CASE NO. 5777 CRB-2-12-9 : COMPENSATION REVIEW BOARD
CLAIM NO. 200170951

JOHN MOORE
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: JUNE 3, 2013

ALFRED PACIOTTI
d/b/a EMPIRE REMODELING, et al
EMPLOYER
NO RECORD OF INSURANCE

and

SECOND INJURY FUND
RESPONDENT-APPELLANT

APPEARANCES:

The claimant was represented by Jeffrey Polinsky, Esq., and Eric A. Polinsky, Esq., Polinsky Law Group, LLC, 890 West Boulevard, Hartford, CT 06105.

Alfred A. Paciotti d/b/a Empire Remodeling, 27 Joseph Street, Manchester, CT 06042 appeared at the trial level but did not attend oral argument.

Joseph Snay d/b/a Quality Masters, 95 Grove Street, Rockville, CT 06066 did not appear at the trial level or attend oral argument.

Roy Stratton, 12 Rockville Street, Apt. B, Hartford, CT 06112 did not appear at the trial level or attend oral argument.

The respondent Second Injury Fund was represented by Michael J. Belzer, Esq., Assistant Attorney General, Office of the Attorney General, 55 Elm Street, PO Box 120, Hartford, CT 06141-0120.

This Petition for Review[1] from the July 19, 2012 Finding and Award of the Commissioner acting for the First District was heard February 15, 2013 before a Compensation Review Board panel consisting of Commissioners Charles F. Senich, Nancy E. Salerno and Scott A. Barton.

[1] We note that extensions of time were granted during the pendency of this appeal.

OPINION

CHARLES F. SENICH, COMMISSIONER. The respondent Second Injury Fund (the "Fund") appeals from a Finding and Award which set a compensation rate which the Fund believed to be in error. The Fund argues that the trial commissioner should have been guided by legal precedent which predated the 1961 revisions to this section of Chapter 568, and by not following this precedent, set an improper compensation rate. After review, we find the trial commissioner applied the current version of Chapter 568 to the evidence. We find no error and affirm the Finding and Award.

The following facts are relevant to the issue on appeal. A prior Finding and Award had determined the claimant had sustained a compensable injury on May 7, 2010 and identified various noninsured individuals as the claimant's employer. The claimant had been hired to do roofing work. At the formal hearing a witness familiar with the wage rate paid roofers in the locality, Dennis Anderson, testified. Mr. Anderson testified that the wage for a day laborer working as a roofer's helper in the Plainville, CT area was about $750 to $800 per week. The trial commissioner found Mr. Anderson to be an expert and credited his testimony. The trial commissioner cited the terms of the compensation rate statute, § 31-310 C.G.S. for the proposition that in the absence of an agreement to the contrary the compensation rate for a claimant injured who had worked less than two weeks on the job was set based on the average weekly wage for that job in the locality.[2] The trial commissioner found that there was no hourly wage agreement

[2] The relevant portion of this statute reads as follows:

between the claimant and his employers. Therefore, he found the claimant had an average weekly wage of $750.00 per week, with a compensation rate of $483.73[3] per week. Based on the medical evidence presented the trial commissioner awarded the claimant 76 weeks of temporary partial disability benefits and 44.81 weeks of permanent partial disability benefits. The trial commissioner indicated a § 31-355 C.G.S. order would issue against the Fund if the employers did not pay the awarded benefits.

The Fund filed a Motion to Reopen Finding and a Motion to Correct. The trial commissioner denied both motions. The Fund then pursued the present appeal. They argue that the trial commissioner was obligated to apply the holdings of two cases, Johnson v. Phaefflin, 136 Conn. 107 (1949) and Olivieri v. Bridgeport, 126 Conn. 265 (1940). In those cases, the Fund argues, the compensation rate was not set at what the claimant would have earned had he worked on a full time weekly basis. They argue that since the claimant only worked for one day that the compensation rate must be set at the weekly amount based on the claimant's earnings for only one day of work.

Sec. 31-310. Determination of average weekly wage of injured worker. Concurrent employment. Payments from Second Injury Fund. Publication of wage tables. (a) For the purposes of this chapter, the average weekly wage shall be ascertained by dividing the total wages received by the injured employee from the employer in whose service the employee is injured during the fifty-two calendar weeks immediately preceding the week during which the employee was injured, by the number of calendar weeks during which, or any portion of which, the employee was actually employed by the employer, but, in making the computation, absence for seven consecutive calendar days, although not in the same calendar week, shall be considered as absence for a calendar week. When the employment commenced otherwise than at the beginning of a calendar week, that calendar week and wages earned during that week shall be excluded in making the computation. When the period of employment immediately preceding the injury is computed to be less than a net period of two calendar weeks, the employee's weekly wage shall be considered to be equivalent to the average weekly wage prevailing in the same or similar employment in the same locality at the date of the injury except that, when the employer has agreed to pay a certain hourly wage to the employee, the hourly wage so agreed upon shall be the hourly wage for the injured employee and the employee's average weekly wage shall be computed by multiplying the hourly wage by the regular number of hours that is permitted each week in accordance with the agreement.

[3] We note the amount of $483.37 appears, as well, in the Finding and Award. Upon review, we believe this was a scrivener's error.

On appeal, we generally extend deference to the decisions made by the trial commissioner. "As with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did." Daniels v. Alander, 268 Conn. 320, 330 (2004). The case herein presents us primarily with a case based on statutory interpretation. We note that since the time the cases relied upon by the Fund were decided the General Assembly enacted § 1-2z C.G.S., which requires us to apply the "plain meaning" of a statute's provisions to the interpretation of a statute.[4] Notwithstanding the deference we extend to a trial commissioner, in the event a commissioner fails to properly apply the law, we are obligated to reverse his or her decision. Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

The trial commissioner concluded that there was no hourly wage agreement in place between the claimant and his employers. Findings, ¶¶ 11 and 14. In the absence of such an agreement, the commissioner concluded the terms of § 31-310 C.G.S. required the compensation rate to be calculated on the basis of the prevailing weekly wage for this labor. Whether an hourly wage agreement was in existence when the claimant was injured is a factual question for the commissioner to resolve. We note that the Fund's Motion to Correct sought to introduce evidence of a parol agreement between the claimant and one of the respondents to pay the claimant a set wage per day for each day

[4] This statute reads as follows:
Sec. 1-2z. Plain meaning rule. The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.

worked. The trial commissioner denied the Motion to Correct and when a trial commissioner denies a Motion to Correct, we may properly infer that the commissioner did not find the evidence submitted probative or credible. Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008). Even assuming *arguendo*, the trial commissioner should have found a verbal agreement was in place to pay a daily wage to the claimant, this would not rise, as a matter of law, to constituting an agreement to pay an "hourly wage" as defined in § 31-310 C.G.S.[5] The trial commissioner determined this factual question in a manner adverse to the Fund's position and we may not intercede at this point to reach a different result. Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988).

We have reviewed the precedent cited by the Fund. We are not persuaded that either the Johnson case or the Olivieri case is sufficiently similar on the facts to the present case to warrant reliance at this juncture. In particular, the outcome of the Olivieri case was dependent on construing the mechanism of social welfare programs in place during the Great Depression, which is not at all an issue in this dispute. In any event, the General Assembly revised the compensation rate statute in 1961 and the Fund has brought no appellate authority to our attention citing Johnson or Olivieri as precedent in

[5] A "daily wage" without setting a defined number of hours worked per day or per week would make the calculation of an hourly wage rate or weekly wage rate a factual challenge for the trial commissioner to resolve. The evidence herein is the agreement in question was verbal, as no written wage agreement was submitted as evidence. We defer to the trial commissioner's factual determination in this case that such an agreement may not constitute an "hourly wage" agreement between the claimant and the respondent.

the 52 years subsequent to that statutory revision.[6]

The plain meaning of the statute herein is when a claimant is hired shortly prior to his injury for part-time or temporary work that in the absence of an hourly wage agreement between the claimant and his or her employer the trial commissioner must ascertain the prevailing weekly wage for such work in the locality, and set a compensation rate in accordance with this wage rate. We do not find this "plain meaning" of the statute yields "bizarre or absurd results." First Union National Bank v. Hi Ho Mall Shopping Ventures, Inc., 273 Conn. 287 (2005). The trial commissioner in the present case applied the statute in the manner the General Assembly intended it to be applied.

The decision herein is consistent with the current version of Chapter 568. As the trial commissioner did not find an hourly wage agreement had been reached between the claimant and the employer, the prevailing wage provision of § 31-310 C.G.S. was applicable in this matter. We affirm the Finding and Award.

Commissioners Nancy E. Salerno and Scott A. Barton concur in this opinion.

[6] The Fund argues on appeal that Hummel v. Marten Transport, Ltd., 282 Conn. 477 (2007) stands for the proposition that notwithstanding the "plain meaning" rule, prior precedent which has interpreted a statute should govern our present application of statutes. While we acknowledge Hummel stands for that principle, we find the case herein distinguishable from Hummel. The issue in Hummel was the "final judgment rule" which the Supreme Court held had been the subject of precedent in numerous appellate court decisions reached in the years shortly prior to the enactment of § 1-2z C.G.S. In the present case, the precedent cited by the Fund predates by over a decade the 1961 revision to Chapter 568, and predates the enactment of § 1-2z C.G.S. by over a half century. We therefore conclude the plain meaning of the statute should govern this decision.