

CASE NO. 5762 CRB-4-12-6  
CLAIM NO. 400054765

: COMPENSATION REVIEW BOARD

RONALD SHEPARD  
CLAIMANT-APPELLEE

: WORKERS' COMPENSATION  
COMMISSION

v.

: NOVEMBER 22, 2013

CITY OF BRIDGEPORT  
EMPLOYER  
SELF-INSURED

and

BERKLEY ADMINISTRATORS  
OF CONNECTICUT, INC.  
ADMINISTRATOR  
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by Donna Civitello, Esq., Carter & Civitello, One Bradley Road, Suite 301, Woodbridge, CT 06525.

The respondents were represented by David A. Kelly, Esq., Montstream & May, LLP, 655 Winding Brook Drive, PO Box 1087, Glastonbury, CT 06033.

This Petition for Review<sup>1</sup> from the May 17, 2012 Finding and Award of the Commissioner acting for the Fourth District was heard May 31, 2013 before a Compensation Review Board panel consisting of Commissioners Charles F. Senich, Peter C. Mlynarczyk and Daniel E. Dilzer.

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<sup>1</sup> We note that a postponement and extensions of time were granted during the pendency of this appeal.

## OPINION

CHARLES F. SENICH, COMMISSIONER. The respondent has appealed from a Finding and Award in this matter which determined that the claimant had been totally disabled for a period exceeding 260 weeks and therefore was entitled to retroactive cost of living adjustments pursuant to § 31-307a(c) C.G.S. The respondent's position is that the evidence on the record did not support the finding that the claimant had been totally disabled for 260 weeks. The claimant argues that to the extent there was any ambiguity in the original Finding and Award, such ambiguity was resolved in the claimant's favor by the trial commissioner in a December 18, 2012 Ruling on Claimant's Motion for Articulation/Reconsideration (6/22/12) of Ruling on Respondents' Motion to Correct (6/5/12) which corrected the Finding to delineate the specific weeks of the claimant's total disability. We concur with the claimant that this decision is dispositive of the issue under appeal. We therefore affirm the Finding and Award, as corrected.

The trial commissioner's Finding and Award dated May 17, 2012 outlined the long history of this claim; which emanates from a compensable back injury the claimant sustained on August 11, 2003. A voluntary agreement was approved on March 16, 2004 for that injury and since that date the claimant has undergone surgeries in 2004 and 2006. In January of 2009 the respondents filed a Form 36 which was at issue in the hearing. This Form 36 sought to find the claimant at maximum medical improvement and to credit payments subsequent to November 18, 2008 against permanent partial disability. The claimant underwent a Commissioner's examination with Dr. Patrick Duffy on May 4, 2010. Dr. Duffy opined the claimant would not benefit from further surgery and could

not return to his former job as a sanitation worker. Dr. Duffy supplemented his opinion after reviewing a May 2009 Functional Capacity Evaluation of the claimant and opined that the claimant had a light duty work capacity. Based on Dr. Duffy's report the Commissioner granted the Form 36 on August 2, 2010, retroactive to January 25, 2009.

The trial commissioner noted the respondent's medical examiner, Dr. F. Scott Gray, testified that the claimant would have trouble maintaining any kind of significant work activity. Dr. Duffy also testified that he became aware of discrepancies in the FCE and that "now the picture's flawed." Findings, ¶ 25. The claimant testified as to his work history and his present level of pain and his difficulties with various activities of daily living. Two vocational experts, Dr. Jeff Blank and Ms. Donna White, offered opinions as to the claimant's work capacity. Dr. Blank testified that the claimant lacked the skills and capacity to perform any kind of work. Ms. White opined that the claimant had the capacity to perform a variety of available jobs in the labor market, but also noted the claimant appeared to have difficulty sitting or standing for periods exceeding 2-5 minutes at a time.

Based on this record, the trial commissioner concluded that Dr. Gray's opinion on the claimant's work capacity was persuasive and credible, as well as Dr. Blank's opinion. She did not find Dr. Duffy's opinion on employability persuasive, nor that of Ms. White, and dismissed the results of the FCE as not credible or persuasive in any respect. She found that the claimant was credible and persuasive, and noted that the claimant had unsuccessfully sought employment for many years. She further found that at this time the claimant was unemployable at either full time or part time work. She also found the claimant had been totally disabled for a period exceeding five years. Findings, ¶ N.

Accordingly, she reversed the prior approval of the January 23, 2009 Form 36 approved on August 2, 2010 and ordered the respondents to pay retroactive temporary total disability benefits. She also ordered retroactive cost-of-living increases pursuant to § 31-307a(c) C.G.S.

The respondents filed a Motion to Correct the Finding and Award. The Motion sought the deletion of Finding, ¶ N as unsupported by the record, as well as the substitution of various other findings with those supportive of limiting the claimant's relief and finding the respondent's witnesses persuasive. On June 5, 2012 the trial commissioner issued a ruling on the respondent's Motion to Correct, clarifying Finding, ¶ N, and denying the other corrections sought by the respondent. The Ruling in part stated:

“Finding N shall be corrected to read:

I find that the claimant has been totally disabled for a period exceeding five years. Specifically, the claimant has been totally disabled through at least the following periods of time:

August 11, 2003 - August 22, 2003  
October 5, 2004 - December 19, 2005  
March 13, 2006 - August 14, 2006; and  
January 23, 2009 – present.”

The respondents filed an appeal on the grounds that the decision herein was not supported by evidence in the record and that the trial commissioner had failed to identify a sufficient period of total disability for the claimant to qualify for cost-of-living adjustments under the statute. During the pendency of the appeal, counsel for the claimant filed a Motion for Articulation which included a Stipulation of Facts dated December 6, 2012 and signed by counsel for both parties. This stipulation of facts outlined the various periods of total disability. This stipulation noted that prior to

January 22, 2009 the claimant had been totally disabled for four separate periods totaling a cumulative period of 92 weeks and 6 days. The stipulation also noted that the period between January 23, 2009 and the date of the Finding and Award, May 17, 2012, totaled 172 weeks and 3 days. Therefore, if the Finding and Award were affirmed the total period of disability would consist of 265 weeks and 2 days as of the date of the Finding and Award. On December 18, 2012 the trial commissioner issued a Ruling which amended Finding, ¶ N to incorporate the dates of total disability delineated in the Stipulation of Facts.

The respondents initiated this appeal on the grounds that there was an inadequate basis to award the claimant a COLA in this matter. On a legal basis, we find that the trial commissioner's reasoning is consistent with our precedent in Marandino v. Prometheus Pharmacy, 5434 CRB 6-09-2 (February 22, 2012). In Marandino, we found that the terms of § 31-307a(c) C.G.S., allowed COLA's to be awarded after a claimant's cumulative period of total disability reached five years, and the term of disability did not have to be uninterrupted for eligibility for COLA's to occur. The trial commissioner therefore could apply separate periods of total disability for the claimant and determine if they cumulatively reached 260 weeks in order to award a COLA. We find the trial commissioner did precisely that and her legal reasoning was consistent with our precedent.

We now look to the evidentiary basis for the commissioner's decision. The claimant argues that as counsel for the respondent agreed to the Stipulation of Facts and that the amended Finding and Award incorporates these stipulated facts; there is no

longer an evidentiary dispute as to whether the claimant's cumulative period of total disability exceeded 260 weeks. We concur with the claimant's reasoning herein.

We find the case of Nationwide Mutual Ins. Co. v. Allen, 83 Conn. App. 526 (2004) on point. In Nationwide, a trial court granted a declaratory judgment for the plaintiff that an individual who did work for the carrier's insured was an employee and not an independent contractor, and Nationwide was not obligated to defend the suit. The Appellate Court concluded that the trial court could rely on admissions made by the parties in the underlying workers compensation case that an employer-employee relationship existed. *Id.*, 541-542.

In the present matter, counsel for the respondent agreed to a stipulation of facts that the claimant had been totally disabled for more than 260 weeks. We believe that the trial commissioner could reasonably rely on this admission and render a decision regarding the claimant's eligibility for COLA's based on this now uncontroverted evidence. The precedent in Nationwide, *supra*, is fully dispositive of this issue.<sup>2</sup>

The Finding and Award, as corrected, is herein affirmed.

Commissioners Peter C. Mlynarczyk and Daniel E. Dilzer concur in this opinion.

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<sup>2</sup> Nationwide Mutual Ins. Co. v. Allen, 83 Conn. App. 526 (2004) contains an extensive discussion as to the distinctions between "judicial admissions" and "evidentiary admissions." *Id.*, 541-542. In the present case, we could reasonably conclude that by affixing an executed stipulation to a Motion for Articulation that the admission herein constitutes a "judicial admission" as it is part of a pleading; however, were we to deem this admission an "evidentiary admission" we would still affirm the Finding and Award as the trial commissioner's decision was supported by probative evidence on the record.