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2000 Survey of Rhode Island Law: Cases: Workers' Compensation Law

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Workers' Compensation Law. *D. Corso Excavating, Inc. v. Poulin,* 747 A.2d 994 (R.I. 2000). Beneficiaries of legislated economic benefits who do not enjoy a protected property interest, a vested substantive entitlement or an enforceable contractual right to receive benefits from the state are not entitled to benefits once legislation providing for such benefits is repealed. The repeal of a workers' compensation reimbursement statute, allowing qualifying employers and their insurers to obtain reimbursement from the Second Injury Fund,[1] eliminates reimbursement benefits for those whose claims were not yet accepted nor adjudged entitled to reimbursement when the repeal became effective.

FACTS AND TRAVEL

Employee Louis Mosca, Sr. (Mosca) sustained an injury to his left knee during the course of his employment with petitioner D. Corso Excavating, Inc. (Corso) on May 26, 1989.[2] Mosca had injured his knee twice previously while working for different employers and had undergone three surgeries to the knee.[3] Corso knew of Mosca's previous knee problems upon hiring him.[4] Corso's workers' compensation insurer, petitioner Liberty Mutual Insurance Co. (Liberty), accepted liability for Mosca's disability through a memorandum of agreement just one day after the injury was sustained.[5] For ten years thereafter, Mosca received weekly workers' compensation payments.[6]

It was not until August 1993 that the director of the Department of Labor and Training (director) was notified by petitioners of a potential section 28-37-4[7] reimbursement claim against the state's Second Injury Fund arising from Liberty's disability payments to Mosca.[8] On August 31, 1993, Liberty submitted its reimbursement claim.[9] On December 23, 1994, the director denied the claim and petitioners filed suit in the workers' compensation court

1. *See* R.I. Gen. Laws § 28-37-4 (1956) (1998 repealed).
2. *See* D. Corso Excavating, Inc. v. Poulin, 747 A.2d 994 (R.I. 2000).
3. *See id.* at 997.
4. *See id.*
5. *See id.*
6. *See id.*
7. *See* R.I. Gen. Laws § 28-37-4 (1956) (1998 repealed).
8. *See D. Corso*, 747 A.2d at 997.
9. *See id.*

to obtain reimbursement.[10] In 1996, the trial judge dismissed the claim as untimely.[11] After a panel of the appellate division affirmed that ruling, Corso and Liberty petitioned the Rhode Island Supreme Court for certiorari.[12]

While the supreme court petition was pending, the Rhode Island General Assembly repealed section 28-37-4.[13] Thereafter, the supreme court issued a writ of certiorari to review the appellate decision and to determine the effect of the repeal on petitioners' reimbursement claim.

BACKGROUND

Under the reimbursement scheme provided by section 28-37-4,[14] certain second-injury payments by employers and/or their workers' compensation insurers to previously disabled employees were eligible for potential reimbursement.[15] The source for this reimbursement was an administrative account, also known as the Second Injury Fund, within the state's general fund.[16] Section 28-37-4 provided that an employer may qualify for reimbursement from the special state fund if the employer could establish by written records that he or she had knowledge of a preexisting disability at the time that the employee was hired.[17] The law additionally provided that when an employee who was previously disabled by any work-related cause aggravates this preexisting condition, the current employer shall pay all compensation, but shall, subject to qualification, be reimbursed from the special fund for any compensation payments paid after the first twenty-six weeks of disability.[18] The legislative purpose of this second injury payment system was to encourage the employment of disabled employees by limiting employer liability for the high compensation and medical charges associated with re-injury of a previous existing condition.[19]

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10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.*
14. *See* R.I. Gen. Laws § 28-37-4 (1956) (1998 repealed).
15. *See id.*
16. *See* R.I. Gen. Laws § 28-37-1 (1956) (2000 Reenactment).
17. *See* R.I. Gen. Laws § 28-37-4(d) (1956) (1998 repealed).
18. *See id.* at § 28-37-4(b).
19. *See id.* at § 28-37-4(a).

With the 1998 legislative repeal of section 28-37-4,[20] the Rhode Island General Assembly expressly provided that second injury reimbursement benefits would no longer be available and such repeal would "apply to all claims for reimbursement against the fund in which the director has not accepted liability nor has been adjudged liable for reimbursement."[21] The current case responds to questions of the constitutionality of this legislation and of the legislative intent by the repeal to have a retroactive effect on compensation claimants not yet granted a secure right to payment but who have relied on an expectancy of this right.

ANALYSIS AND HOLDING

The Rhode Island Supreme Court considered whether the General Assembly intended its 1998 repeal of section 28-37-4[22] to eliminate reimbursement benefits for those qualifying employers who, prior to the repeal, had paid workers' compensation to previously disabled employees and had submitted claims, but whose claims were not yet accepted nor adjudged entitled for reimbursement when the repeal became effective.[23] The supreme court held that the repeal had been intended to eliminate these claims.[24] The court based its decision on prior case law requiring that retroactive termination of an unsecured expectation such as reimbursement can only be accomplished by clear evidence of legislative intent.[25] After reviewing the plain language of the repealing legislation, the court determined that the Legislature expressly terminated reimbursement funding to claimants whose claims were pending.[26] The Legislature maintained one exception to this generalized determination. The exception was that a claim may be exempt from the reimbursement repeal if it entailed any preexisting agreements, preliminary determinations, orders or decrees between the director and any employer, employee or insurer under which the director accepted liability or had been adjudged liable.[27] Similarly,

20. *See D. Corso*, 747 A.2d at 998.
21. *Id.* at 998.
22. *See* R.I. Gen. Laws § 28-37-4 (1956) (1998 repealed).
23. *See D. Corso*, 747 A.2d at 997.
24. *See id.* at 998.
25. *See id.* at 999 (citing Dunbar v. Tammelleo, 673 A.2d 1063, 1068 (R.I. 1996)).
26. *See id.*
27. *See id.* at 998.

any substantive rights were not to be affected by the repealing legislation.[28]

In light of this determination, the supreme court considered whether a qualified employer or insurer, who paid compensation to disabled employees in reliance on the presumed continued availability of section 28-37-1 reimbursement benefits has a claim that has ripened into a substantive right.[29] The court held that under this circumstance, claimants possess mere "floating expectancies or gratuities," but not substantive rights, which are immune to legislative reimbursement repeal.[30] Consequently, petitioners in this case possessed a mere expectancy that could be eliminated at any time.[31] Following the determination in *Dunbar v. Tammelleo*,[32] a floating expectancy remains subject to legislative modification until an award is made.[33] The supreme court emphasized the danger inherent in allowing mere expectations to be construed as terms of an enforceable contract, a protected property interest, or a vested substantive right.[34] The court expressed deference to the fundamental power of the Legislature alone to modify and amend statutes.[35] Therefore, in this case, the submission of a claim for statutory benefits, even when based upon actions performed before the repeal and in reliance upon the presumed availability of such benefits, has not immunized the claim from the effects of the legislative repeal of reimbursement funds.[36] The court affirmed the appellate division's decision to deny petitioner's claim, but for reasons of the efficacy of the legislative repeal and not for reasons of an untimely submitted claim.[37]

The Rhode Island Supreme Court placed emphasis on the principle that mere enactment of a statutory benefit scheme does not create protected property interests, substantive vested rights or enforceable contractual obligations in benefit claimants, unless

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28. *See id.*
29. *See id.*
30. *See id.* (citing *Dunbar*, 673 A.2d at 1067).
31. *See id.*
32. *See Dunbar*, 673 A.2d at 1067.
33. *See D. Corso*, 747 A.2d at 998.
34. *See id.* (citing Retired Adjunct Professors v. Almond, 690 A.2d 1342, 1346 (R.I. 1997)).
35. *See id.*
36. *See D. Corso*, 747 A.2d at 1000.
37. *See id.* at 1002.

the government has become liable for the claim.[38] Liability would attach upon a government agent's acceptance of liability or upon adjudication of liability.[39] In this case, the director had not accepted the claim by the petitioners, nor had liability been judicially mandated.[40] The petitioners were deemed to have no property rights in the reimbursement funds sought because the Second Injury Fund is strictly property of the state.[41] Any annual assessment fees paid into the fund by employers or insurers become public monies, and the employees or insurers possess no direct or vested interest in the fund.[42] Consequently, the Fund does not amount to a taking without just compensation in violation of the Fifth Amendment to the United States Constitution, or in violation of article 1, section 16, of the Rhode Island Constitution.[43]

Additionally, the court rejected the argument that reliance on future benefits amounts to a unilateral contract, enforceable on the theory of promissory estoppel.[44] The court deemed such notions as applicable to private contractual contexts only, and ill suited for public contract-rights analysis.[45] Also, no statutory language demonstrated any legislative intent to enter into a contract with employers or insurers to provide them with reimbursement benefits, or to vest them with substantive rights immune to legislative abrogation.[46] In this case, petitioners' interest in reimbursement was deemed a mere floating expectancy, distinct from a legally protected substantive right.[47] The court hinted, however, that even if a substantive right had been impaired by the repeal, as long as the repeal was reasonable and appropriate for a legitimate public purpose (such as preserving state fund assets), no contract impairment claim would be viable.[48]

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38. *See id.* at 1000.

39. *See id.*

40. *See id.*

41. *See id.* at 1001 (citing John J. Orr & Sons, Inc. v. Waite, 479 A.2d 721, 726 (R.I. 1984)).

42. *See id.*

43. *See id.*

44. *See D. Corso*, 747 A.2d at 1001 (citing *Retired Adjunct Professors*, 690 A.2d at 1346).

45. *See id.*

46. *See D. Corso*, 747 A.2d at 1001.

47. *See id.*

48. *See id.* at 1002 (citing Energy Reserves Group, Inc. v. Kan. Power & Light Co., 459 U.S. 400 (1983)).

Finally, the retroactive repeal of section 28-37-4[49] was held not to violate petitioners' equal protection clause guarantees under either article 1, section 2 of the Rhode Island Constitution or under the Fourteenth Amendment to the United States Constitution.[50] The supreme court looked to the reasonableness and appropriateness of the repeal as a means of furthering the state's public purpose of asset preservation.[51] Because this purpose was deemed to further a legitimate state interest, the court gave deference to the power and provisions of the statutory repeal.[52] Consequently, the court held that the Rhode Island General Assembly was entitled to conclude that this strong state interest outweighed any floating expectancies that employers and insurers may have entertained to obtain reimbursement under section 28-37-4.[53] The court reasoned that because the retroactive repeal of this statute was not irrelevant to achieving the state's objective, the petitioners' equal protection challenge was unavailing.[54]

CONCLUSION

In *D. Corso Excavating, Inc. v. Poulin*, the Rhode Island Supreme Court clarified the General Assembly's intent in repealing Rhode Island General Laws section 28-37-4 by holding that a claim for workers' compensation reimbursement, initiated prior to statutory repeal, may be retroactively denied when claimant had no substantive, contract, or property rights established. A mere floating expectation of future reimbursement by a state fund, and a reliance on such funds when paying workers' compensation for an employee suffering a re-injury, creates no vested right to payment when the statutory source of funds is repealed. A statutory benefit scheme may be repealed by the Legislature if its purpose is in furtherance of a legitimate state interest, thereby eliminating retroactively even those claims already pending prior to repeal. Absent a state's acceptance of liability, or an adjudged liability, such retroactive application is not violative of a claimant's constitutional

49. *See* R.I. Gen. Laws § 28-37-4 (1956) (1998 repealed).
50. *See D. Corso*, 747 A.2d at 1002.
51. *See id.*
52. *See id.*
53. *See id.*
54. *See id.*

rights and cannot be the subject of a due process, just compensation or contract impairment challenge.

Christy Hetherington

Workers' Compensation. *Lombardo v. Atkinson-Kiewit,* 746 A.2d 679 (R.I. 2000). The Rhode Island Supreme Court held that the amendment to the Workers' Compensation Act regarding the common law odd-lot doctrine both codified and modified the doctrine.

FACTS AND TRAVEL

Alfred Lombardo (Lombardo) was employed by Atkinson-Kiewit Construction Company.[1] In 1991, he injured his back in a fall at work.[2] He underwent surgery, but remained partially and permanently disabled.[3] Lombardo began receiving total-disability benefits on July 29, 1991.[4] The employer then petitioned to review the award, feeling that Lombardo could return to light duty work.[5] Later the parties entered into a consent decree, discontinuing the total-disability benefits and awarding Lombardo partial-disability benefits.[6] In February 1995, Lombardo filed a petition to review, alleging that he was entitled to total-disability benefits based on section 28-33-17(b)(2).[7] The parties agreed that Lombardo's alleged entitlement to total-disability benefits according to the odd-lot doctrine was the sole issue before the court.[8]

The matter went to trial in March 1996.[9] The trial judge asked for memoranda from both sides stating their positions on how the statute, particularly the subsection (section 28-33-17(b)(2)), should be construed.[10] The judge ruled Lombardo was entitled to receive total-disability benefits.[11] The trial judge determined that the "1992 amendment *did not create* or establish a *new* entitlement to benefits, but merely defined, in statutory form, the criteria for application of the odd-lot doctrine."[12] The appellate division reversed the trial judge's decision.[13] The three-judge panel

1. *See* Lombardo v. Atkinson-Kiewit, 746 A.2d 679, 682 (R.I. 2000).
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.* at 682-83.
8. *See id.* at 683.
9. *See id.*
10. *See id.*
11. *See id.*
12. *Id.*
13. *See id.*

ruled that the employee failed to prove "manifest injustice" as required by statute.[14]

BACKGROUND

The original Workers' Compensation Act (WCA) provided that if an employee sustained a compensable and work-related total and permanent disability, the employer must pay the injured employee one-half his or her wages.[15] The original WCA did not specifically address permanent but partially disabled employees who were unable to obtain regular work.[16] Instead, the court applied the common law odd-lot doctrine to these partial but permanent disability cases.[17] The common law doctrine basically provided that a permanently, but partially, disabled employee was entitled to recover total-disability benefits (as opposed to partial-disability benefits) if he or she was unable to perform either his or her regular job, or any alternative employment.[18] It was up to the employer to show that the worker could actually perform and obtain an alternative job.[19]

In 1992, the General Assembly amended the WCA.[20] The amendment codified the odd-lot doctrine, but made a few revisions. Basically, section 28-33-17(b)(2) states the odd-lot doctrine, but adds the requirement that the employee would suffer "manifest injustice" if he or she did not receive total disability compensation and shifts the burden of proof from the employer to the employee.[21]

ANALYSIS AND HOLDING

The court found that the General Assembly intended to both codify, and at the same time modify, the common law odd-lot doctrine.[22] The court found that for an employee to qualify for benefits under section 28-33-17(b)(2), the employee has to show he or she is unable to perform his or her job and any alternative employ-

14. *Id.* at 683-84.
15. *See id.* at 681.
16. *See id.*
17. *See id.*
18. *See id.*
19. *See id.* at 681-82.
20. *See id.* at 682.
21. *See* R.I. Gen. Laws § 28-33-17(b)(2) (1956) (1992 Reenactment).
22. *See Lombardo*, 746 A.2d at 684.

ment.[23] This showing subsumes "manifest injustice."[24] Thus, the court holds that when a permanent but partially disabled employee shows he or she is unable to perform regular or alternate work, the trial judge should find that "manifest injustice" would otherwise result if total disability benefits are not awarded to such employee.[25]

The court also found that because Lombardo affirmatively invoked the provisions of section 28-33-17(b)(2), he cannot argue that portions of the statute (namely the "manifest injustice" and burden of proof portions) do not apply to his case because his injury occurred before the 1992 effective date of the WCA amendments.[26] The court ultimately held that the panel acted within in powers in determining that Lombardo did not carry his burden of proof on the manifest injustice issue.[27]

The Dissenting Opinion

Justice Goldberg dissented.[28] She argued that, pursuant to longstanding Rhode Island precedent, the court should have applied the law as it stood at the time of the injury.[29] Justice Goldberg also opined that Lombardo should have been estopped from arguing the inapplicability of the statute simply because he at one time affirmatively invoked the statute.[30] She stated that "it is obvious that the employee amended his petition for review and abandoned his reliance on the statute or at the least, he signaled his alternative reliance on the common-law doctrine."[31]

CONCLUSION

In *Lombardo v. Atkinson-Kiewit*, the Rhode Island Supreme Court held that the amendment to the Workers' Compensation Act found in section 28-33-17(b)(2) both codified and modified the common law odd-lot doctrine. The court held that the employee has the burden of proving that because of his or her partial but perma-

23. *See id.* at 686.
24. *Id.*
25. *Id.* at 687.
26. *See id.* at 684.
27. *See id.* at 687.
28. *See id.* at 689.
29. *See id.* at 689-90.
30. *See id.* at 690.
31. *Id.* at 691.

nent disability, the employee is unable to perform his or her regular job and any alternative employment. If the employee can prove this, he or she has proved that "manifest injustice" will result if the employee is not awarded total-disability benefits.

Tanya J. Zorabedian

Workers' Compensation Law. *Ponte v. Malina Co.*, 745 A.2d 127 (R.I. 2000). The workers' compensation statute governing appeals from memorandum of agreements (MOA) is interpreted to allow an employee to petition to amend the MOA without any limitations period if the purpose of the petition is to include in the MOA another part of the body that was injured at the same time as the original injury. Based on such an amended MOA, any petition by the workers' compensation claimant to obtain additional compensation retroactive to the date of the MOA, or to some later date if the MOA is still in effect, must be brought within a three-year period. A claimant may only be awarded such benefits if the claim or issue is not precluded because of res judicata or collateral estoppel and if the incapacity is proven by a fair preponderance of the credible evidence. A petition for benefits based on a recurrence of incapacity because of an injury included in an amended MOA, and only applying to benefit payments from and including the date of the alleged recurrence, must be filed within a ten-year period.

FACTS AND TRAVEL

This case originated when an employee of the Malina Company (employer), Estrela F. Ponte (employee), injured herself in May 1986 while working as a machine operator.[1] The original MOA that employer filed with the Rhode Island Department of Labor and Training described employee's injury as a "sprain on left shoulder."[2] Employee later alleged that this description of her injury was incomplete because it failed to mention the injury to her neck that she also suffered when she injured her shoulder at work.[3] Nevertheless, employee initially failed to take any steps to amend the MOA while she received workers' compensation benefits based upon the original MOA.[4] These benefits were terminated on September 6, 1988, based upon the Workers' Compensation Court trial judge's finding, pursuant to employer's petition (WCC 1), that the employee's work-related left shoulder injury was no longer disabling.[5] The Appellate Division affirmed

1. *See* Ponte v. Malina Co., 745 A.2d 127, 130 (R.I. 2000).
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*

this decree and employee's petition for certiorari was denied by the supreme court.[6]

In 1989, employee filed two subsequent petitions. In the first petition (WCC 2), employee alleged a recurrence of her incapacity arising from her original injury.[7] In the second petition (WCC 3), employee alleged the same recurrence of incapacity, and additionally requested that the MOA be amended to include a neck injury as part of the original injury.[8] However, WCC 3 was voluntarily withdrawn by the employee's counsel at trial.[9] WCC 2 was heard on the merits in the Workers' Compensation Court and after a review of the medical evidence, which primarily addressed complaints about the alleged neck injury, the trial judge found no recurrence of incapacity. Employee's petition was therefore denied, and she did not appeal.[10]

In 1993, employee filed a second petition (WCC 4) to amend the MOA to include her neck injury.[11] The employer opposed the petition by arguing that the applicable three-year limitations period for filing compensation claims (section 28-35-57)[12] barred any such amendment to the MOA.[13] Further, the employer argued that the doctrine of res judicata barred any amendment since WCC 3 had already addressed this issue.[14] The trial judge rejected the argument of res judicata because WCC 3 had been voluntarily withdrawn without prejudice and had not been litigated on the merits.[15] As for the limitations period allowable for an MOA amendment, the trial court recognized ambiguity in the Workers' Compensation Act (WCA) and held that section 28-35-5 applied.[16] Consequently, while section 28-35-5 does not specify any time period for filing petitions to amend an MOA,[17] the trial court applied

6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.*
12. *See* R.I. Gen. Laws § 28-35-57 (1956) (2000 Reenactment).
13. *See Ponte*, 745 A.2d at 130.
14. *See id.* at 130-31.
15. *See id.* at 132.
16. *See id.* at 131; R.I. Gen. Laws § 28-35-5 (1956) (2000 Reenactment).
17. *See id.* at 131-32 (citing Viera v. Davol Inc., 392 A.2d 375 (R.I. 1978)).

a ten-year limitations period by analogy to section 28-35-45.[18] This decision was based on the premise that the WCA should be construed liberally in favor of employees.[19] The trial judge ordered that the 1986 MOA be amended to add employee's neck injury, but the order failed to indicate whether employer was therefore responsible for any compensation payments due to employee based on this amendment.[20]

In 1995 employee filed two more petitions (WCC 5 and WCC 6) that were later consolidated.[21] In WCC 5, employee alleged that she suffered yet another return of incapacity, either as of September 7, 1988, and continuing (the day after WCC 1 was decided) or as of June 13, 1994, and continuing (the day that WCC 4 allowed the neck injury to be added to the original MOA).[22] Despite a pending appeal by employer regarding the decision allowing amendment from WCC 4, the trial judge accepted that employee's neck injury was now properly before her as part of the amended MOA.[23] With regard to the allegations of a recurrence date in 1988, the trial court held that the issue was barred by the doctrine of res judicata because the court in WCC 2 did in fact evaluate employee's neck injury on its merits and found no evidence of any recurrence of any incapacitating injury during that period.[24] With regard to the allegations of a recurrence date in 1994, the trial judge determined that employee failed to prove by a preponderance of the evidence her claim of incapacity and that the opinions of employer's experts were more persuasive and probative than those of employee's experts.[25]

In WCC 6 employee contended that the decision in WCC 4 had ordered her employer, by implication, to pay compensation for the neck injury that was not in the original MOA.[26] The trial judge denied this petition, stating that in allowing an amendment to the MOA, the judge in WCC 4 did not order employer to pay any addi-

18. *See Ponte*, 745 A.2d at 132; R.I. Gen. Laws § 28-35-45 (1956) (2000 Reenactment) (specifying a ten-year-limitations period for review and modification of agreements and decrees).
19. *See Ponte*, 745 A.2d at 132.
20. *See id.*
21. *See id.*
22. *See id.*
23. *See id.*
24. *See id.* at 133.
25. *See id.*
26. *See id.*

tional weekly benefits and did not alter the WCC 2 finding which discontinued payment as of September 1988.[27]

A three-judge panel of the WCC's Appellate Division consolidated the appeals of WCC 4-6.[28] The panel reversed the trial judge's finding in WCC 4 that allowed the MOA amendment.[29] The panel concluded that an employee must file a petition to amend an original petition for benefits within the limitation period of section 28-35-57,[30] just as she would for an original petition.[31] Consequently, the panel denied and dismissed the petition of WCC 6 to enforce compensation payments under the amended MOA since the holding in WCC 2 terminated compensation payments and a petition requesting such relief would not have been timely.[32] Lastly, the panel denied and dismissed employee's petition to review the decision in WCC 5, which found no recurrence of injury in either 1988 or 1994.[33] The panel held that res judicata was properly applied to the 1988 recurrence claim and that the trial judge properly used her discretion in finding employer's medical experts more persuasive in the 1994 claim.[34]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court's review of an Appellate Division's decree is a limited one.[35] The supreme court determines whether that tribunal erred in deciding questions of law. Additionally, if legally competent evidence exists in support of factual findings by the Workers' Compensation Court Appellate Division, such findings are binding upon the supreme court.[36] Cognizant of this standard of review, the supreme court analyzed both the limitation periods applicable to amending and asserting MOA's, and em-

27. *See id.*
28. *See id.*
29. *See id.*
30. *See* R.I. Gen. Laws § 28-35-57 (1956) (2000 Reenactment). This statute bars a claim for compensation unless payment of weekly compensation has commenced or a petition has been filed within three (3) years after the occurrence of the injury or incapacity. The lower court in WCC 4 had rejected this statute as applicable to employee's amendment. *See id.*
31. *See Ponte*, 745 A.2d at 133.
32. *See id.*
33. *See id.* at 134.
34. *See id.*
35. *See id.*
36. *See id.*

ployer liability upon allegations of a return of incapacity.[37] These issues emerged over the course of WCC 1-6. Ultimately, the employee's petition was granted in part and denied in part.

The supreme court agreed with employee that her WCC 4 petition to amend the MOA to include her neck injury was improperly denied and dismissed by the Appellate Division panel.[38] Consistent with prior Rhode Island case law, section 28-35-45[39] does not apply to a case of a separate, additional injury arising from one incident, rather it is limited to injuries that "flow-from" the original injury.[40] Therefore, the ten-year limitation relied upon by the trial court in WCC 4 and based upon section 28-35-45 was deemed inapplicable.[41] The supreme court held (as did also the court in WCC 4) that it is section 28-35-5[42] that applies to an employee whose MOA fails to set out correctly all the injuries received and that the WCC shall hear such petitions.[43] The updated version of this statute no longer strictly limits petitions to those alleging incomplete diagnoses and does not explicitly set a limitation period.[44] Consistent with the WCC 4 decision, the supreme court recognized the need to liberally construe legislation in order to implement the legislative goal of providing some degree of economic help to an injured worker because of a loss of earnings.[45] It therefore construed section 28-35-5 literally and held that an employee may petition to amend an MOA without any limitations period if the purpose of such a petition is merely to include in the MOA another part of the body that was injured at the same time as the injuries already specified.[46]

The supreme court next addressed the issue of entitlement to compensation once an MOA is amended.[47] It held that entitlement to compensation for such an omitted original injury depends on the

37. *See id.* at 134-39.
38. *See Ponte*, 745 A.2d at 134.
39. *See* R.I. Gen. Laws § 28-35-45 (1956) (2000 Reenactment).
40. *See Ponte*, 745 A.2d at 135 (citing Coletta v. Leviton Mfg. Co., 437 A.2d 1380 (R.I. 1981) and Leviton Mfg. Co. v. Lillibridge, 387 A.2d 1034 (R.I. 1978)).
41. *See Ponte*, 745 A.2d at 135.
42. R.I. Gen. Laws § 28-35-5 (1956) (2000 Reenactment).
43. *See Ponte*, 745 A.2d at 134.
44. *See id.*
45. *See id.* at 136 (citing Church v. Doherty, 267 A.2d 693, 695 (1970)).
46. *See id.*
47. *See id.*

type and timing of the claim.[48] Once an MOA is amended for a reason set forth in section 28-35-5, an employee may be awarded compensation benefits retroactively (or to some later date, if the MOA is still in effect) based upon the later-included injury only if three conditions are met.[49] The claim must not be precluded because of res judicata or collateral estoppel, the employee must prove by a preponderance of the credible evidence that she is incapacitated based upon the injury at issue, and the retroactive compensation claim must be filed as set forth in section 28-35-57.[50] Such a claim is analogous to the filing of an additional original petition.[51] If an employee seeks benefits from an amended MOA, looking only forward from a date of recurrence, and not retroactively, section 28-35-45 applies.[52] In such a case, a ten-year limitations period applies and any claim made thereafter is barred.[53] The supreme court emphasized that the purpose of requiring claims to be brought within a limitations period is to protect the employer from stale claims too old to be properly investigated or defended.[54]

In light of the supreme court's determinations of MOA amendments and limitations periods, the court rejected employee's contention that employer violated a WCC order to pay compensation to her after the decision in WCC 4 ordered the MOA to be amended.[55] An allowance for amendment cannot be equated with an order for payment.[56] The supreme court agreed with the appellate panel that the decision in WCC 1 terminated any benefit payments as of September 1988.[57] Additionally, both the trial court and the panel were correct in finding per WCC 5 that the doctrine of res judicata applied to employee's petition alleging a recurrence of incapacity because of her neck injury as of September 1988.[58]

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48. *See id.*
49. *See id.*
50. *See id.;* R.I. Gen. Laws § 28-35-57 (1956) (2000 Reenactment). Unlike § 28-35-5, this statute provides for a limitations period of three (3) years for a retroactive claim of workers' compensation benefits.
51. *See Ponte*, 745 A.2d at 137.
52. *See id.* at 136.
53. *See id.*
54. *See Ponte*, 745 A.2d at 137.
55. *See id.*
56. *See id.*
57. *See id.*
58. *See id.* at 138.

The supreme court looked to whether there was an identified issue, the prior proceeding resulted in a final judgment, and the same parties, or those in privity with the parties, were involved.[59] Also, the court looked to whether the issue of fact was raised and decided in the prior case.[60] When WCC 2 was presented and employee was denied a finding of a recurrence of injury, the judge evaluated the medical evidence of employee's neck complaints on its merits and the issue was litigated and decided upon in full.[61]

Lastly, the employee in this case was rightfully denied a finding of a return of incapacity in the time periods covered in WCCs 1, 2 and 5.[62] When WCC trial judges are presented with conflicting medical opinions, they are entitled to give greater weight to one expert over the other.[63] As long as the opinion relied upon is competent, the trial judge's choice should be left alone.[64] The panel properly declined to find the trial judge's decision clearly erroneous, since the trial judge chose to believe the conclusion by a medical expert that employee's injuries were consistent with preexisting arthritis and not work-related injuries.[65]

CONCLUSION

In *Ponte v. Malina Co.*, the Rhode Island Supreme Court clarified the allowable limitations periods for an employee injured on the job to amend the injuries listed in an original MOA and to seek additional workers' compensation benefits based upon that amendment. When seeking to amend an original MOA to add an additional body part to the description of the work-related incident, there is no statutory limitation to when this amendment must be made. If seeking retroactive benefits from the date of the amended MOA, there is a statutory limitations period of three years to file such petition.

Additionally, retroactive benefits may be granted only if the issue is not precluded by res judicata or collateral estoppel, and if the claimant proves by a fair preponderance of the credible evi-

59. *See id.* (citing Lavoie v. Victor Elec., 732 A.2d 52, 54 (R.I. 1999)).
60. *See Ponte*, 745 A.2d at 138 (citing Di Vona v. Haverill Shoe Novelty Co., 127 A.2d 503, 505 (R.I. 1956)).
61. *See Ponte*, 745 A.2d at 138.
62. *See id.*
63. *See id.*
64. *See id.* at 139.
65. *See id.*

dence that he is incapacitated. If an employee merely seeks additional benefits from the date of a recurrence of an injury, whether based on an injury described in the original MOA or one later added by amendment, a ten-year limitations period applies. These determinations are made in keeping with a public policy balance between the need for injured employees to receive compensation for injuries received at work and the need for employers to be protected from stale claims too old to be properly defended or adequately investigated.

Christy Hetherington

Workers' Compensation Law. *Star Enterprises v. DelBarone*, 746 A.2d 692 (R.I. 2000). Because employer proceeded with its petition to review before the trial judge on a purely abstract basis, the trial judge did not err in declining to establish earnings capacity based solely on medical functional impairment.

FACTS AND TRAVEL

In *Star Enterprises v. DelBarone*,[1] Dennis DelBarone (DelBarone) injured his neck loading a truck owned by his employer, Star Enterprises (Star).[2] DelBarone was incapacitated due to this injury, which occurred on October 16, 1995.[3] In March 1996, DelBarone's physician advised him that he could return to work on a light-duty basis.[4] DelBarone's physician and Star's consultant surgeon agreed that DelBarone would not be able to return to his former job, but that he would be capable of light-duty work.[5] The parties stipulated that Star was entitled to reduce DelBarone's benefits to seventy percent of the weekly compensation rate.[6] However, Star also argued that it was entitled to a further reduction of benefits under the provisions of section 28-33-18(c) of the Rhode Island General Laws, which deals with earnings capacity.[7] The Rhode Island Worker's Compensation Court (WCC) judge disagreed and denied the request to set an earnings capacity.[8] The WCC appellate division affirmed.[9] Star seeks review of this decision.[10]

ANALYSIS AND HOLDING

Star argues that the WCC appellate division erred in its interpretation of section 28-33-18(c).[11] Star argues that this statute mandates that an earning capacity for a functional impairment

1. 746 A.2d 692 (R.I. 2000).
2. *See id.* at 694.
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.* at 693.
7. *See id.*
8. *See id.* 693-94.
9. *See id.* at 694.
10. *See id.*
11. *See id.* at 695.

must be calculated so as to reduce weekly benefits paid.[12] The supreme court disagreed and stated that an earnings capacity may be set in many different ways, not just based on functional impairment.[13] The court stated that the phrase "and/or" used in the statute accords a court the discretion to apply one term or the other, or both.[14] Therefore, the court held that a judge can look at functional impairment or an employee's actual disability or both in establishing an employee's compensation.[15]

Star also argued that the burden is on the employee to demonstrate a relationship between the functional impairment rating and the actual disability.[16] Star alleges that DelBarone failed to meet his burden because he did not present evidence regarding the degree of his disability as it relates to his employment.[17] The supreme court held that because Star proceeded with its petition to review before the trial judge on a purely abstract basis, the trial judge did not err in declining to establish earnings capacity based solely on medical functional impairment.[18] However, were this petition before the court on any other basis, the court held that the employer would have the burden of showing a correspondence between the functional impairment and the actual disability, measured by the ability to earn.[19]

CONCLUSION

In *Star Enterprises v DelBarone*, The Rhode Island Supreme Court affirmed the Rhode Island Worker's Compensation Court Appellate Division's denial of a request to set an earning capacity. Because Star proceeded with its petition to review before the trial judge on a purely abstract basis, the trial judge did not err in declining to establish earnings capacity based solely on medical functional impairment.

Sheila M. Lombardi

12. *See id.*
13. *See id.*
14. *See id.* at 696.
15. *See id.*
16. *See id.*
17. *See id.*
18. *See id.* at 697.
19. *See id.*