CASE NO. 5873 CRB-1-13-8 : COMPENSATION REVIEW BOARD
CLAIM NO. 100182632

KEVIN MENARD : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : SEPTEMBER 16, 2014

WILLIMANTIC WASTE PAPER CO.
EMPLOYER

and

EMC INSURANCE COMPANY
INSURER
RESPONDENTS/APPELLEES

APPEARANCES: The claimant was represented by Howard B. Schiller, Esq., Law Offices of Howard B. Schiller, 55 Church Street, P.O. Box 699, Willimantic, CT 06226-0699.

The respondents were represented by David J. Weil, Esq., Nuzzo & Roberts, L.L.C., One Town Center, P.O. Box 747, Cheshire, CT 06410.

This Petition for Review from the July 29, 2013 Finding and Award of the Commissioner acting for the Second District was heard on April 25, 2014 before a Compensation Review Board panel consisting of Commission Chairman John A. Mastropietro and Commissioners Stephen B. Delaney and Michelle D. Truglia.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has petitioned for review from the July 29, 2013 Finding and Award of the Commissioner acting for the Second District. We find no error and accordingly affirm the decision of the trial commissioner.[1]

The trier found that the parties had stipulated to the following facts:

1. Claimant's Exhibit A accurately reflects wages paid to the claimant between March 17, 2010 and March 11, 2011 in the total sum of $53,131.91.
2. Claimant is married and files separately, claiming one (1) exemption.
3. During the period from March 17, 2010 through March 11, 2011, the claimant was compensated for a total of 112 vacation hours.
4. Said vacation pay was paid to the claimant in the following amounts:
    a. Week ending July 7, 2010: 40 hours vacation pay at $16.99 per hour totaling $679.60. Claimant was additionally paid for 8 hours of holiday pay at the same rate in the amount of $135.92. Total compensation paid to the claimant for the week ending July 7, 2010 was $815.52.
    b. Week ending September 8, 2010: 40 hours vacation pay at $16.99 per hour totaling $679.60. Claimant was additionally paid for 8 hours of holiday pay at the same rate in the amount of $135.92. Total compensation paid to the claimant for the week ending September 8, 2010 was $815.52.

[1] We note that a motion for extension of time and a motion for continuance were granted during the pendency of this appeal.

   c. Week ending November 24, 2010: 32 hours vacation pay at $16.99 per hour totaling $543.68. Claimant was issued a second check for this week for 40 hours regular pay and 13.50 hours overtime pay in the gross amount of $1,023.65. Total compensation paid to the claimant for the week ending November 24, 2010 was $1,567.33.

5. Claimant did not perform any actual labor for the respondent during the calendar weeks ending July 7, 2010 and September 8, 2010, and received vacation pay during these weeks as referenced in paragraph four.
6. Claimant's total earnings during the 52 weeks prior to the date of injury were $53,131.91.
7. If the gross wages of $53,131.91 are divided by 52, the average weekly wage is $1,022.00 corresponding to a compensation rate of $569.59. When adjusted for the 2011 Social Security tax deduction of 1.5% an additional $15.33 is added to the compensation rate, generating a corrected compensation rate of $584.92.
8. If the total gross wages earned in the 52 weeks prior to the injury of $53,131.91 are divided by the 50 weeks during which actual labor was performed, the average weekly wage is $1,062.64. This corresponds to a compensation rate of $588.29. When adjusted for the Social Security withholding tax multiplier of 1.5% an additional $15.94 is added to the compensation rate generating a corrected compensation rate of $604.71.
9. If the two weeks of vacation pay received by the claimant are eliminated from the wage base, the earnings counted for the 52 weeks prior to the injury would be

reduced to $51,500.87. If this figure is divided by 50 weeks because of exclusion of the two vacation weeks, the average weekly wage is $1,030.00. The corresponding compensation rate would be $573.33. When adjusted by the Social Security multiplier of 1.5% an additional $15.45 is added to the compensation rate generating a corrected compensation rate of $588.78.

10. Vacation and personal time are calculated based on the date of hire. Therefore, the vacation pay payable to the claimant was a benefit accorded based on the claimant's years of service with the respondent.
11. Claimant was allowed by respondent to work during the vacation week ending November 24, 2010 and was also paid vacation time for that same week.

The following findings by the trial commissioner are also pertinent to our review:

12. The additional two weeks of paid vacation provided to the claimant by respondent had to be used as paid vacation without reporting to work or that paid vacation time was forfeited ("use it or lose it").
13. In light of the provisions of § 31-310(a) C.G.S., the parties disagree as to whether the claimant is entitled to have the two weeks of paid vacation (during which the claimant did not perform any labor for the respondent) included in the claimant's total wages and whether, if the vacation pay is included or excluded, a divisor of 52 or 50 should be used in calculating claimant's average weekly wage.
14. The claimant's position is that the two weeks of paid vacation should be included in the calculation of the total wages for the 52 weeks prior to the injury, but not counted in terms of the divisor in determining the average weekly wage because

the claimant did not perform any services for the employer during those two weeks of paid vacation, thus creating an average weekly wage by dividing the total wages by 50 weeks.

15. The respondent's position is either: (i) exclude the two weeks of wages for paid vacation from the claimant's total wages for the 52 weeks prior to the date of injury and then determine the average weekly wage by dividing by 50 weeks, or (ii) include the two weeks of wages for paid vacation in claimant's total wages for the 52 weeks prior to the date of injury and then calculate the average weekly wage by dividing the total wages by 52 weeks.

Having heard the foregoing, the trial commissioner determined that there was no reason to eliminate any wages received or any weeks of employment given that the claimant was employed and received wages from the respondent employer throughout the entire 52-week period preceding his injury, including the periods of paid vacation, and did not have any absences for seven consecutive days not in the same calendar week. The trier concluded that the proper calculation required dividing the gross wages of $53,131.91 by 52, resulting in an average weekly wage of $1,022.00 corresponding to a compensation rate of $569.59. When adjusted for the 2011 Social Security tax deduction of 1.5%, an additional $15.33 is included in the compensation rate, generating a corrected compensation rate of $584.92.

The claimant filed a Motion to Correct which was denied save for one correction to a scrivener's error, and this appeal followed. On appeal, the claimant contends, consistent with the reasoning set forth in ¶ 14, supra, that the trial commissioner

erroneously calculated the claimant's average weekly wage by dividing the total wages paid to the claimant for the 52 weeks preceding the date of injury by 52 rather than 50.[2]

We begin our analysis of this matter with a recitation of the well-settled standard of review we are obliged to apply to a trial commissioner's findings and legal conclusions. "The trial commissioner's factual findings and conclusions must stand unless they are without evidence, contrary to law or based on unreasonable or impermissible factual inferences." Russo v. Hartford, 4769 CRB-1-04-1 (December 15, 2004), citing Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Moreover, "[a]s 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." Burton v. Mottolese, 267 Conn. 1, 54 (2003). Thus, "it is … immaterial that the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court." Fair, supra, 540 (1988), quoting Del Vecchio v. Bowers, 296 U.S. 280, 287 (1935).

Turning to the matter at bar, the claimant argues that the trial commissioner misapplied the provisions of § 31-310(a) C.G.S. by including in the calculations of the claimant's average weekly wage the two weeks for which the claimant was absent from work on paid vacation leave. Our analysis therefore implicates the language of § 31-310(a) C.G.S. (Rev. to 2011), which states, in pertinent part:

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[2] The respondents did not appeal the trial commissioner's decision to include claimant's vacation pay in the calculation of claimant's total annual wages.

> 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….

It is of course axiomatic that "[t]he purpose of the Workers' Compensation Act is remedial in nature and should be construed to accomplish its humanitarian purpose." Scott v. Bridgeport, 4637 CRB-4-03-2 (February 24, 2004). If one examines the provisions of Section § 31-310(a) C.G.S. through this prism, it should be readily apparent that the purpose of the statute is to arrive at an average weekly wage which is as fair and equitable as possible while remaining consistent with provisions of the statute. As such, an employer is generally entitled to have included in the "dividend" all wages it has paid to the claimant, and the claimant is generally entitled to have excluded from the "divisor" any weeks (or, in some cases, partial weeks) for which he was not paid by the employer in order to arrive at an average weekly wage which most accurately reflects the payment history of the claim. It can therefore be logically inferred that the inclusion of the phrase "absence for seven consecutive calendar days, although not in the same calendar week, shall be considered as absence for a calendar week," § 31-310(a) C.G.S., represents an adjustment in the calculations to avoid utilizing a divisor which will artificially inflate the number of weeks worked by the claimant and thus result in a lower compensation rate.

This interpretation is buttressed by the sentence which immediately follows this phrase: "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…." Id.

However, the instant claimant asserts that the "plain meaning" of § 31-310(a) C.G.S. supports the exclusion of the claimant's two weeks of paid vacation because these time periods constituted an "absence for seven consecutive calendar days" and the statute thereby requires that those weeks be dropped from the divisor. The claimant cites § 1-2z C.G.S. for the proposition that because the phrase "absence for seven consecutive calendar days" is not ambiguous, in that a claimant is either at the workplace or not at the workplace, it thereby follows that any such absences should be automatically excluded from the total number of weeks worked.[3] We concede that, generally speaking, there is little ambiguity about whether an individual is present at or absent from the workplace. However, rather than examining the phrase "absence for seven consecutive calendar days" in isolation,

> we are [also] guided by the principle that the legislature is always presumed to have created a harmonious and consistent body of law…. [T]his tenet of statutory construction … requires us to read statutes together when they relate to the same subject matter…. Accordingly, [i]n determining the meaning of a statute … we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction. (Internal quotation marks omitted.)

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[3] Sec. 1-2z C.G.S. (Rev. to 2011) states: "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."

In re Jan Carlos D., 297 Conn. 16, 21-22 (2010).

We have postulated herein that the purpose of § 31-310(a) C.G.S. is to ensure that the parties arrive at a fair and equitable average weekly wage which accurately reflects both the total wages paid to the claimant and the number of weeks for which these wages were paid. In light of this interpretation, we reject the notion that the statute requires that every seven-day absence from the workplace, whether paid or unpaid, automatically merits exclusion from the wage calculations. Under the facts of this matter, excluding the weeks for which the claimant was paid, albeit in the form of vacation pay rather than regular wages, would be sharply at variance with the underlying purpose of the statute and, in our estimation, lead inexorably to the "absurd or unworkable results" contemplated by § 1-2z C.G.S. Excluding paid vacation time from the calculations required by § 31-310(a) C.G.S. would essentially penalize employers for granting this benefit and, as such, represents the antithesis of the "sound policy considerations" the claimant urges us to consider in furtherance of his own argument. Appellant's Brief, p. 6. Moreover, we are inclined to agree with the respondents, who point out that "[treating] "voluntary, paid absences due to vacation provided at the expense of the employer the same as absences due to seasonal unemployment or an industrial depression is logically inconsistent." Appellees' Brief, p. 14.

The claimant has provided no authority for his position, remarking instead that "[n]o case appears to have considered the issue of 'absence for seven consecutive calendar days' in the context of absence due to vacation or illness." Appellant's Brief, p.

9. Undeterred, the claimant attempts to bolster his argument by examining the § 31-310(a) C.G.S. methodology employed in several cases in which the parties contested the proper average weekly wage for municipal schoolteachers employed under an annual contract. Unfortunately, the factual predicates underlying these cases bear little resemblance to the case at bar. For instance, in Arnold v. Tolland Board of Education, 10 Conn. Workers' Comp. Rev. Op. 235, 1220 CRD-2-91-4 (January 7, 1993), the parties disputed the proper computation of the average weekly wage for a schoolteacher who had elected to receive a portion of his annual salary in the form of a "balloon" payment at the end of the semester. In Kazo v. Seymour, 4658 CRB-5-03-4 (March 31, 2004), the parties disputed the calculation of the average weekly wage for a schoolteacher who had chosen to receive her annual salary in 44 rather than 52 installments. In Sweeney v. Waterbury, 10 Conn. Workers' Comp. Rev. Op. 240, 1225 CRD-5-91-5 (January 7, 1993), the claimant sought to have added to her total annual wages monies received in the form of reimbursement for time spent obtaining medical treatment pursuant to § 31-312.[4]

Similarly unpersuasive is the claimant's analysis of Baba v. Eastern Malleable Iron Co., 98 Conn. 815 (1923), in which the parties disputed the proper calculation of the

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[4] Section 31-312 C.G.S. (Rev. to 1987) states, in pertinent part: "(a) A person receiving medical attention under the provisions of this chapter and required to be absent from work for medical treatment, examination, laboratory tests, x-rays or other diagnostic procedures, and not otherwise receiving or eligible to receive weekly compensation weekly benefits, shall be compensated for the time lost from the job for such medical treatment and tests at the rate of his average earnings, but not less than at the minimum wage established by law, provided the amount payable in any one week shall not exceed the weekly benefit rate of the individual. Time lost from the job shall include necessary travel time from the plant to the place of treatment, the time for the treatment and such other time as is necessary for such treatment, examination or laboratory test…. Where the medical attention or treatment is provided at a time other than during the employee's regular working hours and the employee is not otherwise receiving or eligible to receive weekly compensation weekly benefits, he shall be compensated for the time involved for such medical treatment as though it were time lost from the job at the rate of his average hourly earnings and shall be paid for the cost of necessary transportation as herein provided."

average weekly wage for a claimant who was injured after only two weeks of employment, and Graziano v. St. Mary's Hospital, 11 Conn. Workers' Comp. Rev. Op. 10, 1230 CRD-5-91-5 (February 8, 1993), which concerned, *inter alia*, the treatment of sick pay and vacation pay received by a claimant during a period of time when she was not working. While the factual circumstances in both Baba, supra, and Graziano are in no way similar to those in the matter at bar, Graziano is somewhat instructive in light of this board's recognition therein that "the vacation and sick pay earned by this employee may be wages, but if they are, then they are wages allocable to the period during which the employee worked to earn such payments." Id., at 14. Nevertheless, while that observation is helpful insofar as it supports the premise that vacation pay may be considered in lieu of wages, we are nevertheless inclined to agree with the respondents that "[t]he Claimant's discussion of the problems with 'attributing' the vacation pay to certain weeks is an unnecessary diversion from the primary issue." Appellees' Brief, p. 13.

The claimant has also claimed as error the trial commissioner's failure to distinguish between whether the claimant was "actually employed" or "actually worked" during the weeks in question. The claimant states that "Sweeney … stands, with Arnold, for the proposition that all pay received or due must be counted when calculating average weekly wage but weeks not worked are not utilized in the calculation." (Emphasis in the original.) Appellant's Brief, p. 14. In Sweeney, supra, this board, in paraphrasing § 31-310(a) C.G.S., observed that "Sec. 31-310 states without ambiguity that the average weekly wage equals total wages earned in the twenty-six weeks prior to the injury

divided by the number of calendar weeks worked in that period." Id., at 238. The claimant has evidently interpreted this remark as providing a basis for his assertion that the two paid vacation weeks when the claimant did not report to work should not be factored into the § 31-310(a) calculations because "no labor was performed" for the employer during those weeks. Appellant's Brief, pp. 1, 2. We find this argument to be without merit; the exact wording of § 31-310(a) C.G.S. is "actually employed" and, as such, the proper analysis goes to whether the claimant was in fact "actually employed" for the weeks in question (which the instant claimant concedes he was), and not whether the claimant "actually worked." It strikes us as self-evident that the assessment of a claimant's employment status for a certain time period is conceptually far different from an analysis of whether a claimant "performed labor" during that period.

In addition, the claimant argues that the trial commissioner erroneously "concluded that Connecticut General Statutes §31-310(a) only applies in circumstances where the claimant has been absent from work for seven or more consecutive days during a time period which is not a calendar week." Appellant's Brief, p. 2. The claimant predicates this claim of error on the wording of one of the trier's conclusions in the Finding and Award in which the trial commissioner stated:

> There is no reason to eliminate any wages received or to eliminate any weeks of employment as the Claimant was employed and received wages from the Respondent throughout the entire 52 week period preceding his injury, including the periods of paid vacation, and did not have any absences for seven consecutive days not in the same calendar week.

July 29, 2013 Finding and Award of the Commissioner acting for the Second District, Conclusion, ¶ III.

The "[c]laimant contends that the language of the statute is not reasonably susceptible to a construction which limits its application exclusively to weeks of partial employment and fails to apply it to all periods of absence for seven constructive days." Appellant's Brief, p. 8. Had we any basis to infer that the trial commissioner reached the conclusion alluded to by the claimant, we would be inclined to grant this claim of error. However, our examination of the totality of the trier's findings in this matter gives us no plausible rationale for the inference that the trier would have employed a different methodology had the claimant's vacation time not occurred in the same calendar week. Rather, we are inclined to regard the wording of this paragraph as a reflection of the trier's attempt to recite the exact text of § 31-310(a) C.G.S. which happened to include a clause which was not applicable to the facts of the instant matter.

Finally, we note that the claimant has claimed as error the trier's denial of the balance of the proposed corrections proffered in his Motion to Correct save for one correction addressing a scrivener's error. Our review of the proposed corrections indicates that the claimant was merely reiterating the arguments made at trial which ultimately proved unavailing. As such, the trial commissioner was under no compunction to grant the remainder of the claimant's proposed corrections. D'Amico v. State/Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003).

There is no error; the July 29, 2013 Finding and Award of the Commissioner acting for the Second District is accordingly affirmed.

Commissioners Stephen B. Delaney and Michelle D. Truglia concur in this opinion.