CASE NO. 03645 CRB-05-97-07
CLAIM NO. 100011652 : COMPENSATION REVIEW BOARD

JAMES SIMON
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

INTERNATIONAL BROTHERHOOD
OF BOILERMAKERS : AUGUST 12, 1998
EMPLOYER

and

NATIONWIDE INSURANCE
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by James L. Pomeranz, Esq., Pomeranz, Drayton & Stabnick, 95 Glastonbury Blvd., Glastonbury, CT 06033.

The respondents were represented by James F. Powers, Esq., Law Office of Larry Lewis, 639 Research Parkway, Meriden, CT 06450.

This Petition for Review from the July 10, 1997 Finding and Dismissal of the Commissioner acting for the Fifth District was heard March 27, 1998 before a Compensation Review Board panel consisting of the Commission Chairman Jesse M. Frankl and Commissioners Michael S. Miles and Amado J. Vargas.

OPINION

JESSE M. FRANKL, CHAIRMAN. The claimant has petitioned for review from the July 10, 1997 Finding and Dismissal of the trial commissioner acting for the Fifth District. In that decision the trial commissioner denied the claimant's request for partial disability benefits pursuant to § 31-308(a). In support of his appeal, the claimant contends that the trial commissioner improperly denied § 31-308(a) benefits on the basis that the claimant did not search for work. In addition, the claimant contends that the trial commissioner misinterpreted the opinion of Dr. Grayson, who conducted an examination at the request of a trial commissioner. We find no error.

The trial commissioner took judicial notice that on July 27, 1995, a Finding and Award was issued by another trial commissioner which concluded that on May 8, 1992, the claimant suffered a compensable stress injury, specifically panic attacks, while working for the respondent employer. The trial commissioner further found that the claimant worked as a boilermaker for many years until he ultimately became the business manager for Local 237 of the International Brotherhood of Boilermakers. The claimant actively participated in his re-election to that position in June of 1993.

The claimant testified that he remained on the job for economic reasons until he turned sixty on September 12, 1995, at which time his pension benefits vested. Effective September 12, 1995, the claimant voluntarily removed himself from the work force. The claimant testified that he had no intention of seeking employment of any kind. At the request of a trial commissioner, an examination of the claimant was performed by Dr. Grayson, who opined that the claimant could return to work, if he so desired, to a job

with less stress than his previous position. A vocational expert, Dr. Cohen, opined that the claimant had an earning capacity of between $13,800.00 and $22,500.00.

> Section 31-308(a) (rev'd. to 1991) provides in part:
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> If any injury for which compensation is provided under the provisions of this chapter results in partial incapacity, there shall be paid to the injured employee a weekly compensation equal to sixty-six and two-thirds per cent of the difference between the wages currently earned by an employee in a position comparable to the position held by such injured employee prior to his injury *and the amount he is able to earn after such injury*, except that when (1) the physician attending an injured employee certifies that such employee is unable to perform his usual work but is able to perform other work, (2) such employee *is ready and willing to perform such other work* in the same locality and (3) no such other work is available, such employee shall be paid his full weekly compensation...."
> Section 31-308(a) (emphasis added).

Whether a claimant has satisfied the statutory criteria for § 31-308(a) wage differential benefits is a factual determination for the trial commissioner. Wright v. Institute of Professional Practice, 13 Conn. Workers' Comp. Rev. Op. 262, 1790 CRB-3-93-8 (April 18, 1995).

The power and duty of determining the facts rests on the trial commissioner as the trier of fact. This fact-finding authority "entitles the commissioner to determine the weight of the evidence presented and the credibility of the testimony offered by lay and expert witnesses." Webb v. Pfizer, Inc., 14 Conn. Workers' Comp. Rev. Op. 69, 70, 1859 CRB-5-93-9 (May 12, 1995) (citing Tovish v. Gerber Electronics, 32 Conn. App. 595, 599 (1993), *appeal dismissed*, 229 Conn. 587 (1994)). We will not disturb such determinations unless they are found without evidence, based on impermissible or unreasonable factual inferences or contrary to law. Fair v. People's Savings Bank, 207 Conn. 535 (1988).

In the instant case, the trial commissioner found that the claimant did not intend to re-enter the job market following his retirement, and that he did not search for any work after his retirement. Although our statutes do not require a claimant to perform a work search, it has been accepted as one evidentiary basis to demonstrate willingness to work and the availability of suitable light duty employment. Shimko v. Ferro Corp., 40 Conn. App. 409, 414 (1996); Goncalves v. Cornwall & Patterson, 10 Conn. Workers' Comp. Rev. Op. 43, 1111 CRD-4-90-9 (Jan. 28, 1992). In Shimko, the claimant sustained a compensable occupational disease which required him to avoid working in certain environments. The trial commissioner in that case found that the claimant was capable of light duty work, and further found that the claimant "had failed to pursue that capability and had failed to document a willingness to return to work within his capability." Id. at 412. The trial commissioner therefore dismissed the claim for temporary partial benefits under § 31-308(a). Id. at 412. The Appellate Court remanded the matter in order to determine whether the claimant's employment limitations were caused by his compensable injury and whether there was other work that the claimant could have performed. Id. at 415.

Similar to the facts in Shimko, supra, in the instant case the trial commissioner found that the claimant did not search for work. However, unlike Shimko, supra, where the court remanded the matter for a determination of whether suitable work was available, here the trial commissioner specifically found that the claimant was capable of earning between $13,800.00 and $22,500.00. (Finding No. 9; see also Finding No. 8). Furthermore, in Shimko, supra, the claimant had not retired, and in fact successfully found employment, whereas in the instant case the claimant never intended to re-enter the

job market following his retirement. We conclude that in the case at hand the trial commissioner's denial of the claimant's request for benefits under § 31-308(a) is a factual determination which is fully supported by the record, including the claimant's failure to search for work following his retirement. The claimant's failure to search for work following his retirement demonstrated that he was not willing to work, despite an ability to work at various types of jobs.[1] We conclude that the trial commissioner's denial of temporary partial disability benefits is fully supported by the record.

In support of his appeal, the claimant contends that he was "advised to leave his job as the result of stress by his attending physician, Dr. Crabbe...." (Claimant's Brief, p. 2, citing May 12, 1997 Transcript, p. 12-14 and 19-20). Although the claimant testified that Dr. Crabbe advised him that it would be "good for him to leave" (May 12, 1997 Transcript, p. 12), the trial commissioner was not required to credit said testimony. The claimant further testified that the reason he left on September 12, 1995 was because his benefits vested on that date and therefore he had not wanted to leave earlier. (May 12, 1997 Transcript, p. 13). The claimant does not contend that there were any contemporaneous medical opinions advising him to leave his job due to job stress as of September 12, 1995. The trial commissioner's finding that the claimant remained on the job for economic reasons until he turned sixty on September 12, 1995, at which time his pension benefits vested, is fully supported by the record. (Finding No. 5; May 12, 1997 Transcript, p. 13).

In further support of his appeal, the claimant contends that the trial commissioner misconstrued the written report issued by Dr. Grayson, who conducted a trial

[1] Dr. Cohen, a vocational expert, after meeting with the claimant and reviewing the medical reports, opined that the claimant could work in the following jobs: "assembler, cashier, food preparer, bill collector,

commissioner's examination. The claimant contends that the trial commissioner erred by adopting a portion, but not all, of Dr. Grayson's opinion contained in his July 11, 1996 report. The trial commissioner found that Dr. Grayson "opined that the Claimant could return to work if he so desired, to a job that would not entail the same stress as his prior job." (Finding No. 8). This finding is fully supported by Dr. Grayson's report wherein he states: "... if he so desires, I can see no reason why he is unfit to return to a job that does not entail the same stress that he perceived in his last job." (Claimant's Exhibit C at p. 16). It was not necessary for the trial commissioner to make findings of fact regarding the opinion of Dr. Grayson that the claimant should not return to his *former* job as business manager of the union, as that issue is not relevant due to the trial commissioner's findings that the claimant had a capacity to work, but that the claimant was unwilling to work.

The trial commissioner's decision is affirmed.

Commissioners Michael S. Miles, and Amado J. Vargas concur.

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customer service clerk, grader, sorter, telemarketer." (May 12, 1997 Transcript, p. 28, 31).