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1999 Survey of Rhode Island Law: Cases: Workers' Compensation Law

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Workers' Compensation Law. *American Power Conversion v. Benny's, Inc.*, 740 A.2d 1265 (R.I. 1999). The Rhode Island Supreme Court held that under Rhode Island General Laws section 28-34-8, a statute that requires the last employer to pay total compensation for employees' injuries sustained during employment, the last employer is "made liable" for the injury when it either admits to the liability or is found liable by an order or decree of a court.

FACTS AND TRAVEL

On November 2, 1995, employee David Sherman (Sherman) sustained an injury while he was in the employment of plaintiff American Power Conversion (American).[1] Because Sherman sustained his injury while employed by American, American filed a memorandum of agreement (MOA) accepting liability for the injury.[2] However, American claimed that the injury was initially sustained while Sherman was in the employment of defendant Benny's, Inc. (Benny's), a prior employer of Sherman.[3] American then filed a petition for apportionment pursuant to Rhode Island General Laws section 28-34-8[4] and named Benny's as liable for Sherman's injuries.[5] Benny's moved to dismiss the apportionment petition.[6]

The trial justice for the Workers' Compensation Court dismissed the apportionment motion based on the fact that American had not been "made liable" as dictated by section 28-34-8, but had unilaterally accepted liability by entering into the MOA.[7] The trial justice believed that section 28-34-8 requires a judicial determination assessing liability to be a prerequisite to seeking relief under section 28-34-8.[8] American appealed to the Appellate Division of the Workers' Compensation Court, contending that the trial justice erred in her assessment of section 28-34-8.[9] The Appellate Divi-

1. *See* American Power Conversion v. Benny's, Inc., 740 A.2d 1265, 1267 (R.I. 1999).
2. *See id.*
3. *See id.*
4. R.I. Gen. Laws § 28-34-8 (1956) (1995 Reenactment).
5. *See American Power Conversion*, 740 A.2d at 1267.
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*

sion of the Workers' Compensation Court upheld the trial justice's decision with the same reasoning.[10] American appealed from this judgment.[11]

ANALYSIS AND HOLDING

In order to determine whether American was precluded from seeking apportionment under section 28-34-8, the Rhode Island Supreme Court looked to the language of the statute.[12] The court determined that where the statute is unambiguous and expresses a clear and sensible meaning, "this court must interpret the statute literally and give the words of the statute their plain and ordinary meanings."[13] However, when as here, the statutory provisions are unclear or ambiguous, the court examines the statute in its entirety in order to "glean the intent and purpose of the legislature . . . 'keeping in mind [the] nature, object, language and arrangement' of the provisions to be construed."[14]

Section 28-34-8 provides:

> The total compensation due shall be recovered from the employer who last employed the employee in the employment to the nature of which the disease was due and in which it was contracted. If, however, the disease was contracted while the employee was in the employment of a prior employer, the employer who is made liable for the total compensation as provided by this section may petition the workers' compensation court for an apportionment of the compensation among the several employers who since the contraction of the disease shall have employed the employee in the employment to the nature of which the disease was due. The apportionment shall be proportioned to the time the employee was employed in the service of the employers and shall be determined only after a hearing, notice of the time and place of which shall have been given to every employer alleged to be liable for any portion of the compensation. If the court finds that any por-

10. *See id.* The Appellate Division used Black's Law Dictionary to define the term "made" in section 28-34-8's "made liable" as, "to have required or compelled" the employer to compensate the employ. *Id.* at 1267-68 n.3.

11. *See id.* at 1268.

12. *See id.*

13. *Id.* (quoting Accent Store Design, Inc. v. Marathon House, Inc., 647 A.2d 1223, 1226 (R.I. 1996)).

14. *Id.* (quoting *In re* Advisory to the Governor, 668 A.2d 1246, 1248 (R.I. 1996)).

> tion of the compensation is payable by an employer prior to the employer who is made liable for the total compensation as provided by this section, it shall make an award accordingly in favor of the last employer, and that award may be enforced in the same manner as an award for compensation.[15]

Because the court found section 28-34-8 ambiguous as to whether an employer *must* engage in an adversary proceeding so that it can be "made liable" by the Workers' Compensation Court, the court examined the statute in its entirety in order to ascertain the intent of the legislature and the statute itself.[16] The court then turned to *Esmond Mills, Inc. v. American Woolen Co.*,[17] for a previous discussion on the intended purpose of section 28-34-8.[18]

The supreme court found that the Appellate Division's interpretation of section 28-34-8 was contrary to the statute's intent.[19] The supreme court instead agreed with the dissent in the Appellate Division's decision, that the statute serves two purposes: (1) to provide monetary assistance to a qualified employee in a speedy manner to provide for successive hearings, and (2) to provide for successive hearings.[20] The supreme court believed that the Appellate Division failed to consider the underlying intent of section 28-34-8, which is to provide monetary assistance to a qualified employee in a speedy manner.[21] It believed that if an employer must engage in an adversary proceeding so that it can be "made liable" by the Workers' Compensation Court, the intent of providing monetary assistance in a speedy manner would be severely hindered.[22]

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15. R.I. Gen. Laws § 28-34-8 (1956) (1995 Reenactment).

16. *See American Power Conversion*, 740 A.2d at 1268 (citing *In re* Advisory to the Governor, 668 A.2d 1246, 1248 (R.I. 1996)).

17. 68 A.2d 920 (R.I. 1949).

18. 18.

> [T]he legislature evidently considered it advisable in the interest of the employee and in the speedy enforcement of his rights that he should be allowed to collect all compensation then due from the employer for whom he was working when he became incapacitated; and that such employer should then have the right to ask for proportionate apportionment from those employers for whom the employee had previously worked in the same employment and had contracted or had been exposed to the occupational disease which finally caused his disability.

See American Power Conversion, 740 A.2d at 1268.

19. *Id.* (quoting Esmond Mills, Inc. v. American Woolen Co., 68 A.2d 920, 923 (R.I. 1949)).

20. *See id.*

21. *See id.*

22. *See id.* at 1268-69.

In this case American did not dispute whether it was partially liable for the injuries suffered by Sherman.[23] However, American filed a MOA to pay the injured employee his total compensation.[24] The statute governing the filing of a MOA provides in pertinent part: "Upon the filing of the memorandum of agreement with the department, the memorandum shall be as binding upon the party filing the memorandum as a preliminary determination, order, or decree."[25]

In the court's judgment, section 28-34-8 does not contain mandatory language that a court must determine liability; thus it is appropriate to allow the use of a MOA to fulfill the legislature's intent to expedite compensation payments to an injured employee.[26] Therefore, the supreme court remanded the case to the Workers' Compensation Court for a determination of liability between American and Benny's.[27]

CONCLUSION

In *American Power Conversion v. Benny's, Inc.*, the Rhode Island Supreme Court correctly held that American Power Conversion should be able to apportion its liability to other previous employers of an injured employee pursuant to section 28-34-8 of the Rhode Island General Laws. Because the workers' compensation statutes are intended to provide injured employees with a speedy avenue to compensation for their injuries, an employer should not have to seek a judicial determination that it is "made liable" for the injury before it can give compensation to the employee and seek apportionment from the injured employee's prior employer.

B. Jason Erb

23. *See id.* at 1269.
24. *See id.*
25. *Id.* (quoting R.I. Gen. Laws § 28-35-1(e) (1956) (1995 Reenactment)).
26. *See id.*
27. *See id.*

Workers' Compensation Law. *Brooks v. Dockside Seafood*, 740 A.2d 1277 (R.I. 1999). When reviewing a petition for benefits due to latent or undiscovered injuries, the Workers' Compensation Court is to apply section 28-35-57 of the Rhode Island General Laws. Section 28-35-57 sets forth a two year statute of limitations that commences when the claimant becomes aware, or could reasonably be held to have been aware, of the full impact and significance of the pain that caused him or her to be unable to work.

In *Brooks v. Dockside Seafood*,[1] the Rhode Island Supreme Court determined that under section 28-35-57 of the Rhode Island General Laws, the statute of limitations begins to run on latent or undetected injuries once the claimant knows, or should have reasonably known, that the claimant's pain and injury were the result of her employment.[2] In *Brooks*, the Rhode Island Supreme Court stated that the Workers' Compensation Court should base their decision on the claimant's injury and subsequent incapacity rather than the mere presence of pain.[3]

FACTS AND TRAVEL

Irene Brooks (Brooks) was employed as a meat wrapper at Dockside Seafood (Dockside), a retail fish market, from 1986 until leaving work due to pain in her wrists in November of 1994.[4] In November of 1994, Brooks consulted a physician and was diagnosed with bilateral carpal tunnel syndrome.[5] In March of 1995, Brooks underwent carpal tunnel release on both her left and right wrists.[6] Brooks then petitioned the Workers' Compensation Court (WCC) for disability benefits.[7] The WCC found that Brooks had suffered a loss of earning capacity as a result of her employment at Dockside and awarded her partial benefits from November 28, 1994 through March 2, 1995, and total benefits from March 3,

1. 740 A.2d 1277 (R.I. 1999).
2. *See id.* at 1281.
3. *See id.* at 1282.
4. *See id.* at 1278.
5. *See id.*
6. *See id.*
7. *See id.*

1995.[8] However, on September 22, 1995, the WCC found that Brooks' inability to work had ended and discontinued her benefits.[9]

In March of 1996, Brooks consulted Dr. Andrew Green, who found her to have "ulnar nerve compression . . . causally related to her previous work activities as a meat wrapper."[10] In June of 1996, after consulting a third physician, Brooks was diagnosed with ulnar neuropathy in her left side and tendinitis in her left shoulder, once again found to be caused by her work at Dockside.[11] Surgery was recommended and Brooks filed a petition to have her prior decree reviewed.[12] On October 7, 1996, the WCC denied her petition for review.[13] Brooks appealed this decision and requested a trial.[14] Brooks then filed a second petition which claimed benefits for her left elbow and shoulder injuries caused by her job at Dockside.[15]

On July 18, 1997, a trial judge denied and dismissed both petitions.[16] The trial judge found that the petition to review failed to prove that Brooks was again incapacitated due to injuries sustained in November of 1994.[17] The trial judge also found that the original petition did not conform to the requirements of section 28-35-61 of the Rhode Island General Laws, requiring that a decree under review be amended within months of it becoming final.[18]

Brooks appealed to the Appellate Division of the WCC on July 21, 1997, arguing that the trial court was incorrect in finding her petitions barred by section 28-35-61.[19] Brooks asserted that the proper standard was section 28-35-57 of the Rhode Island General

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8. *See id.*
9. *See id.*
10. *Id.*
11. *See id.*
12. *See id.*
13. *See id.* at 1278-79.
14. *See id.* at 1279.
15. *See id.* The two petitions were consolidated for trial.
16. *See id.*
17. *See id.*
18. *See id.* The trial judge found that Brooks' injuries to her right shoulder and left elbow had been known to her at the commencement of her first petition in March 1995.
19. *See id. See also* R.I. Gen. Laws § 28-35-61(a)(2) (1956) (1995 Reenactment) (providing that the Workers' Compensation Court may vacate, amend, or modify any final decree entered within a period of six months prior to the filing of the petition if the petition does not accurately and completely set forth and describe the nature and location of all injuries sustained by the employee).

Laws, which provides a general limitation, stating that a claimant has a two-year period to bring a claim for compensation.[20] On May 26, 1998, the Appellate Division denied Brooks' appeal and affirmed the decision of the trial court regarding both petitions.[21] Following the Appellate Division's ruling, Brooks petitioned the Rhode Island Supreme Court for a writ of certiorari, which was granted.

ANALYSIS AND HOLDING

In *Brooks,* the Rhode Island Supreme Court addressed the sole issue of "whether the Appellate Division erred as a matter of law in holding that Brooks' original petition was barred by the six-month time limitation in section 28-35-61."[22] Brooks asserted that section 28-35-61 did not apply to her original petition filed in 1996.[23] After finding that section 28-35-61 was both clear and unambiguous, the supreme court found that it provided a mechanism for the WCC to amend any decree procured in a fraudulent manner.[24] Additionally, the court found that contrary to the Appellate Division's finding, "section 28-35-61 is not a statute of limitation, nor is it a statute of repose."[25] The crux of Brooks' appeal was her original petition, which enumerated injuries to her left elbow and left shoulder.[26] Brooks maintained that it was not until March 13, 1996, one year after the initial benefits decree had been entered, that she consulted her doctor once again due to increasing pain in her left elbow and shoulder.[27] It was only after this consultation and her subsequent diagnosis of "ulnar nerve compression . . . causally related to her previous work activities" that she filed the original petition.[28]

The Rhode Island Supreme Court dismissed the Appellate Division's reasoning that Brooks' situation was intended to be gov-

20. *See id.*

21. *See id.* The Appellate Division held that the trial court did not err in applying section 28-35-61 of the Rhode Island General Laws.

22. *Id.*

23. *See id.*

24. *See id.* at 1280. *See also* Luzzi v. Imondi, 198 A.2d 671 (R.I. 1964) (stating that the language of section 28-25-61 is such that it is not open to interpretation as it conveys a plain meaning).

25. *Id.*

26. *See id.*

27. *See id.*

28. *Id.*

erned by section 28-35-61.[29] The court determined that section 28-35-61 is not a statute of limitation.[30] Therefore, the court concluded that Brooks was not required to file a petition detailing changes to the nature or location of her injuries within six months of the final decree of the initial pretrial order.[31] The court further held that section 28-35-57 is applicable when determining the timeliness of an original claim for compensation.[32] Section 28-35-57 provides a two-year statue of limitations for filing petitions "after the occurrence or manifestation of the injury or incapacity."[33] Section 28-25-57 further states that the time for filing begins to run for "latent or undiscovered" injuries only after the claimant knew or could reasonably been aware of the existence of the injury and its relation to her employment.[34]

The court applied section 28-35-57 to Brooks' appeal, concluding that Brooks became incapacitated due to the ulnar neuropathy only after her first claim had been litigated.[35] Specifically, the court concluded "the manifestation of an injury and the consequent incapacity, not the mere presence of pain, should be the primary consideration for the WCC when reviewing a petition for benefits."[36] Thus, the statute of limitations did not begin to run on Brooks' claim until such time that she knew, or could reasonably have known, that the pain was casually related to injuries sustained while employed at Dockside.[37]

CONCLUSION

The Rhode Island Supreme Court held that in claims for benefits before the Workers' Compensation Court concerning latent or undiscovered injuries, the applicable statute is section 28-35-57 of the Rhode Island General Laws. The statute of limitations does not

29. *See id.*
30. *See id.* at 1281. The Appellate Division had cited language where the legislature had recognized that "certain types of injuries may not immediately manifest themselves" and that § 28-35-61 allows the parties to "relitigate the nature and location of the employee's injuries for a period of six (6) months after the time an actual decree was entered."
31. *See id.*
32. *See id.*
33. *Id.* (quoting R.I. Gen. Laws § 28-35-57 (a)).
34. *Id.* (quoting R.I. Gen. Laws § 28-35-57 (b)).
35. *See id.* at 1282.
36. *Id.*
37. *See id.*

begin to toll until the claimant is aware, or could reasonably have been aware, that his or her pain bears a causal relationship to their employment. Thus, the crucial inquiry for the Workers' Compensation Court is the point at which claimant's injury manifests itself as an inability to work rather than a mere pain.

Shannon M. Garvey

Workers' Compensation Law. *Donnelly v. Town of Lincoln,* 730 A.2d 5 (R.I. 1999). When benefits are awarded in a workers' compensation case, the claimant need not request interest in order to receive it because the raise-or-waive rule is inapplicable to all cases governed by sections 9-21-10 or 28-35-12 of the Rhode Island General Laws. Additionally, where a municipality voluntarily joins the workers' compensation system, it waives its sovereign immunity and is therefore not insulated from an award of interest in workers' compensation cases.

FACTS AND TRAVEL

On September 13, 1991, Christopher Donnelly (Christopher) was undergoing training in preparation to be a police officer for the Town of Lincoln when he died of a cardiac arrhythmia.[1] His wife, Susan Donnelly (Susan), filed a petition with the Workers' Compensation Commission for benefits on January 27, 1992.[2] This petition was denied approximately one month later, and Susan filed a claim for a trial.[3]

A trial was held in the Workers' Compensation Court on August 31, 1992, and October 2, 1992.[4] The Workers' Compensation Court determined that Christopher was not an employee of the town at the time of his death, and a decree denying benefits was entered on October 13, 1992.[5] Susan appealed this decision and on August 2, 1993, the parties presented oral arguments to the Appellate Division.[6] The Appellate Division did not issue a final decree until five years later, when it granted death benefits to Christopher's estate on August 7, 1998.[7]

Due to the inordinate delay, on August 22, 1997, Susan's attorney filed a motion seeking twelve percent interest on the award of benefits pursuant to section 28-35-12 of the Rhode Island General Laws.[8] Thereafter, the Appellate Division awarded death benefits to Christopher's estate retroactive from September 13, 1991, but

1. *See* Donnelly v. Town of Lincoln, 730 A.2d 5, 6 (R.I. 1999).
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.* at 7; R.I. Gen. Laws § 28-35-12(c) (1956) (1995 Reenactment).

did not address the award of any interest on those benefits.[9] Susan objected and on June 17, 1998, the Appellate Court refused to reopen the decree.[10] On August 7, 1998, the final decree was entered and Susan filed a petition with the Rhode Island Supreme Court for certiorari.[11] On October 22, 1998, the petition for certiorari was granted.[12]

ANALYSIS AND HOLDING

The central issue addressed by the *Donnelly* court was whether or not Susan was required to request interest at the time of trial in order for interest to be awarded on the workers' compensation benefits.[13] Susan contended that the Workers' Compensation Act mandates that interest be included in a retroactive award of benefits.[14] The Town of Lincoln (the Town) argued that the raise-or-waive rule precluded Susan from now requesting interest.[15]

The Town's argument rested on a decision made by the Appellate Division on November 9, 1992, after the Appellate Division was directed by the Rhode Island Supreme Court to clarify when the waive-or-raise rule would be applied for all future workers' compensation cases.[16] The Appellate Division's rule required that "*in the future*, interest will be deemed waived unless requested at trial. . . ."[17]

As an initial matter, the Rhode Island Supreme Court concluded that the Town's argument was inapplicable to the present case since Susan's trial was completed one month before the raise-or-waive rule was stated by the Appellate Division.[18] However, the court elaborated that pursuant to sections 9-21-10 and 28-35-12(c) of the Rhode Island General Laws, the waive-or-raise rule

9. *See Donnelly*, 730 A.2d at 7.
10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.* at 8.
14. *See id.* at 7.
15. *See id.*
16. *See* Conrad v. State, 592 A.2d 858, 860 (R.I. 1991).
17. *Donnelly*, 730 A.2d at 8.
18. *See id.*

would be inapplicable regardless of whether the rule was stated before or after Susan's trial.[19]

Under section 9-21-10, interest shall be added at the rate of twelve percent per annum on any civil action resulting in a verdict or decision for pecuniary damages.[20] Section 28-35-12(c) provides that the Workers' Compensation Court "shall award to the employee interest at the rate per annum provided in § 9-21-10. . . ."[21] Thus, the court held that the claimant would not need to raise the issue of interest at trial in order to preserve interest because the applicable statutes specifically provide for a mandatory application of interest.[22] As a result, it was held to be unnecessary to request the interest in order to receive it in all cases governed by section 28-35-12(c) or section 9-21-10.[23]

The Town next argued that, as a municipality, it was immune from the payment of interest.[24] The supreme court ruled that the Town waived its immunity by voluntarily joining the workers' compensation system and is responsible for the pre-judgment interest.[25] The court also held that the Town may fairly be held to pay the interest because although the Town was not responsible for the Appellate Division's delay, the Town used the funds and earned interest on them during that five-year period.[26]

CONCLUSION

The Rhode Island Supreme Court concluded that sections 28-35-12(c) and 9-21-10 of the Rhode Island General Laws provide for interest to automatically be calculated and added to a judgment when appropriate. Therefore, the raise-or-waive rule is inapplicable to all cases governed by sections 28-35-12(c) or 9-21-10. Additionally, a town which voluntarily joins the workers' compensation system, and in return receives the advantages of the system, has

19. *See id.* at 8-9.
20. R.I. Gen. Laws § 9-21-10 (1956) (1997 Reenactment).
21. R.I. Gen. Laws § 28-35-12(c) (1956) (1995 Reenactment).
22. *See Donnelly*, 730 A.2d at 9.
23. *See id.*
24. *See id.* at 10.
25. *See id.*
26. *See id.*

waived its sovereign immunity and is therefore vulnerable to an award of interest.

Melissa Coulombe Beauchesne

Workers' Compensation Law. *Lambert v. Stanley Bostitch, Inc.*, 723 A.2d 777 (R.I. 1999). In the event that the claimant of workers' compensation benefits has not worked for the thirteen weeks prior to the week of his incapacity because of an occupational injury, the average weekly wage of the claimant will be calculated on the basis of the amount that he earned during the thirteen weeks immediately preceding the last day of his employment.

In *Lambert v. Stanley Bostitch, Inc.*,[1] the court addressed how workers' compensation benefits are to be calculated when the claimant has not worked for the thirteen weeks prior to the period that he has made a workers' compensation claim. The governing statute, section 28-33-20 of the Rhode Island General Laws, does not expressly address this issue. Therefore, the court held that when a claimant's failure to work for the thirteen weeks prior to his injury is involuntary, benefits should be calculated on the basis of the amount that he earned during the thirteen weeks immediately preceding the last day of his employment.

FACTS AND TRAVEL

Howard Lambert (Lambert) worked for Stanley Bostitch, Inc. (Bostitch) from 1977 to June of 1995.[2] During this time, Lambert held a number of different positions at Bostitch.[3] During the period of 1986 or 1987 to 1995, Lambert held the position of a wire winder.[4] In 1994, Lambert consulted a physician because he began experiencing pain and numbness in both hands.[5] In February of 1995, Lambert injured his right wrist while lifting weights during his leisure time.[6] Lambert continued to work, but finally sought medical treatment on or about June 30, 1995, when the pain in his wrist increased.[7] He consulted Dr. A. Louis Mariorenzi (Mariorenzi), who determined that Lambert's wrist was fractured.[8]

1. 723 A.2d 777 (R.I. 1999).
2. *See id.* at 779.
3. *See id.*
4. *See id. See also id.* at 779 n.1 (outlining the different duties of a wire winder to include: hoisting 280 pound spools of wire onto a machine, pushing the spools of wire by hand on a tram, filling a vat with glue and using shears to cut a thousand pound pulley).
5. *See id.* at 779.
6. *See id.*
7. *See id.*
8. *See id.*

Mariorenzi placed Lambert's wrist in a cast and instructed him not to return to work.[9]

Mariorenzi gave Lambert permission to return back to work after removing his cast in September of 1995.[10] However, Bostich refused to let Lambert return at this time.[11] Lambert continued to experience pain in his right wrist and began to experience pain in his left wrist, so Mariorenzi referred him to Dr. Gary A. L'Europa (L'Europa).[12] L'Europa concluded that there were nerve abnormalities consistent with carpel tunnel syndrome, but did not determine the cause.[13] Lambert was then examined by Dr. Arnold-Peter C. Weiss (Weiss).[14] On October 19, 1995, Weiss reported that Lambert was suffering from work-related bilateral carpal tunnel syndrome, which was aggravated by Lambert's non-work-related activities.[15] After giving Lambert a cortisone injection in his right wrist, Weiss permitted Lambert to return to work on the conditions that he wear a splint at all times and not lift more than five pounds.[16] Bostitch again refused Lambert's offer to return to work.[17]

On December 4, 1995, Weiss performed surgery on Lambert's left wrist and on his right wrist on March 4, 1996.[18] Lambert was discharged from Weiss' care on June 25, 1996, and was given permission to return back to work without any restrictions.[19] At this time, Bostitch employed Abacus Management Group to have Lambert examined by Dr. Gregory J. Austin (Austin).[20] Austin concluded that the carpal tunnel syndrome was primarily work-related.[21]

Lambert sought workers' compensation benefits, claiming a disability at or about the time of his surgery on December 4,

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9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.*
14. *See id.*
15. *See id.*
16. *See id.*
17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.*
21. *See id.*

1995.[22] The case was heard on four separate occasions before a trial judge of the Workers' Compensation Court.[23] Although Lambert was not allowed to testify why he did not return to work as a wire winder, Bostitch did stipulate that Lambert attempted to return to work and that Bostitch would not allow him to do so.[24] The trial judge held that Lambert was partially disabled from December 4, 1995, through June 25, 1996, but denied and dismissed his claims for benefits.[25] The denial and dismissal of benefits claims was based on the fact that Lambert had failed to convince the court, by a fair preponderance of the evidence, that he suffered a loss of earnings during that time as a result of a work-related accident.[26] Furthermore, the court found that Lambert failed to show that he had earned any wages for the thirteen weeks prior to his disability claim, upon which the disability benefits would be calculated pursuant to the statute.[27]

Lambert appealed to the Appellate Division of the Workers' Compensation Court, arguing that the trial justice's holding was erroneous because he calculated Lambert's disability benefits inaccurately.[28] Lambert argued that the governing statute mandates that his earning capacity be calculated using the thirteen weeks prior to his leaving the employment of Bostitch in June of 1995, and not the thirteen weeks prior to his surgery on December 4, 1995, at which time he was unemployed.[29] The Appellate Division reversed the trial court's decision on the basis that the formula set

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22. *See id.*

23. Those dates include March 26, 1996, April 11, 1996, May 24, 1996 and August 27, 1996. *See id.*

24. *See id.*

25. *See id.*

26. *See id.*

27. *See id.* at 779-80.

28. *See id.* at 780.

29. *See id.* The governing statute is R.I. Gen. Laws section 28-33-20, which states in pertinent part:

> For purposes of this chapter, the average weekly wage shall be ascertained as follows:
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> For full-time or regular employees, by dividing the gross wages . . . earned by the injured worker in employment by the employer in whose service he or she in injured during the thirteen (13) calendar weeks 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.

R.I. Gen. Laws § 28-33-20 (1956) (1995 Reenactment).

forth in the statute was not the only governing method of determining earning capacity.[30] The Appellate Division agreed with Lambert that the thirteen weeks prior to his leaving Bostitch in June of 1995 could be the proper measure of his earning capacity for workers' compensation purposes.[31] However, the Appellate Division only required Bostitch to pay Lambert fifty percent of his weekly benefits, finding that Lambert's employment with Bostitch was only a fifty percent contributing factor to his carpal tunnel syndrome.[32]

Both parties appealed to the Rhode Island Supreme Court. Lambert alleged that the Appellate Division erred in finding that his employment at Bostitch was only fifty percent contributable to his condition and that the court did not have authority, or acted in excess of its authority, to award him only fifty percent of his benefits.[33] Bostitch argued that Lambert was not entitled to any benefits because he did not prove an earning capacity within the statutorily required period.[34]

ANALYSIS AND HOLDING

Determination of Earning Capacity

The Rhode Island Supreme Court determined that, under Rhode Island General Laws section 28-33-20(a)(1), "weekly benefits are calculated by adding together the employee's wages for the thirteen weeks prior to injury, and then dividing by the number of weeks worked during the thirteen week period."[35] However, the statute does not address situations in which the claimant has not earned any wages in the thirteen weeks preceding his incapacitation.[36]

The court noted that in three earlier cases, it previously addressed the issue of awarding workers' compensation benefits where the claimant had not earned any wages for the thirteen

30. *See Lambert*, 723 A.2d at 780.
31. *See id.*
32. *See id.*
33. *See id.*
34. *See id.*
35. *Id.*
36. *See id.* at 781.

weeks prior to the date of disability.[37] However, the court distinguished Lambert's situation, whose failure to earn wages was due to his involuntary unemployment.[38] The court determined that Lambert was entitled to earnings because the purpose of workers' compensation statutes and weekly workers' compensation benefits is to provide the claimant with an allowance for his loss of earning capacity as a result of his work-related injury.[39] To achieve this purpose, the statute "'is to be liberally construed to effect its benevolent purposes.'"[40] Therefore, the court held that it would not be in line with the purpose behind the workers' compensation statute to deny Lambert benefits merely because the statute does not provide for his situation.[41]

The court noted that the Workers' Compensation Court has the authority to interpret and apply a statute when necessary to effectuate benefits. However, the court also found that the workers' compensation statutes[42] confers to the Appellate Division the discretion to interpret the Workers' Compensation Act.[43] Accordingly, the Appellate Division here properly construed the statute to award Lambert benefits based upon his earnings during the thirteen weeks preceding his last day of employment.[44]

Apportionment of Benefits

The court stated that while the trial judge did not determine the extent of Bostich's liability for Lambert's injury, the Appellate

37. *See id.* at 781-82. *See also* St. Pierre v. Fulflex, Inc., 493 A.2d 817 (R.I. 1985) (denying claimant's benefits because fact that claimant was laid off before the date of his disability precluded him from showing earning capacity); Aguiar v. Control Power Indus., Inc., 496 A.2d 147 (R.I. 1985) (sustaining denial of benefits to a claimant who waited four years after his injury to file his claim, at which time he was employed by a different employer); Mullaney v. Gilbane Bldg. Co., 520 A.2d 141 (R.I. 1987) (holding that an employee who voluntarily retires from the work force has voluntarily surrended the capacity to earn wages).

38. *See Lambert*, 723 A.2d at 781. Specifically, the court called Lambert's involuntary reason an "occupational disease." *See id.*

39. *See id.* at 780-81.

40. *Id.* at 782 (quoting Bailey v. American Stores, Inc., 610 A.2d 117, 120 (R.I. 1992).

41. *See id.*

42. Specifically, the court mentions R.I. Gen. Laws section 28-35-28 (1956) (1995 Reenactment) as conferring power to the Appellate Division to review the Workers' Compensation Court's findings. *See id.*

43. *See Lambert*, 723 A.2d at 782.

44. *See id.*

Division found that the medical evidence showed the injury to be at least *partially* due to Lambert's employment with Bostich.[45] Section 28-35-28(b) of the Rhode Island General Laws allows the Appellate Division to review factual findings of the trial judge and reverse them for clear error.[46] On the basis of this evidence, the court upheld the apportionment of benefits made by the Appellate Division, stating that it would not revisit an award based on sufficient evidence in the record.[47] However, the court made clear that it was not endorsing an automatic fifty-fifty percentage apportionment of the responsibility for the payment of the workers' compensation benefits to the claimant.[48] Rather, where neither party presented specific opinion evidence regarding the percentage of liability, "the Appellate Division may make a reasonable approtionment based on reasonable inferences drawn from the totality of the evidence presented."[49]

CONCLUSION

When a person claiming workers' compensation benefits has not worked for the thirteen weeks prior to his incapacitation due to an involuntary occupational disease, his benefits will be calculated based upon the thirteen weeks immediately preceding his last day of employment. Furthermore, the Appellate Division may make a reasonable apportionment of benefits based upon the totality of evidence presented.

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45. *See id.* at 783.

46. *See* R.I. Gen. Laws § 28-35-28(b) (1956) (1995 Reenactment). *See also* Davol, Inc. v. Aguiar, 463 A.2d 170, 173-74 (R.I. 1983) (holding that the statute provides the Appellate Division with *de novo* review of all factual findings with the exception of credibility determinations made by the trial judge).

47. *See Lambert*, 723 A.2d at 783.

48. *See id.*

49. *Id.*

Workers' Compensation Law. *Perlman v. Philip Wolfe, Haberdasher*, 729 A.2d 673 (R.I. 1999). When an employee files a petition for benefits arising from a recurrence of a work-related injury, and when that employee has not worked for the requisite period as set forth in section 28-33-20.1 of the Rhode Island General Laws, the employee bears the burden of establishing that his or her absence from the work force was not a voluntary decision.

FACTS AND TRAVEL

On May 25, 1982, Stuart Perlman (Perlman) injured his back while working for his employer, Philip Wolfe, Haberdasher (Haberdasher).[1] For several years following his injury, Perlman received compensation benefits based on his inability to work.[2] Some time later, on the advice of its insurance company, Haberdasher conducted surveillance of Perlman that resulted in a petition to review Perlman's award.[3] On January 3, 1990, the Chairman of the Workers' Compensation Commission declared Perlman "to be no longer totally or partially incapacitated."[4] As a result of this ruling, Perlman's compensation benefits were suspended.[5] Perlman never appealed the decision of the Workers' Compensation Commission and he never reentered the workforce.[6]

Five years later, in September of 1995, Perlman filed a petition to review the suspension of his compensation benefits.[7] His petition was based on a recurrence of the original work-related injury that he allegedly sustained on August 22, 1995.[8] Perlman's petition was denied at a pre-trial hearing, but he later won at trial.[9]

At trial, Perlman introduced the deposition testimony of an orthopedic surgeon, Dr. Spindell.[10] Dr. Spindell was Perlman's treating physician and testified that Perlman's disability had been continuing since 1982 and had gotten worse since his original acci-

1. *See* Perlman v. Philip Wolfe, Haberdasher, 729 A.2d 673 (R.I. 1999).
2. *See id.*
3. *See id* at 673-74.
4. *Id.* at 674.
5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.*

dent in May of 1982.[11] To counter Dr. Spindell's testimony, Haberdasher introduced the deposition testimony of Dr. Willetts.[12] Dr. Willetts was Haberdasher's examining physician and testified that Perlman's injury had gotten better since he first examined Perlman in 1989.[13] Dr. Willetts also testified that Perlman's injury was related to a 1966 injury and was not caused by his 1982 injury.[14]

The trial justice found that Perlman had satisfied his burden of proving "a return of incapacity" and reinstated his weekly compensation benefits.[15] However, because Perlman had not worked the thirteen weeks prior to August 22, 1995, the date of recurrence of the injury, the trial judge ordered that the weekly payments be based on the original decree awarded in May of 1982.[16]

Haberdasher appealed the decision of the trial justice, but the Appellate Division affirmed.[17] The Appellate Division based its decision on *Lisi v. Warren Oil Co.*,[18] which held that "[w]hen a disability is classified as a recurrence, the insurer on risk at the time of the original injury is liable for the employee's disability."[19] The Appellate Division also relied on section 28-33-20.1 of Rhode Island General Laws.[20] Pursuant to section 28-33-20.1, a "recalculation of the average weekly wage for recurrence injuries is limited to those cases 'where the employee has been employed for wages for twenty-six (26) weeks prior to the date of the recurrence. Otherwise, the earnings capacity established in the earlier order or decree still controls.'"[21]

ANALYSIS AND HOLDING

On appeal to the Rhode Island Supreme Court, Haberdasher argued that the Appellate Division "erred as a matter of law in its interpretation and application" of section 28-33-20.1 of the Rhode

11. *See id.*
12. *See id.*
13. *See id.*
14. *See id.*
15. *Id.*
16. *See id.*
17. *See id.*
18. 601 A.2d 956 (R.I. 1992).
19. *Perlman*, 729 A.2d at 674 (quoting *Lisi*, 601 A.2d at 959).
20. R.I. Gen. Laws § 28-33-20.1 (1956) (1995 Reenactment).
21. *Perlman*,729 A.2d. at 674-75 (quoting R.I. Gen. Laws § 28-33-20.1).

Island General Laws.[22] Haberdasher asserted that section 28-33-20.1 is the sole method used in Rhode Island for "recalculating an earning capacity upon a return of incapacity . . . and in order to qualify for recurrence benefits, an employee must have returned to work for at least twenty-six weeks."[23] However, the Rhode Island Supreme Court disagreed and found that recovery should be denied in cases where the employee experiences a recurrence of the injury only when the employee voluntarily leaves the work force.[24]

The supreme court also relied on its recent decision in *Lambert v. Stanley Bostitch, Inc.*[25] Pursuant to *Lambert*, an employee's inability to work during the thirteen weeks prior to his or her date of incapacity does not bar an award of compensation benefits when the employee's absence is not voluntary.[26] The *Lambert* court found it absurd to deny an injured worker compensation benefits, if through no fault of their own, they were unable to work and establish an earning capacity for the thirteen weeks prior to the date of their incapacity.[27] Following its reasoning in *Lambert*, the supreme court held that:

> when an employee files a petition for benefits arising from a recurrence [of a work related injury], and when that employee has not worked for the requisite period as set forth in § 28-33-20.1, the employee bears the burden of establishing that his or her absence from the work force was not voluntary.[28]

Here, involuntary is defined as not due to retirement or unwillingness to work, but because of some "non-volitional cause" beyond the employee's control.[29] Therefore, after affirming the Appellate Division's finding that Perlman voluntarily chose not to work from 1990 through 1995, the Rhode Island Supreme Court held that Perlman could not receive benefits.[30] Because his decision to leave the work force was completely voluntary, Perlman's inability to demonstrate an earning capacity for the requisite

22. *Id.* at 675.
23. *Id.*
24. *See id.*
25. 723 A.2d 777 (R.I. 1999).
26. *See Perlman*, 729 A.2d at 675 (citing *Lambert*, 723 A.2d at 781).
27. *See id.*
28. *Id.* at 676.
29. *Id.*
30. *See id.*

twenty-six weeks prior to his date of incapacity resulted in the denial of his compensation benefits.

CONCLUSION

In *Perlman v. Philip Wolfe, Haberdasher*, the Rhode Island Supreme Court reaffirmed its reasoning in *Lambert*, and held that when an employee files a petition for benefits arising from a recurrence of a work related injury, and when that employee has not worked for the requisite period as set forth in section 28-33-20.1 of the Rhode Island General Laws, the employee bears the burden of establishing that his or her absence from the work force was not voluntary. If the employee cannot satisfy this burden, workers' compensation benefits must be denied.

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Workers' Compensation Law. *Smith v. Colonial Knife Co., Inc.*, 731 A.2d 724 (R.I. 1999). Holiday pay should be included in the calculation of the average weekly wage for workers' compensation purposes pursuant to section 28-33-20 of the Rhode Island General Laws.

FACTS AND TRAVEL

On January 23, 1995, Robert T. Smith (Smith), an employee of Colonial Knife Co., Inc. (Colonial), was injured during the course of his employment.[1] Until Smith's appeal to the Rhode Island Supreme Court, he had been collecting $491.77 of weekly workers' compensation benefits, which reflected his average weekly wage at Colonial.[2] At trial before the Workers' Compensation Court and later at the Appellate Division, however, Smith argued that holiday pay should be included in the calculation of his average weekly wage.[3] The parties discussed how holiday pay should be calculated and agreed that in order to be eligible for holiday pay, an employee must have worked at Colonial for a minimum of three months prior to the holiday.[4] Additionally, the employee was required to work the day before and the day after the holiday in order to receive holiday pay.[5] It was then stipulated that if an employee meets these requirements, holiday pay is calculated by multiplying the employee's hourly rate of pay by eight hours.[6]

The trial judge held that Smith's holiday pay should not be included in his average weekly wage.[7] The trial judge based his decision upon the language of section 28-33-20 of the Rhode Island General Laws,[8] which specifically includes paid vacation time but does not mention holiday pay.[9] The trial judge inferred a legislative intent to not include holiday pay in the calculation of the average weekly wage.[10] The Appellate Division affirmed the trial court, also finding it to be the legislature's intent to exclude holi-

1. *See* Smith v. Colonial Knife Co., Inc., 731 A.2d 724, 725 (R.I. 1999).
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.*
8. R.I. Gen. Laws § 28-33-20 (1956) (1995 Reenactment).
9. *See Smith*, 731 A.2d at 725.
10. *See id.*

day pay from the average weekly wage because it did not specifically list it in section 28-33-20.[11]

On appeal to the Rhode Island Supreme Court, Smith argued that the trial court and the Appellate Division erred in their interpretation of section 28-33-20 and therefore his holiday pay should be included in his average weekly wage.[12] Smith also argued that the failure to mention holiday pay in section 28-33-20 indicates a legislative intent to treat holiday pay as either gross wages or vacation pay.[13]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court held that "[i]n remaining consistent with the goals of workers' compensation, we are of the opinion that holiday pay should be included in the calculation of gross wages."[14] The court found that to conclude otherwise would cause an injured employee to lose compensation based on the timing of his injury.[15] This holding was based on the purpose of the Workers' Compensation Act, which is to provide an effective means of support and protection for injured workers.[16] The court then concluded that to deny holiday pay because of the timing of an employee's injury is contrary to public policy and the goals behind the enactment of the Workers' Compensation Act.[17]

CONCLUSION

In *Smith v. Colonial Knife Co., Inc.*, the Rhode Island Supreme Court determined that the legislative intent of section 28-33-20 of the Rhode Island General Laws is to provide the employee with an equitable formula for the calculation of benefits while also providing protection for the employer against the possibility of excessive claims brought by a newly hired employee. Excluding holiday pay from the calculation of gross wages provides an inequitable solution for an employee who is injured at work during or immediately

11. *See id*
12. *See id.*
13. *See id.*
14. *Id.*
15. *See id.*
16. *See id.* (citing Saddon v. Skin Medic & Surgery Ctrs. of R.I., Inc., 713 A.2d 777, 779-80 (R.I. 1998)).
17. *See id.* at 726 (citing Sorenson v. Colibri Corp., 650 A.2d 125, 129 (R.I. 1994)).

after a holiday season. Therefore, the court held that pursuant to section 28-33-20, holiday pay will be included in the calculation of the employee's gross wages.

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