ROSE GRUZLOVIC v. GIOVANNI'S TRATTORIA

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-1519-08T1

ROSE GRUZLOVIC,

Respondent,

v.

GIOVANNI'S TRATTORIA and

GIOVANNI BARRONE,

Appellants.

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Argued October 6, 2009 - Decided April 15, 2010

Before Judges Grall and LeWinn.

On appeal from the Department of

Labor and Workforce Development,

Division of Workers' Compensation,

Case No. 2005-25507.

Lauren M. Santonastaso argued the

cause for appellants (Gaylord Rubinstein

Popp, L.L.C., attorneys; Ms.

Santonastaso, on the brief).

James L. Creegan argued the cause for

respondent (Stark & Stark, attorneys;

Mr. Creegan, on the brief).

PER CURIAM

An employer, Giovanni's Trattoria, appeals from an award of

workers' compensation to its part-time employee, Rose Gruzlovic.

Prior to her work-related accident Gruzlovic, who was about

seventy-seven years of age at that time, had worked one day a

week for thirteen years. The employer contends that the

Workers' Compensation Court erred in calculating compensation as

if Gruzlovic worked forty hours per week. We agree and reverse.

The employer also contends that the evidence does not

support a finding of twenty-five percent partial total

disability. We affirm that determination because it is

supported by "sufficient credible evidence on the record as a

whole." R. 2:11-3(e)(1)(D).

Giovanni's Trattoria is a cafeteria situated on a property

used for auto auctions on Wednesdays. Wednesday is the only day

the cafeteria is open. Gruzlovic's job entailed serving the

food and keeping the cafeteria clean. On April 27, 2005,

Gruzlovic tripped and fell while cleaning up. She had been

working in the same cafeteria for eight to nine hours every

Wednesday since 1993. She was paid an hourly wage, which was

$10.50 at the time of the accident.

During the thirteen years Gruzolvic worked in the

cafeteria, she did not have or seek either full-time or

After the accident, Gruzlovic

additional part-time employment.

did not go back to work or seek other work. She explained, "I

thought I had my share."

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Workers' compensation is awarded pursuant to a "'long-

standing and comprehensive statutory scheme.'" Cruz v. Cent.

Jersey Landscaping, Inc.,

195 N.J. 33, 42 (2008) (quoting

Fitzgerald v. Tom Coddington Stables,

186 N.J. 21, 30 (2006)).

The act, N.J.S.A. 34:15-1 to -142, "is remedial social

legislation and should be given liberal construction in order

that its beneficent purposes may be accomplished." Id. at 42

(quoting Torres v. Trenton Times Newspaper,

64 N.J. 458, 461

(1974)).

The calculation of compensation for an employee with a

permanent disability is governed by N.J.S.A. 34:15-37, which in

pertinent part provides:

"Wages," when used in this chapter shall be

construed to mean the money rate at which

the service rendered is recompensed under

the contract of hiring in force at the time

of the accident. . . . When the rate of

wages is fixed by the hour, the daily wage

shall be found by multiplying the hourly

rate by the customary number of working

hours constituting an ordinary day in the

character of the work involved. In any case

the weekly wage shall be found by

multiplying the daily wage by the customary

number of working days constituting an

ordinary week in the character of the work

involved . . . .

A different method of calculation is required in cases involving

temporary disability for a part-time employee. In that

circumstance,

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if the employee worked less than the

customary number of working days

constituting an ordinary week in the

character of the work involved, the weekly

wage for the purposes of compensation under

provisions of [N.J.S.A. 34:15-12a (which

address temporary disability)] only shall be

found by multiplying the hourly rate by the

number of hours of work regularly performed

by that employee in the character of the

work involved.

[N.J.S.A. 34:15-37.]

In Katsoris v. S. Jersey Publ'g Co.,

131 N.J. 535, 541

(1993), the Supreme Court interpreted the statute. Accordingly,

our role is to apply the statute in conformity with Katsoris.

Both passages of the statute quoted above were amended in

1979 and Katsoris discusses the significance of the amendments.

L. 1979, c. 283, § 37. Prior to the 1979 amendment, weekly wage

was found "by multiplying the daily wages by 5, or if the

employee worked a greater proportion of the week regularly, then

by 5 1/2, 6, 6 1/2 or 7," a minimum work week was five days and

there was no special formula for calculating compensation for

temporarily disabled workers who worked less than five days.

See Katsoris, supra,

131 N.J. at 541 n.2 (quoting prior law and

reflecting the Legislature's alterations made in L. 1979, c.

283, § 37).

The Court considered the impact of those amendments on

compensation for part-time employees who are permanently

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disabled and concluded: "No implication arises that persons who

work significantly fewer days each week or fewer hours each day

than the norm of a five-day or forty-hour week cannot be

considered part-time workers." Id. at 546. Reasoning that the

amended formula for calculation of weekly wages and the special

formula for part-time workers with a temporary disability did

not give "the slightest hint that the Legislature intended to

alter the character or categorization of all such

employment . . . from part-time to full-time employment," ibid.,

the Court determined that the amendments were "not intend[ed] to

alter the practice with respect to the calculation of

compensation benefits for part-time, permanently injured

employees," and "had no effect on calculation of benefits for

those part-time employees who suffer disabilities that are

permanent in nature," id. at 544-45.

Thus, Katsoris directs courts confronted with a permanently

disabled worker to consider -- as courts had for decades prior to

the amendment, see, e.g., Torres, supra,

64 N.J. at 461

-- whether it is appropriate in the particular case to

"reconstruct" the work week and wages of a part-time employee to

provide compensation that would have been awarded for "full-

time" employment. See Katsoris, supra,

131 N.J. at 543-46.

"The use of a reconstructed work week to calculate the

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compensation award of a part-time employee had never been

considered automatic," and is not automatic under the current

Id. at 546.

statute as construed in Katsoris.

Reconstruction is appropriate when consistent with the

purpose of workers' compensation, which is "to compensate [the

worker] for . . . loss of earning capacity, i.e., diminution of

Id. at 546 (quoting Torres, supra, 64

future earning power."

N.J. at 460-61). "[P]rinciples of fairness and equity" govern

the decision to use a "reconstructed work week for disabled

part-time employees [and] turn on the diminishment of future

earning capacity." Id. at 548. Thus the "key" inquiry is

"whether the disability represents a 'loss of earning capacity,

i.e., a diminution of future earning power,'" that includes loss

of "potential for full employment." Id. at 547-48 (quoting

Torres, supra,

64 N.J. at 460-61).

The importance of the impact of the disabling injury on

"potential for full employment" is illustrated by Katsoris and

prior decisions. Where an employee, permanently disabled due to

an injury on a part-time job, also has a full-time job, use of a

reconstructed work week is appropriate if there is an impact on

the employee's ability to return to the full-time job. Mahoney

v. Nitroform Co.,

20 N.J. 499, 509-10 (1956) (death benefit for

person killed in accident on part-time job should be calculated

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on the basis of their full-time employment in recognition of the

act's purpose -- "to arrive at a fair approximation of claimant's

probable future economic capacity"). In contrast, where a

worker with part-time and full-time employment is permanently

and partially disabled from the part-time employment but able to

return to the full-time employment, reconstruction of the work

week as if the part-time employment were full-time employment is

improper. Katsoris, supra,

131 N.J. at 548.

Cases involving part-time employees who have no full-time

employment are more instructive in evaluating the relevance of

diminution of future earning capacity to the "fairness and

equity" of calculating wages on the basis of part-time

employment in this case. Torres, supra,

64 N.J. at 461 (noting

that the statute does not address the issue and that the

reconstruction has been invoked by our courts to avoid "an

injustice").

Torres involved a "minor who work[ed] only a few hours a

week in a part-time job and suffer[ed] . . . a permanent

disability as a result of a work-connected accident." Ibid.

The Court determined that reconstruction of wages based on full-

time employment was necessary to serve "[t]he entire objective

of wage calculation," which the Court viewed as "arriv[ing] at a

fair approximation of claimant's probable future earning

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capacity." Id. at 462 (internal quotations omitted). The Court

concluded that "minors engaged in part-time employment outside

school hours possess a unique status," "must be presumed to have

a potential for full employment," and to serve the purpose of

the act their status as part-time workers at the time of

accident must be deemed "immaterial." Ibid.

Our courts have also addressed the diminution of future

earning capacity with respect to adults employed in one part-

time job at the time of the accident. In a case involving a

sixty-eight-year-old employee working part-time, there was

evidence to support a finding that his part-time status was

attributable to a series of hernia operations and evidence

suggesting that prior to the accident the employee did not

expect to resume full-time employment due to his condition.

Krogman v. Krogman Filter Co.,

89 N.J. Super. 16, 22-23 (App.

Div. 1965). The court reasoned that "the right to reconstruct

the pay base has been assumed to be dependent on the assumption

that the injured workmen would, absent the accident, have been

able to earn full-time wages during a hypothetical future work

career." Id. at 24. Due to the evidence suggesting that the

employee's pre-accident condition precluded full-time

employment, this court remanded to permit the employee to come

forward with additional evidence relevant to the question of the

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significance of the work-related accident relevant to full-time

or part-time employment. Id. at 26. Following remand, this

court determined that the employee's failure to "com[e] forward

with affirmative proof that by any determinable date after the

accident he would have been capable of full-time work" precluded

reconstruction of his wages "on a full-time basis." Krogman v.

Krogman Filter Co.,

91 N.J. Super. 1, 3-4 (App. Div. 1966).

In different circumstances, on recognizing that an

"ordinary part-time worker today may have full-time employment

tomorrow or that a part-time worker . . . may have four or five

such jobs each week," this court has concluded that

reconstruction of the employee's work week is appropriate when

the permanently disabling accident "prevents or interferes with

later full-time employment." Engelbretson v. Am. Stores,

49 N.J. Super. 19, 25 (App. Div. 1957), aff'd,

26 N.J. 106 (1958).

In Engelbretson, the majority noted the absence of evidence that

the sixty-eight-year-old employee "was in poor health or unable

to work a full week or for additional days for another

employer." Ibid. The evidence in that case demonstrated that

the employee's hours had been reduced by her employer about six

months prior to the accident in 1954. Id. at 22. From 1951 to

1953, she was expected to work when needed and worked as many as

nine hours a day on several days each week; between January and

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9 June 1954, however, she worked for four hours on two days per

week. Ibid.

In our view, Krogman and Engelbretson are both consistent

with the principles of equity and fairness relevant to

reconstruction of wages articulated in Katsoris. Katsoris

requires consideration of the relationship between the accident

and the potential for future employment in determining whether

"fairness and equity" in the circumstance warrant reconstruction

of a part-time worker's wages.

131 N.J. at 548.

In this case, the judge of compensation misunderstood

Katsoris. Although the judge recognized that Katsoris rests on

the fact that there was no impact on the employee's ability to

return to full-time employment, she concluded that Katsoris had

no relevance to reconstruction in this case because Gruzlovic

did not have full-time employment. The error in this reasoning

is that it overlooks the fundamental reason for reconstruction

of wages under the current statute as interpreted in Katsoris,

which is fairness and equity in light of the diminution of

potential future earning capacity. The compensation award under

review is inconsistent with Katsoris, because it ignores the

distinction between part-time and full-time employment, which

the Legislature intended to maintain,

131 N.J. at 546, and

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assumes that reconstruction is automatic, a proposition that the

Supreme Court rejected in Katsoris, id. at 549.

This record does not permit an inference that the accident

and resulting disability had any impact on Gruzlovic's capacity

or inclination to work full-time as opposed to part-time. For

thirteen years Gruzlovic had worked one day a week in a

cafeteria that was open for business one day a week. During

that period, she had not looked for an additional part-time job

or a full-time job. The evidence in this case defeats any basis

for an inference that but for the accident and resulting

partial, permanent disability, Gruzlovic would have pursued

either full-time employment or additional part-time jobs. When

an inference of a loss of potential full-time employment

attributable to the accident is not available from the evidence

presented, principles of fairness and equity developed to

compensate for that lost potential are not implicated and

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reconstruction of wages is not appropriate.

Larson's Workers' Compensation Law § 93.02 (2009) (discussing

the question of part-time employment and appropriate

compensation with reference to the purpose of compensation for

diminution of earning capacity).

Reversed and remanded for modification of the compensation

award in conformity with this decision.