STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

COLETTE FINUCCI, SURIVIVING SPOUSE OF WILLIAM FINUCCI	)	
	)	
VS.	)	W.C.C. 2010-00303
	)	
PARK ELECTRIC COMPANY	)	
COLETTE FINUCCI, SURVIVING SPOUSE OF WILLIAM FINUCCI	)	
	)	
VS.	)	W.C.C. 2010-00298
	)	
PARK ELECTRIC COMPANY	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the petitioner's claim of appeal from the decision and decrees of the trial judge denying her petitions to review involving the payment of death benefits pursuant to R.I.G.L. § 28-33-12. The trial judge found that the employer correctly paid benefits to the surviving spouse at the deceased employee's initial compensation rate established at the date of the work-related injury on January 29, 1986, after deducting the cost-of-living adjustments (COLAs) which had increased that rate over the course of seventeen (17) years. The surviving spouse argued that she should receive the same weekly benefit the employee was receiving at the time of his death, including the COLAs. After a

thorough review of the record and consideration of the arguments of the respective parties, we grant the employee's appeal and overturn the decision and decree of the trial judge regarding the amount of the weekly benefit to be paid to the surviving spouse.

The record consists of the Stipulation of Facts submitted by the parties which we will summarize as follows. The employee, William Finucci, suffered a work-related injury on January 29, 1986 which was defined as a "closed head injury" in the Memorandum of Agreement. At the time of his injury, the employee's average weekly wage was Four Hundred Ninety-two and 50/100 ($492.50) Dollars which provided for a weekly workers' compensation payment of Three Hundred Seven and 00/100 ($307.00) Dollars for total incapacity beginning January 30, 1986.

The employee passed away due to his injuries on January 17, 2008, at which time he left two (2) minor children and a wife, Colette Finucci. At the time of his death, the employee was receiving Five Hundred Twenty-four and 79/100 ($524.79) Dollars in weekly workers' compensation benefits, which included annual COLAs since 1991, and Eighteen and 00/100 ($18.00) Dollars in dependency benefits, for a total of Five Hundred Forty-two and 79/100 ($542.79) Dollars. Pursuant to a pretrial order entered in W.C.C. No. 2009-02907 on June 1, 2009, Mrs. Finucci, the surviving spouse, began receiving death benefits at a rate of Three Hundred Seven and 00/100 ($307.00) Dollars per week, plus Eighty and 00/100 ($80.00) Dollars in dependency benefits, for a total of Three Hundred Eighty-seven and 00/100 ($387.00) Dollars per week. The parties stipulated that the petitioner has received and continues to receive a four percent (4%) COLA on each anniversary of the employee's death.

On January 14, 2010, Mrs. Finucci filed two (2) petitions to review. In W.C.C. No. 2010-00298, the petitioner alleged that the employer had failed to pay the cost-of-living increase

mandated in R.I.G.L. § 28-33-12. On February 8, 2010, a pretrial order was entered denying the petition and the petitioner filed a timely claim for trial. The second petition, W.C.C. No. 2010-00303, alleged that the employer failed to pay the correct amount of weekly indemnity benefits in accordance with the pretrial order entered in W.C.C. No. 2009-02907 and a Memorandum of Agreement dated March 24, 1995. This petition was also denied at the pretrial conference on February 8, 2010 and the petitioner filed a timely claim for trial.

In his decision, the trial judge reviewed the language of R.I.G.L. § 28-33-12 and concluded that the wording of the statute was clear and unambiguous. He found that Mrs. Finucci was only entitled to the weekly benefit her husband received at the time of his injury, rather than at the time of his death. The trial judge apparently considered the two (2) petitions as presenting the same issue and denied and dismissed them both. The petitioner filed appeals in both cases.

When undertaking the review of a trial judge's decision, we are bound by the provisions of R.I.G.L. § 28-35-28(b), which mandates that "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." We are precluded from engaging in a *de novo* review of the evidence and substituting our own judgment for that of the trial judge without first determining that the trial judge was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). In the present matter, the parties stipulated to the pertinent facts. Consequently, our review is limited to whether the law was properly applied in this factual context. Bearing this in mind, and after review of the relevant statutes and case law, we find that the trial judge misapplied the provisions of § 28-33-12 and reverse his decision and decree in W.C.C. No. 2010-00303.

The petition in W.C.C. No. 2010-00298 alleges that the employer failed to pay a cost-of-living increase to Mrs. Finucci in accordance with § 28-33-12. Section 28-33-12(g) provides as follows:

> A surviving spouse entitled to benefits under this section shall receive an annual cost of living increase of four percent (4%) on every anniversary of the date of death for so long as he or she is eligible for benefits under this section.

In the Stipulation of Facts submitted to the trial judge, the parties agreed that "[t]he petitioner spouse has received and will continue to receive a four (4) percent cost of living adjustment on each anniversary of the employee's death." In light of this stipulation, the appeal in W.C.C. No. 2010-00298 is moot as there is no issue in dispute. Consequently, we deny the petitioner's appeal in that matter and affirm the trial judge's decree denying and dismissing the petition.

The petitioner has filed eight (8) reasons of appeal pertaining to her appeal in W.C.C. No. 2010-00303 in which she contends that the trial judge clearly erred in concluding that the language of § 28-33-12 mandates that the surviving spouse shall receive a weekly benefit equal to the amount the employee was receiving on the date of his work-related injury. The petitioner argues that the trial judge erred when he held that the wording of § 28-33-12 together with § 28-33-17 does not allow for the surviving spouse to receive the same weekly compensation benefits that the employee was receiving at the time of his death. The petitioner alleges that the trial judge misconstrued or overlooked relevant case law and overlooked the fact that § 28-33-17(f)(1) incorporates COLAs into the compensation rate for totally incapacitated injured workers. After our review of the pertinent case law and the statutory language, we must agree.

The Workers' Compensation Act provides that if death results from a work-related injury, "the employer shall pay the surviving spouse the weekly rate for total incapacity the deceased employee would have been entitled to receive under the provisions of § 28-33-17 plus

forty dollars ($40.00) per week for each dependent child." R.I.G.L. § 28-33-12(a)(2). If an injured employee was receiving weekly benefits prior to his death, payments to the surviving spouse shall begin from the date of the last payment to the employee. R.I.G.L. § 28-33-12(d). At the time of the employee's injury in 1986, § 28-33-17(a)(1) provided that while he was totally disabled, an employee would receive "weekly compensation equal to sixty-six and two-thirds percent (66 2/3 %) of his average weekly wages, earnings, or salary," but not to exceed one hundred percent (100%) of the state average weekly wage as computed under the provisions of § 28-44-6(a). In 1986, the maximum weekly compensation rate was Three Hundred Seven and 00/100 ($307.00) Dollars. The employee was also entitled to receive an additional Nine and 00/100 ($9.00) Dollars per week for each dependent in accordance with § 28-33-17(c).

Prior to 1990, the amount of the weekly benefit paid to a totally disabled employee was locked in as of the date of injury, except for the amount of dependency benefits, regardless of the length of the disability. In 1990, the Legislature amended § 28-33-17 and provided for a COLA to injured workers who were totally disabled for more than fifty-two weeks as of May 10, 1991, regardless of the date of injury. R.I.G.L. § 28-33-17(f)(1). In Mr. Finucci's case, the addition of the annual COLAs to his weekly benefit from 1991 to 2008 increased his weekly compensation from Three Hundred Seven and 00/100 ($307.00) Dollars to Five Hundred Twenty-four and 79/100 ($524.79) Dollars.

The language of § 28-33-12(a)(2) provides that the surviving spouse shall receive a weekly benefit in the amount the deceased employee would have been entitled to for total incapacity under § 28-33-17. Section 28-33-17 includes subsection (f) which is the COLA provision. There is nothing in § 28-33-12(a)(2) which indicates that the benefit is limited to the amount calculated according to the formula set forth in § 28-33-17(a). We cannot find any

language in either statutory provision that would suggest that the Legislature intended to exclude all accumulated COLAs from the benefit paid to a surviving spouse.

Several cases addressing the application of the provisions of § 28-33-12 and its predecessor statute lend support to the petitioner's position that the benefit paid to a surviving spouse is the amount of the weekly benefit the deceased employee was receiving at the time of his death. In Card v. Lloyd Mfg. Co., Inc., 82 R.I. 182, 107 A.2d 297 (1954), the Rhode Island Supreme Court considered whether the finding of a compensable injury in an original petition for benefits was *res judicata* of that issue in a dependent's petition for benefits after the employee's death. In concluding that the issue was *res judicata*, the Court reasoned:

> When once that fact is established the right to compensation *for the injury* accrues to the employee and *if he dies of such injury* it is in effect continued in favor of his dependent.
>
> That the compensation which the dependent thereby becomes entitled to receive is not new compensation for the death but continuing compensation for the injury is evident from the following provision of G. L. 1938, chap. 300, art. II, § 6, as amended: 'When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin from the date of the last of such payments, ...'

Card, 82 R.I. at 187, 107 A.2d at 299. The Court indicated that the statute did not confer a separate and distinct right to compensation to the dependents for the death of the employee, but rather transferred to them the right to receive the employee's weekly compensation benefit. See id.

In Cogswell v. Max Silverstein & Sons, Inc. , 488 A.2d 732 (R.I. 1985), the surviving spouse petitioned to increase the weekly benefits she received based upon an amendment to the calculation of the weekly benefit for total incapacity which went into effect after her husband's work injury, but before his death. The Court, citing the language of § 28-33-12, denied the petition, stating:

> The dependent widow's benefits are therefore a continuation of her husband's benefits and should not be greater than those that her deceased husband would have received had he lived.

Id. at 734. These two (2) decisions support the position that the benefits paid to a surviving spouse or dependents are simply a continuation of the benefit paid to the injured employee prior to his death. In the present matter, the surviving spouse is seeking the same benefit her husband was receiving at the time of his death.

The employer argues that the language of § 28-33-12 is clear and unambiguous and mandates that the rate of compensation is locked in as of the date of the employee's injury, rather than his death. However, we find this view to be overly simplistic. The employer overlooks the fact that the statute refers to the amount paid for total disability under § 28-33-17, in its entirety. The payment of COLAs as a part of the weekly benefit for total incapacity is set forth in this statute. To hold that the surviving spouse is only entitled to the weekly benefit the employee was receiving in 1986 would subvert the intent of the Legislature in enacting the COLA provision and ignore the basic principle that "the provisions of the Workers' Compensation Act are to be liberally construed to effectuate the benevolent purpose that led to is enactment." Fontaine v. Calderone, 122 R.I. 768, 771, 412 A.2d 243, 245 (1980).

The Rhode Island Supreme Court's willingness to liberally interpret statutory language, specifically § 28-33-12, to effectuate the intended purpose of the Act was no more evident than in Billington v. Fairmount Foundry, 724 A.2d 1012 (R.I. 1999). Sections 28-33-12(a)(1) and (b) provide that weekly benefits shall be paid to the dependents of the deceased employee in the event that there is no surviving spouse; however, subsection (g) states only that a surviving spouse shall receive an annual cost of living increase of four percent (4%). In Billington, the deceased employee was not married at the time of his death, but had a surviving dependent

daughter. In rejecting the narrow and literal interpretation advocated by the employer that only a surviving spouse could receive the cost of living increase, the trial judge concluded, after reviewing the statutory language of § 28-33-12 as a whole and in accordance with the benevolent purpose of the Act, that "the dependent child steps into the shoes of the surviving spouse," and would be entitled to the cost of living increase. Id. at 1013. The Appellate Division, in affirming the trial judge's decision, stated:

> We do not feel that the Legislature ever intended to reduce the benefits to a dependent child who, in most circumstances, will be more vulnerable than the surviving spouse. Thus, we feel that the trial judge was correct in finding an ambiguity in this section and properly interpreted the section to accomplish the Act's humanitarian goals.

Billington v. Fairmount Foundry, W.C.C. No. 97-00689 (App. Div. 1998) (Emphasis added.) The Rhode Island Supreme Court agreed with the reasoning of the Appellate Division and denied the employer's petition for certiorari.

Over the past twenty (20) years, the Workers' Compensation Act has frequently been amended to reflect the recognition that inflation and a changing economy can adversely affect an injured worker's economic status such that her/his workers' compensation benefit is no longer an adequate substitute for wages. *See e.g.,* R.I.G.L. §§ 28-33-17(f) (COLA for totally disabled employees) and 28-33-20.1(a)(recalculation of AWW for recurrence after return to work for 26 weeks). The provision for COLAs for totally disabled employees after fifty-two (52) weeks of total incapacity was an attempt to provide some relief from the effects of inflation and allow weekly compensation benefits to keep pace somewhat with the increased cost of living. To eliminate those COLAs and reduce a surviving spouse's benefit to the rate the employee was receiving at the time of his injury would be contrary to the benevolent purposes of the Act and this entire legislative scheme.

This recognition of the changing circumstances from the date of injury to the date of death is reflected in R.I.G.L. § 28-33-12(a)(1) which states, "[t]he employer shall pay the dependents of the employee wholly dependent upon his or her earnings for support at the time of his injury or death, whichever is greater…" (emphasis added). This language acknowledges that locking in the number of eligible dependents at the time of the injury would be unreasonable and that the statute should be applied to benefit the greatest number. Similarly, we believe that interpreting the statute to limit the benefit received by Mrs. Finucci to the amount her husband received in 1986 would be an inequitable result and inconsistent with the purpose of the statute.

We agree with the petitioner's premise that equity demands that Mrs. Finucci "steps into the shoes" of her deceased husband. Just as Mr. Finucci's cost of living had increased between the years of his injury and eventual passing, so has that of his family. As such, we find that the trial judge misconstrued R.I.G.L. § 28-33-12 when read in conjunction with R.I.G.L. § 28-33-17 and the relevant case law.

In accordance with the above, we deny and dismiss the petitioner's appeal in W.C.C. No. 2010-00298 and affirm the decree of the trial judge denying and dismissing the petition to review. With regard to the petitioner's appeal in W.C.C. No. 2010-00303, we hereby grant the petitioner's appeal and reverse the decision and decree of the trial judge. A new decree shall enter containing the following findings and orders:

1. That the employee, William Finucci, suffered a work-related injury on January 29, 1986.

2. That the employee's weekly workers' compensation rate for total incapacity was Three Hundred Seven and 00/100 ($307.00) Dollars.

3. That the employee passed away due to the effects of his work-related injury on January 17, 2008.

4. That at the time of his death, the employee was receiving Five Hundred Twenty-four and 79/100 ($524.79) Dollars in weekly compensation benefits for total incapacity, plus Eighteen and 00/100 ($18.00) Dollars a week in dependency benefits, for a total of Five Hundred Forty-two and 79/100 ($542.79) Dollars per week.

5. That the petitioner/surviving spouse was awarded benefits in accordance with R.I.G.L. § 28-33-12(a)(2) pursuant to a pretrial order entered in W.C.C. No. 2009-02907 on June 11, 2009.

6. That the employer incorrectly paid the petitioner benefits in the amount of Three Hundred Seven and 00/100 ($307.00) Dollars plus Eighty and 00/100 ($80.00) Dollars in dependency benefits per week, after eliminating the COLAs which had been paid to the employee since 1991.

7. That the petitioner is entitled to receive the same weekly benefit for total incapacity, inclusive of all accumulated COLAs, that the employee was receiving at the time of his death, plus dependency benefits as provided for in R.I.G.L. § 28-33-12(a)(2).

It is, therefore, ordered:

1. That the employer shall pay to the petitioner a weekly payment of Five Hundred Twenty-four and 79/100 ($524.79) Dollars, plus dependency benefits as provided for in R.I.G.L. § 28-33-12(a)(2), beginning January 17, 2008.

2. That the employer shall pay to the petitioner a cost of living increase in accordance with R.I.G.L. § 28-33-12(g).

3. That the employer shall reimburse the petitioner the sum of Fifty and 00/100 ($50.00) Dollars for the cost of filing the petition and the claim of appeal.

4. That the employer shall pay a counsel fee in the sum of Six Thousand Three Hundred and 00/100 ($6,300.00) Dollars to Stephen J. Dennis, Esq., and Robert S. Thurston, Esq., attorneys for the petitioner, for services rendered throughout the course of the litigation of this petition and appeal.

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 on

Connor and Ferrieri, JJ., concur.

ENTER:

_____
Olsson, J.

_____
Connor, J.

_____
Ferrieri, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

COLETTE FINUCCI, SURIVIVING SPOUSE OF WILLIAM FINUCCI	)	
	)	
VS.	)	W.C.C. 2010-00303
	)	
PARK ELECTRIC COMPANY	)	

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division on the claim of appeal of the petitioner from a decree entered on December 29, 2010. Upon consideration thereof, the appeal of the petitioner is granted, and in accordance with the Decision of the Appellate Division, the following findings of fact are made:

1. That the employee, William Finucci, suffered a work-related injury on January 29, 1986.

2. That the employee's weekly workers' compensation rate for total incapacity was Three Hundred Seven and 00/100 ($307.00) Dollars.

3. That the employee passed away due to the effects of his work-related injury on January 17, 2008.

4. That at the time of his death, the employee was receiving Five Hundred Twenty-four and 79/100 ($524.79) Dollars in weekly compensation benefits for total incapacity, plus Eighteen and 00/100 ($18.00) Dollars a week in dependency benefits, for a total of Five Hundred Forty-two and 79/100 ($542.79) Dollars per week.

5. That the petitioner/surviving spouse was awarded benefits in accordance with R.I.G.L. § 28-33-12(a)(2) pursuant to a pretrial order entered in W.C.C. No. 2009-02907 on June 11, 2009.

6. That the employer incorrectly paid the petitioner benefits in the amount of Three Hundred Seven and 00/100 ($307.00) Dollars plus Eighty and 00/100 ($80.00) Dollars in dependency benefits per week, after eliminating the COLAs which had been paid to the employee since 1991.

7. That the petitioner is entitled to receive the same weekly benefit for total incapacity, inclusive of all accumulated COLAs, that the employee was receiving at the time of his death, plus dependency benefits as provided for in R.I.G.L. § 28-33-12(a)(2).

It is, therefore, ORDERED:

1. That the employer shall pay to the petitioner a weekly payment of Five Hundred Twenty-four and 79/100 ($524.79) Dollars, plus dependency benefits as provided for in R.I.G.L. § 28-33-12(a)(2), beginning January 17, 2008.

2. That the employer shall pay to the petitioner a cost of living increase in accordance with R.I.G.L. § 28-33-12(g).

3. That the employer shall reimburse the petitioner the sum of Fifty and 00/100 ($50.00) Dollars for cost of filing the petition and the claim of appeal.

4. That the employer shall pay a counsel fee in the sum of Six Thousand Three Hundred and 00/100 ($6,300.00) Dollars to Stephen J. Dennis, Esq., and Robert S. Thurston, Esq., attorneys for the petitioner, for services rendered throughout the course of the litigation of this petition and appeal.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Connor, J.

_____
Ferrieri, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Stephen J. Dennis., Esq., Robert S. Thurston, Esq., and Vivian B. Dogan, Esq., on

_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

COLETTE FINUCCI, SURVIVING SPOUSE OF WILLIAM FINUCCI	)	
	)	
VS.	)	W.C.C. 2010-00298
	)	
PARK ELECTRIC COMPANY	)	

FINAL DECREE OF THE APPELLATE DIVISION

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

ORDERED, ADJUDGED, AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on December 29, 2010 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Connor, J.

_____
Ferrieri, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Stephen J. Dennis, Esq., Robert S. Thurston, Esq., and Vivian B. Dogan, Esq., on

_____