-five (25) pounds and repetitive overhead lifting. On June 5, 2000, prior to the conclusion of the trial on her original petition, Ms. Norton went to Brown and Sharpe and met with Robert A. Richer and asked to return to her job as a stock clerk. Ms. Norton acknowledged that she did not present to Mr. Richer any documentation from a doctor either releasing her to her regular job or describing her restrictions. On June 9, 2000, the employee was examined by Dr. William S. Buonanno at the request of the employer. Dr. Buonanno concluded that Ms. Norton could return to her former job duties at Brown and Sharpe without restriction. The employer submitted the opinion of Dr. Buonanno to the trial judge in the employee's workers' compensation case to support its contention that her disability had ended. Sometime thereafter, the employee was advised that the company was refusing her request for reinstatement.

The employee then filed a request to review the reinstatement denial with the Department of Labor and Training (hereinafter “the Department”) pursuant to the version of R.I.G.L. § 28-33-47(d)(1) in effect in 1999. In 2000, the statute was amended to provide that after September 1, 2000, any request to determine a reinstatement dispute shall be filed and heard at the Workers’ Compensation Court in the first instance, rather than at the Department. Ms. Norton’s request was filed prior to September 1, 2000 and is therefore governed by the previous version of the statute.

At the Department hearing, in addition to her own testimony, the employee presented the testimony of Marlo J. Magnette and Gary L. Blackmer. Ms. Magnette, the manager of employee benefits and employment at Brown and Sharpe, testified that the employee was denied reinstatement for three (3) reasons: (1) the request for reinstatement was not in writing; (2) the employee did not provide any medical note releasing her to return to work; and (3) her position with the company had been eliminated.

Ms. Magnette stated that at the time of the employee’s injury, there were eight (8) stock clerks, including Ms. Norton. She related that after the employee stopped working, the electronics department was reorganized and the employee’s job was merged into another position. She acknowledged that a seniority list for the position was used in the event of a layoff or reassignment of positions, and that the employee had more seniority than several other people in her position. Ms. Magnette asserted that no one was hired as a stock clerk after Ms. Norton stopped working for the company. She also stated that she received a copy of Dr. Buonanno’s report by fax on June 21, 2000.

Mr. Blackmer, the production, planning, and control manager in the Measuring Systems Division, testified that he was aware that the employee had worked full-time in an enclosed

stockroom that serviced just the electronics department, which was part of his division. Around the time that the employee stopped working, business had decreased in the electronics department and some of the work was being outsourced. The staff in that area was reduced by about one-half. When Ms. Norton stopped working in the stockroom, other employees covered her job duties on an ad hoc basis until the electronics stockroom was merged into the main stockroom.

On August 7, 2001, the hearing officer designated by the Director of the Department to conduct a hearing on the employee's request, issued a decision and order denying the employee's request for reinstatement on three (3) grounds: (1) that at the time of her request, the employee did not provide a certificate from her treating physician approving her return to work; (2) that a valid request for reinstatement was not made within one (1) year of the date of her work-related injury; and (3) that her former position was not available due to a company reorganization and there was no other suitable vacant position available.

Pursuant to R.I.G.L. § 28-33-47(d)(2), Ms. Norton filed a petition with the Workers' Compensation Court seeking review of the determination made by the Director's designee. In considering this type of petition, the trial judge's review is confined to the record made at the Department and is very deferential to the judgment of the Director's designee as to the weight of the evidence on factual issues.

“... The workers' compensation court may affirm the decision of the director or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, conclusions, or decisions, are: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the director; (3) made upon lawful [sic] procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious of [sic] characterized by abuse of discretion or clearly unwarranted exercise of discretion.” R.I.G.L. § 28-33-47(d)(2)(v).

The trial judge, after reviewing the record and decision from the Department, as well as the memoranda of the parties, affirmed the denial of the employee's request for reinstatement. He agreed that the employee's request for reinstatement made to Mr. Richer was insufficient because she did not provide any medical documentation regarding her ability to work. The employee then filed a claim of appeal.

The employee has filed six (6) reasons of appeal which can be condensed into the presentation of three (3) basic issues. The first contention is that the one (1) year limitation on the right to reinstatement commences on the date of incapacity rather than the date of injury. We agree that to restrict the application of the statute to the date of injury in this context would lead to an absurd result.

Rhode Island General Laws § 28-33-47(c)(1)(vi), as it existed in 1999, states that the employee's right to reinstatement is terminated in the following circumstance:

“The expiration of thirty (30) days after the employee reaches maximum medical improvement or concludes or ceases to participate in an approved program of rehabilitation, or one year from the date of injury, whichever is sooner.” (Emphasis added.)

The Rhode Island Supreme Court has interpreted the phrase “date of injury” to mean the date of incapacity in a number of situations. See Parkinson v. Leeson Corp., 115 R.I. 120, 341 A.2d 33 (1975) (regarding rate of compensation for total incapacity under R.I.G.L. § 28-33-17); Romano v. B. B. Greenberg Co., 108 R.I. 132, 273 A.2d 315 (1971) (regarding calculation of rate of compensation pursuant to R.I.G.L. § 28-33-20); Ludovici v. American Screw Co., 99 R.I. 747, 210 A.2d 648 (1965) (regarding limit on period of partial incapacity benefits under prior version of R.I.G.L. § 28-33-18). The rationale underlying the holding in these cases is that the right to

receive weekly compensation benefits does not arise until there is an impairment of earning capacity.

In the present case, Ms. Norton continued to work for about six (6) weeks after the trauma occurred at work. She was working in her regular job, but had assistance with lifting and moving heavier items and retrieving items overhead. There was no impairment of her earning capacity until she stopped working on July 28, 1999. Prior to that date, the “right to reinstatement” to her regular job provided for in R.I.G.L. § 28-33-47 would be meaningless because she was still working in her regular position with the employer. To start the clock ticking for the one (1) year period on the date of injury would make no sense. The right to reinstatement to one’s former position of employment only has force and effect if the employee is no longer working in that position. Consequently, we conclude that the one (1) year limitation provided for in R.I.G.L. § 28-33-47(c)(1)(vi) begins to run on the date of incapacity, not the date of the injury.

In addition, we would note that R.I.G.L. § 28-33-47(a) states that “[a] worker who has sustained a compensable injury shall be reinstated” (Emphasis added). The employer in this case did not accept liability for Ms. Norton’s injury and she was required to file an original petition in order to have her claim adjudicated. A decree deciding her case was not entered until July 26, 2000. In that decree, it was found that she had sustained a compensable injury which resulted in a period of incapacity which ended on June 9, 2000. To hold that the period to claim a right to reinstatement began and potentially expired during a time when neither the employer nor the employee was certain that the alleged injury was compensable would place both parties in an untenable position. The employee may be contending that her period of incapacity is ongoing which would contradict the assertion of the right to reinstatement to her regular job. On

the other hand, the employer may incur significant penalties from refusing the right to reinstatement because it is arguing that the injury is not compensable.

Subsequent to the initial enactment of R.I.G.L. § 28-33-47, the Legislature apparently recognized this conundrum and amended the statute to allow a window of twenty-one (21) days from the date of entry of the trial decree finding a compensable injury, during which the employee must assert the right to reinstatement. See R.I. Pub. Laws 2002, ch. 119, § 3. This amendment certainly sheds some light on the Legislature's thinking with regard to this situation, even if, as in Ms. Norton's case, it arose prior to the enactment of the amendment. Therefore, we find that Ms. Norton would have had some reasonable period of time after the entry of the trial decree on July 26, 2000 within which to assert her right to reinstatement. It is clear that, based upon the above discussion, her right to reinstatement did not terminate on June 9, 2000, as asserted by the employer.

The second issue is whether the employee's former position, or any other vacant and suitable position, was available at the time of the request for reinstatement. The employee argues that the record demonstrates that there were other similar positions available and after she stopped working, another worker was hired who was performing virtually the same duties that she had previously performed. After reviewing the record of the Department hearing, we cannot say that the hearing officer was clearly erroneous in concluding that the employee's position was no longer available and no other suitable vacant positions existed in the company.

Marlo Magnette, the manager of employee benefits and employment, testified that no one was hired in the position of "stock clerk" after the employee left work. She explained that the department in which the employee had previously worked was downsized and reorganized and her position was merged into another job. Gary Blackmer, the production, planning and control

manager of the Measuring Systems Division, further explained that the employee had worked in a stockroom that serviced only the electronics department. Around the time Ms. Norton stopped working, business in that department had decreased and some work was outsourced to other companies. As a result, the personnel in that department were cut in half. When the employee stopped working, other stock clerks and similar personnel in other areas covered her job on an as needed basis. Eventually, the electronics department stockroom was merged into the main stockroom.

The employee contends that Paul Allard testified that he was hired as a stock clerk after the reorganization. However, Mr. Allard never testified before the Department hearing officer and the listing of the stock clerks admitted into evidence does not contain his name. The employee does not point out any other evidence which supports her contention that her position was available, or that a similar vacant position was available. Based upon the evidence presented to the hearing officer, we find that his determination that Ms. Norton's former position was no longer available and no other similar vacant position existed in the company, was not clearly erroneous.

The third issue presented by the employee's reasons of appeal is whether the submission of a certificate from the treating physician releasing the employee to work is a requirement for a valid request for reinstatement. In light of our decision affirming the conclusion that the employee's position is unavailable, and no other similar vacant position is available, we need not address this issue at this time.

Based upon the foregoing discussion, the employee's appeal is denied and dismissed. We hereby affirm the trial judge's denial and dismissal of the employee's appeal from the decision of the Department of Labor and Training, although on different grounds. In accordance

