CASE NO. 5783 CRB-7-12-10 : COMPENSATION REVIEW BOARD
CLAIM NO. 700124831

JEROME KINSEY
CLAIMANT-APPELLANT : WORKERS' COMPENSATION
CROSS-APPELLEE COMMISSION

v.

: SEPTEMBER 17, 2013

WORLD PAC
EMPLOYER

and

ACE USA
INSURER
RESPONDENTS-APPELLEES
CROSS-APPELLANTS

APPEARANCES:

The claimant was represented by Alan Scott Pickel, Esq., The Pickel Law Firm, LLC, 1700 Bedford Street, Stamford, CT 06905.

The respondents were represented by Colette S. Griffin, Esq., Howd & Ludorf, LLC, 65 Wethersfield Avenue, Hartford, CT 06114-1190.

This Petition for Review from the September 21, 2012 Finding of the Commissioner acting for the Seventh District was heard March 22, 2013 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Charles F. Senich and Peter C. Mlynarczyk.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. Counsel for the claimant and the respondent have both appealed from a Finding issued by the trial commissioner in this matter awarding sanctions to the claimant. Counsel for the respondent has appealed the award of sanctions; arguing the respondents' conduct did not merit penalties. Counsel for the claimant has also appealed, finding the amount of the award insufficient for a number of reasons and seeking a new hearing on the issue. We find neither argument persuades us that the trial commissioner committed reversible error. We affirm the Finding.

The trial commissioner reached the following factual findings at the conclusion of the Formal Hearing. The trial commissioner took administrative notice of all documents in the file, which included hearing notices seeking sanctions pursuant to § 31-300 C.G.S. She also took administrative notice of the informal hearing held December 27, 2011. She found that the claimant had been injured in 2000 and the respondents had been paying temporary total disability benefits since that date. In October 2011 the claimant was entitled to receive a cost of living adjustment of $7.26 in each weekly check, and the respondents did not make this COLA adjustment. The last weekly benefit check received by the claimant was in the amount of $306.94 for the period November 2, 2011 through November 8, 2011 and then the payments stopped for approximately four weeks. The respondents did not file a Form 36 advising the claimant that they were discontinuing payments. Eventually, the respondents sent the claimant a check for the period November 9, 2011 to December 6, 2011 (27 days); which the claimant received on December 8, 2011. The claimant did not receive any COLA adjustments until December

13, 2011, which was a period of 73 days from when they were due, and the respondents did not file a Form 36 advising the claimant a COLA would not be provided. At that point the claimant received a check from the respondents which paid the COLA arrearage.

The claimant testified that the respondents had previously failed to make timely payments of benefits or timely COLA adjustments. The claimant testified to this "pattern and practice" of not receiving payments and not being provided an explanation for the delays; and presented documentary evidence in the form of "make-up" checks for stopped payments and arrearages, and attorney's fees; one for $6,000.00 issued June 22, 2007 and the other for $1,448.60 issued on April 2, 2008.

Counsel for the claimant provided an affidavit for attorney's fees he believed were owed as a result of the respondents' delays in paying his client. The trial commissioner noted the first entry reflecting time spent by the attorney of record occurred on December 14, 2011, after the claimant had had his arrearages paid by the respondents. The claimant's attorney confirmed that as of the December 27, 2011 informal hearing there were no arrearages owed to his client. The trial commissioner found that at that informal hearing the respondents offered $1,000.00 in attorney's fees to settle the sanction claim and the claimant's counsel sought $1,500.00. Claimant's counsel stated that his billing rate is $495/hr. for non-contingency matters and provided a history of his experience practicing law since 1990; he also stated his paralegals have a billing rate of $145/hr. The trial commissioner also cited as evidence a January 18, 2012 letter from claimant's counsel to respondent's counsel acknowledging receipt of a check for $1,500.00.

The trial commissioner noted that claimant's counsel had questioned whether the settlement offers should have been discussed in regards to the consideration of a fine under § 31-300 C.G.S. Claimant's counsel stated in his proposed findings of fact that he sought $23,118.75 in sanctions and attorneys fees, plus interest. He also requested a new hearing be held on this issue and that the terms of prior settlement negotiations not be considered as evidence at this hearing.

Respondents provided their own proposed findings of fact. They suggested that payments to the claimant might be eligible under § 31-307(e) C.G.S. offset for social security benefits due to the claimant's date of injury, but offered no evidence supporting this claim. Respondents also challenged the claim for attorney's fees, arguing that they had brought the claimant current prior to when the claimant's counsel had expended time on the motion for sanctions. Respondents opposed the levying of penalties under § 31-288 C.G.S. as the issue had not been noticed for the hearing. Respondents also argued that only a delay of payments to a claimant exceeding 35 days could trigger the "undue delay" provisions of § 31-300 C.G.S.

Based on these facts the trial commissioner concluded the various hearing notices only listed § 31-300 C.G.S. as an issue under consideration for the formal hearing. She also concluded that the respondents failed as required to provide required statutory notice of their intent to discontinue temporary total disability benefits, but as they had satisfied this obligation prior to the claimant's attorney expending hours on the matter, no fee was due for sanctions for this lapse. The commissioner also concluded the respondents failed to provide requisite notice as to discontinuing payment of COLA benefits, and failed to make this adjustment for a 73 day period, but claimant's attorney had not expended time

on the matter prior to the arrearage being paid. The trial commissioner awarded the claimant interest on the unpaid temporary total disability benefits and COLA payments at a rate of 10% pursuant to § 37-3a C.G.S. & § 31-300 C.G.S. At the time of the informal hearing the unpaid interest of $26.96 was due to the claimant on these obligations.

The trial commissioner further concluded that claimant's counsel had expended 1.5 hours of time on the informal hearing, and the respondent's offer of $1,000.00 in legal fees to resolve the issue was reasonable and the demand of claimant's counsel of $1,500.00 was not reasonable. The commissioner did not find a statutory basis to award paralegal time as a sanction and found no basis to award legal fees to the claimant's counsel subsequent to the informal hearing. She determined a reasonable legal fee for counsel was $350.00/hr. The commissioner further rejected the respondent's argument the "35 day payment" rule barred sanctions, and further barred the bid of the claimant's counsel for a new hearing, deeming the issues at hand essentially ministerial. The commissioner awarded claimant's counsel $525.00 as a sanction, and directed that had he previously received a sum greater than that amount that the balance should be paid back to the respondent.

The respondents filed a Motion to Correct, seeking to vacate the sanctions. Claimant's counsel objected. The trial commissioner sustained the objection and denied the Motion to Correct. Both parties filed timely appeals from the Finding. The respondents reiterate their position in the Motion to Correct that sanctions were unwarranted in this matter. Counsel for the claimant asserts error in that the trial commissioner failed to approve a sufficient sanction based on the evidence he presented as to time expended, including paralegal time, and his billing rate. He also argues that

the issue of sanctions under § 31-288 C.G.S. was properly presented to the trial commissioner, and that since the trial commissioner should have recused herself, a new hearing is required in this matter.

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). This is particularly true for disputes concerning the imposition of sanctions, Kuhar v. Frank Mercede & Sons, Inc., 5250 CRB-7-07-7 (July 11, 2008), disputes over the conduct of hearings, Valiante v. Burns Construction Company, 5393 CRB-4-08-11 (October 15, 2009) and disputes over evidentiary rulings Turrell v. State/DMHAS, 5640 CRB-8-11-3 (March 21, 2012), *aff'd,* 144 Conn. App. 834 (2013). The disputes in this appeal deal with these issues, and unless the commissioner's decisions herein were an abuse of her discretion, or statutorily unsupportable, we would be obligated to defer to her judgment.

We may deal expeditiously with the respondents' appeal. The trial commissioner denied the Motion to Correct filed by the respondents. We therefore presume that she found the arguments presented in this motion to be neither probative or persuasive. Brockenberry v. Thomas Deegan d/b/a Tom's Scrap Metal, Inc., 5429 CRB-5-09-2 (January 22, 2010), *aff'd,* 126 Conn. App. 902 (2011) (Per Curiam). The trial commissioner specifically explained why she found the "35 day payment" rule in § 31-300 C.G.S. inapplicable when a respondent has accepted compensability of a claim via a voluntary agreement and commenced making regular payments of disability benefits.

Conclusion, ¶ M. We also note that the facts herein specifically demonstrate the claimant had to wait 73 days to receive a COLA adjustment. Findings, ¶ 8. While a trial commissioner may not levy sanctions in the absence of a factual predicate, McFarland v. Dept. of Developmental Services, 5176 CRB-5-06-12 (December 21, 2007), *aff'd in part; rev'd in part*, 115 Conn. App. 306, 323 (2009), *cert. denied*, 293 Conn. 919 (2009) the record herein more than sufficiently provides such a factual predicate. The trial commissioner found that both payment of compensation and adjustment of compensation had been delayed without good cause, and moreover, agreed with the claimant that there had been a pattern or practice of such unexcused errors. See Findings, ¶ 10 and Conclusions, ¶¶ K and M. We find the imposition of sanctions herein supported by the evidence on the record and within the trial commissioner's discretion.[1] [2]

We now turn our attention to the claimant's appeal. We note that the determination as to an appropriate sanction, once a commissioner believes such a sanction is warranted, is based on the evidence presented on the record and is subject to substantial discretion on the part of the trial commissioner. Previti v. Monro Muffler Brake, Inc., 5769 CRB-6-12-7 (June 25, 2013). The manner of conducting a hearing into

[1] Respondents citation of Kuhar v. Frank Mercede & Sons, Inc., 5250 CRB-7-07-7 (July 11, 2008) and Gendron v. Griffin Health Services Corporation, 5686 CRB-4-11-10 (October 11, 2012) as authority to reverse an order of sanctions is unmeritorious, as in those cases the trial commissioner's factual determination as to whether payments were unduly delayed or not was upheld by the Compensation Review Board.

[2] Respondents also raise the issue of a possible social security offset. The trial commissioner concluded that this matter had not been litigated at the formal hearing and that the respondents had not introduced probative evidence on this issue. In light of this, this issue cannot be considered at this juncture by an appellate panel and the respondents must pursue relief if desired by seeking an evidentiary hearing on the issue.

the award of sanctions, and the manner of ascertaining a proper award of legal fees, is governed by statute. We look to § 31-278 C.G.S., § 31-298 C.G.S. and § 31-327 C.G.S. as guiding our review of this appeal.

The relevant sections of each statute are as follows:

> **Sec. 31-278. Powers and duties of commissioners.** Each commissioner shall, for the purposes of this chapter, have power to summon and examine under oath such witnesses, and may direct the production of, and examine or cause to be produced or examined, such books, records, vouchers, memoranda, documents, letters, contracts or other papers in relation to any matter at issue as he may find proper, and shall have the same powers in reference thereto as are vested in magistrates taking depositions and shall have the power to order depositions pursuant to section 52-148. He shall have power to certify to official acts and shall have all powers necessary to enable him to perform the duties imposed upon him by the provisions of this chapter.
>
> **Sec. 31-298. Conduct of hearings.** Both parties may appear at any hearing, either in person or by attorney or other accredited representative, and no formal pleadings shall be required, beyond any informal notices that the commission approves. In all cases and hearings under the provisions of this chapter, the commissioner shall proceed, so far as possible, in accordance with the rules of equity. He shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but shall make inquiry, through oral testimony, deposition testimony or written and printed records, in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter.
>
> **Sec. 31-327. Award of fees and expenses.** (b) All fees of attorneys, physicians, podiatrists or other persons for services under this chapter shall be subject to the approval of the commissioner.

A trial commissioner therefore has great latitude into conducting a hearing and determining what evidence may be probative in reaching a decision on the issues presented. While a trial commissioner may determine that during the course of a hearing a previously unnoticed issue is suitable for adjudication, DiDonato v. Greenwich/Board of Education, 5431 CRB-7-09-2 (May 18, 2010), the commissioner is under no obligation

to do so. The trial commissioner concluded that the notices and correspondence prior to the formal hearing did not reference § 31-288 C.G.S. We also find that unlike Valiante, supra, the trial commissioner did not put the parties on notice at the opening of the formal hearing that this issue was under consideration. Therefore, we find no error from the trial commissioner not awarding the claimant sanctions pursuant to § 31-288 C.G.S.

We turn to the issue of whether the trial commissioner erred in considering the issue of the proposed settlement as to the amount of sanctions. A review of the hearing transcript indicates that both parties at the hearing discussed this issue at great length, (see March 12, 2012 Transcript, pp. 11-17 and pp. 38-42) and that both the claimant (Claimant's Exhibit, ¶ I) and the respondent (Respondent's Exhibit, ¶ 1) introduced documentary evidence as to the proposed settlement into the record of the formal hearing. It is black letter law that "a trial commissioner has broad discretion to determine the admissibility of evidence, and an evidentiary ruling will not be set aside absent a clear abuse of that discretion," LaMontagne v. F & F Concrete Corporation, 5198 CRB-4-07-2 (February 25, 2008). We do not find that this discretion was abused in considering this issue, as it was certainly relevant as to whether the respondents had offered to pay sanctions at a certain date. This would either support or challenge whether claimant's counsel should be compensated for work performed after that date seeking to obtain such an award. The trial commissioner's determination on this issue was supported by evidence admitted to the record she could reasonably have found probative. The trial

commissioner's determinations herein were within her authority pursuant to § 31-278 C.G.S. and § 31-298 C.G.S.[3]

This is also dispositive of the issue as to whether the trial commissioner should have recused herself. As we held in Martinez-McCord v. State/Judicial Branch, 5647 CRB-7-11-4 (August 1, 2012) "the recusal of trial commissioners has been disfavored except for circumstances under which a trial commissioner determined on his or her own that their impartiality was at issue." Id. We cannot discern from the record any indicia that the trial commissioner had any bias or favoritism towards a litigant or a witness as the cases cited in Martinez-McCord indicate would mandate recusal. The claimant's counsel cites Jutkowitz v. Department of Health Services, 220 Conn. 86 (1991) as standing for the proposition that it is improper for administrative tribunals to consider settlement offers in their deliberations. However, the Supreme Court in Jutkowitz did not reverse the decision of the administrative tribunal, finding the error in noting a settlement offer had been extended did not materially prejudice the plaintiff. Id., 97-98. We are also persuaded by the respondents that Jutkowitz can be factually distinguished as dealing with a case in chief, whereas the present dispute is interlocutory in nature and does not impact the substantive rights of the claimant to benefits. We also note that subsequent to the Jutkowitz decision the Supreme Court in Moraski v. Connecticut Board of Examiners of Embalmers & Funeral Directors, 291 Conn. 242 (2009) further restated the public

[3] Claimant's counsel also argues that the trial commissioner committed reversible error by taking administrative notice of prior proceedings, in particular the informal hearing on December 27, 2011 before Commissioner Gregg. We have reviewed our recent precedent on taking administrative notice of earlier proceedings, Turrell v. State/DMHAS, 5640 CRB-8-11-3 (March 21, 2012), *aff'd,* 144 Conn. App. 834 (2013) and Perun v. Danbury, 5650 CRB-7-11-5 (May 3, 2012). We are satisfied that the commissioner's actions were within her discretion.

policy grounds disfavoring the recusal of members of administrative agencies. Id., 261-266.

Even assuming, *arguendo*, the trial commissioner should not have admitted evidence such as Claimant's Exhibit I and Respondent's Exhibit 1 regarding the effort to settle the dispute over sanctions, a review of the trial commissioner's Finding indicates that there was a sufficient quantum of other evidence that she found probative and reliable to sustain the award. Under such similar circumstances we have found any such error to be harmless and have sustained the trial commissioner's decision. See Morales v. FedEx Ground Package Systems, Inc., 5666 CRB-2-11-7 (July 6, 2012), where we affirmed a Finding and Award notwithstanding a commissioner's unsubstantiated finding when an alternative evidentiary basis supported the result.

The amount awarded to claimant's counsel is also an issue on appeal. He argues that the amount awarded was insufficient, in part as it did not include the time of paralegals who worked on the sanction issue. We find that the provisions of § 31-327 C.G.S. make the determination of what is a reasonable legal fee within the discretion of the trial commissioner. See Previti, supra. See also Pattison v. Hartford Hospital, 5784 CRB-1-12-9 (September 10, 2013) where *citing* DiLieto v. New Haven, 4709 CRB-3-03-8 (August 5, 2004) we held "the trier has the discretion to determine a reasonable fee and '[w]e will not overturn a fee award unless there is evidence of the trial commissioner's abuse of that discretion.'" Id. The trial commissioner denied a claim for paralegal time in this matter, and claimant's counsel cites Connecticut cases not involving this Commission where judicial awards have included this element of relief. This is unpersuasive as none of these cases involve sanctions under Chapter 568 and appellate

precedent supports the discretion of a trial judge in determining sanctions. Moreover, the statute herein, § 31-327 C.G.S. discusses the award of fees for "attorneys." While this statute does allow for fees to potentially be approved for "other persons"; we also note that the statute utilized by the commissioner in this case, § 31-300 C.G.S., calls for "a reasonable attorney's fee" to be awarded when payments are unduly delayed.

Our decision in Heilweil v. Montville-Board of Education, 5161 CRB-8-06-11 (October 24, 2007) is instructive on this issue. In Heilweil, we reversed the award of a witness fee to a vocational expert as such individuals were not among those enumerated under § 31-298 C.G.S. as entitled to witness fees. We find paralegals are not among the professionals enumerated under § 31-300 C.G.S. or § 31-327 C.G.S. who may receive fees as a component of sanctions against a respondent. We do not believe the failure of the trial commissioner to issue an award based on paralegal time was reversible error.

The trial commissioner's Finding in this matter was within the discretion entrusted to her by the statute and was supported by evidence entered into the record. We are not persuaded of legal error.

We affirm the Finding.

Commissioners Charles F. Senich and Peter C. Mlynarczyk concur in this opinion.