CASE NO. 5888 CRB-1-13-9 : COMPENSATION REVIEW BOARD
CLAIM NO. 100161710

MATTHEW P. JAMIESON
CLAIMANT-APPELLANT : WORKERS' COMPENSATION
CROSS-APPELLEE COMMISSION

v.

: AUGUST 15, 2014

STATE OF CONNECTICUT/
MILITARY DEPARTMENT
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLEE
CROSS-APPELLANT

and

GALLAGHER BASSETT SERVICES
ADMINISTRATOR

APPEARANCES:

The claimant was represented by James M. Quinn, Esq., Quinn & Quinn, LLC, Stoneleigh Building, 248 Hudson Street, Hartford, CT 06106.

The respondent was represented by Lawrence G. Widem, Esq., Assistant Attorney General, Office of the Attorney General, 55 Elm Street, PO Box 120, Hartford, CT 06141-0120.

This Petition for Review from the September 6, 2013 Finding and Orders of the Commissioner acting for the Third District was heard May 30, 2014 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Michelle D. Truglia and Stephen M. Morelli.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. Both the claimant and the respondent have appealed from the Finding and Orders issued by the trial commissioner in this matter subsequent to the Appellate Court's decision in Jamieson v. State, 132 Conn. App. 225 (2011). The claimant has appealed arguing the trial commissioner improperly denied his claim for 39 weeks of temporary partial disability benefits under § 31-308(a) C.G.S.[1] The respondent has appealed from the award of attorney's fees and statutory interest to the claimant as a sanction for unreasonable contest. Upon review we find the trial commissioner had a substantive basis for the decisions she reached on these issues and her decisions were not contrary to law. We affirm the Finding and Orders.

The commissioner found the following facts which are pertinent to this appeal. As noted, this matter had been the subject of a prior formal hearing and the decisions reached at that juncture ("2009 Findings") had been appealed to this tribunal and affirmed, Jamieson v. State/Military Department, 5471 CRB-1-09-6 (June 16, 2010), and

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[1] This statute reads as follows:

Sec. 31-308. Compensation for partial incapacity. (a) If any injury for which compensation is provided under the provisions of this chapter results in partial incapacity, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the difference between the wages currently earned by an employee in a position comparable to the position held by the injured employee before his injury, after such wages have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act in accordance with section 31-310, and the amount he is able to earn after the injury, after such amount has been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act in accordance with section 31-310, except that when (1) the physician or the advanced practice registered nurse attending an injured employee certifies that the employee is unable to perform his usual work but is able to perform other work, (2) the employee is ready and willing to perform other work in the same locality and (3) no other work is available, the employee shall be paid his full weekly compensation subject to the provisions of this section. Compensation paid under this subsection shall not be more than one hundred per cent, raised to the next even dollar, of the average weekly earnings of production and related workers in manufacturing in the state, as determined in accordance with the provisions of section 31-309, and shall continue during the period of partial incapacity, but no longer than five hundred twenty weeks. If the employer procures employment for an injured employee that is suitable to his capacity, the wages offered in such employment shall be taken as the earning capacity of the injured employee during the period of the employment.

subsequently affirmed by the Appellate Court. The trial commissioner took administrative notice of the prior proceedings in the claim.

The commissioner noted that the claimant's claim was deemed compensable in the prior proceedings and he had been adjudged to have a 30% permanent partial disability of his heart. The open issues under consideration were the length of the total or partial disability between September 5, 2006 and June 30, 2007, the claimant's compensation rate, and whether the respondent has unreasonably contested the claim for these benefits. The commissioner also took administrative notice that the parties stipulated the claimant was among those individuals who qualify for benefits under § 5-145a C.G.S.[2]

The commissioner noted that the respondent had paid the permanent partial disability benefits but had not paid temporary total or partial disability benefits and was

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[2] This statute reads as follows:

Sec. 5-145a. Hypertension or heart disease in certain university, aeronautics, State Capitol police, correction, mental health, criminal justice or hazardous duty personnel. Any condition of impairment of health caused by hypertension or heart disease resulting in total or partial disability or death to a member of the security force or fire department of The University of Connecticut or the aeronautics operations of the Department of Transportation, or to a member of the Office of State Capitol Police or any person appointed under section 29-18 as a special policeman for the State Capitol building and grounds, the Legislative Office Building and parking garage and related structures and facilities, and other areas under the supervision and control of the Joint Committee on Legislative Management, or to state personnel engaged in guard or instructional duties in the Connecticut Correctional Institution, Somers, Connecticut Correctional Institution, Enfield-Medium, the Carl Robinson Correctional Institution, Enfield, John R. Manson Youth Institution, Cheshire, the Connecticut Correctional Institution, Niantic, the Connecticut Correctional Center, Cheshire, or the community correctional centers, or to any employee of the Whiting Forensic Division with direct and substantial patient contact, or to any detective, chief inspector or inspector in the Division of Criminal Justice or chief detective, or to any state employee designated as a hazardous duty employee pursuant to an applicable collective bargaining agreement who successfully passed a physical examination on entry into such service, which examination failed to reveal any evidence of such condition, shall be presumed to have been suffered in the performance of his duty and shall be compensable in accordance with the provisions of chapter 568, except that for the first three months of compensability the employee shall continue to receive the full salary which he was receiving at the time of injury in the manner provided by the provisions of section 5-142. Any such employee who began such service prior to June 28, 1985, and was not covered by the provisions of this section prior to said date shall not be required, for purposes of this section, to show proof that he successfully passed a physical examination on entry into such service.

asserting a defense of "intermilitary immunity." Findings, ¶ 7. The claimant asserted that this constituted unreasonable contest and delay and sought attorney's fees, which his attorney had itemized as consisting of 23.5 hours at $350/hour. In the 2009 Findings the medical witnesses agreed the claimant was disabled from his post as a firefighter due to his atrial fibrillation and the physical demands of the job. The claimant testified at the prior formal hearing that he was not able to return to his firefighting job for two reasons. He said he was not able to take medication while on active duty to control his irregular heartbeat. He further said there was no light duty work made available by the respondent. The commissioner noted that none of the physicians who examined the claimant had declared him totally disabled. The commissioner further noted that the claimant had undergone an atrial fibrillation ablation procedure on May 21, 2007. This procedure was intended to return the claimant to his prior job so he could work without medication. However it was not successful in that regard and the claimant was also hospitalized for ten days following this procedure. The claimant filed for a state service connected disability and his application was approved on September 25, 2007.

The claimant testified he could not recall when he had left the Air National Guard ("ANG") where he had worked while also employed by the State of Connecticut. He said he did not work for the ANG between September 5, 2006 and June 30, 2007 although he admitted none of his doctors had told him he could not work as a dispatcher for a fire department. The claimant said he had worked for a restaurant for over a year beginning in 2008. During the period between September 2006 and May 2007 the claimant's usual routine consisted of light work around the house and cleaning, along with driving to supermarkets. He said he did woodworking as a hobby, as well as carpentry and painting

the house. He testified that between September 5, 2006 and June 30, 2007 he did not do any job searches. He further said that except for the ten day period when he was hospitalized immediately after his ablation surgery that he was not totally disabled from all work, but only from firefighting duties.

The commissioner further noted that the claimant testified that he had applied to Vocational Rehabilitation but did not recall when he had done so. The commissioner determined that the claimant had applied for services in 2008 but as his workers' compensation claim was being denied, it was determined he was not eligible.

The trial commissioner considered the relevant provisions of § 31-308(a) C.G.S. and § 5-145a C.G.S. governing eligibility for indemnity benefits. She also noted the 2009 Findings had set an average weekly wage and a base compensation rate for the claimant. Based on the foregoing she concluded that based on the 2009 Findings being upheld by this tribunal and the Appellate Court that the respondent's continued contest of indemnity benefits was unreasonable. She awarded the attorney's fees sought by claimant's counsel. The trial commissioner further found that although the claimant was eligible to seek benefits for a 39 week period, he was only totally disabled for a ten day period post-surgery. As the claimant did not have an appointment with his physician for three weeks thereafter the trial commissioner found that he was due an additional three weeks of total disability at a rate of $661.34/week and $94.48/day.

The commissioner further found that the claimant did not attempt to contact new employers or apply for jobs during his period of partial disability, but limited his efforts to attempting to return to his prior job. She found that these efforts did not comport with the requirements of § 31-308(a) C.G.S. that a claimant must be ready and willing to

perform other work in the same locality in order to receive partial disability benefits. In the absence of the claimant seeking work during this period the commissioner found the claimant was only entitled to the three months of full salary compensation provided for under § 5-145a C.G.S. The commissioner awarded the claimant that payment, which amounted to $16,143.53, along with $2,928.80 in temporary total disability benefits, payable as of June 26, 2009 with 12% interest accruing thereafter. As noted, she also awarded attorney's fees to claimant's counsel.

Both parties filed a number of post-judgment motions to the Commissioner. The respondent filed a Motion for Reconsideration and a Motion to Correct. The trial commissioner denied both the Motion for Reconsideration and the Motion to Correct. The claimant filed a Motion to Correct, which the respondent objected to. The trial commissioner denied the claimant's Motion to Correct. The parties then both commenced timely appeals of the Finding and Orders.[3]

We must turn to the merits of the claimant's appeal and the respondent's appeal. We note that we have extended deference to a trial commissioner as to the decisions reached after a formal hearing. "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

[3] The respondents also filed a Motion to Dismiss challenging the sufficiency of the claimant's appeal documents. As they have not briefed this issue we deem this issue abandoned on appeal. Christy v. Ken's Beverage, Incorporated, 5157 CRB-8-06-11 (December 7, 2007); St. John v. Gradall Rental, 4846 CRB-3-04-8 (August 10, 2005).

whether the trial court could have reasonably concluded as it did." Burton v. Mottolese, 267 Conn. 1, 54 (2003). "This presumption, however, can be challenged by the argument that the trial commissioner did not properly apply the law or has reached a finding of fact inconsistent with the evidence presented at the formal hearing." Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

We address the respondent's appeal first. They argue that as they believe they advanced a credible defense to the claimant's bid for benefits at the formal hearing, that the trial commissioner lacked a substantive basis to sanction them for undue delay and unreasonable contest. The respondent cites Francis v. Rushford Centers, Inc., 5428 CRB-8-09-2 (February 8, 2010) as being on point. In that case, while we affirmed the commissioner's award of benefits, we vacated the award of sanctions concluding that the issues of that case, which involved the juxtaposition of Arizona and Connecticut law, were complex and therefore the respondent's liability was not indisputable. We find Francis distinguishable from the present case and find it unpersuasive as to whether the trial commissioner erred in this decision.

The trial commissioner pointed in her denial of the respondent's motion for reconsideration to the respondent failing to adhere to the statutory obligations of § 5-145a C.G.S. The Finding and Orders also point to the respondent continuing to challenge the jurisdiction of this Commission to award the claimant benefits. See Findings, ¶ 7. We note that we have long held that the decision as to whether to sanction a party before our Commission is one where we have extended great discretion to a trial commissioner. See Kuhar v. Frank Mercede & Sons, Inc., 5250 CRB-7-07-7 (July 11, 2008). While the respondent cites Zbras v. Colonial Toyota, 5631 CRB-4-11-2 (February 14, 2012) as

supportive of their appeal, we find that unlike Zbras, "we can clearly ascertain from the record what the rationale is for levying such sanctions." Id.

We have affirmed a trial commissioner who sanctioned a party for continuing to litigate issues which had already been fully litigated and resolved in a manner adverse to the litigant. See Hicking v. State/Dept. of Correction, 5026 CRB-2-05-11 (November 3, 2006) and Hicking v. State/Department of Correction, 4935 CRB-2-05-4 (April 10, 2006). The Appellate Court decided that the claimant was among those individuals entitled to benefits under § 5-145a C.G.S. and Chapter 568. Jamieson v. State, supra. The issue of jurisdiction was now *res judicata* and as the trial commissioner found the respondent apparently refused to accord an Appellate Court decision full faith and credit, she had a substantive basis to levy sanctions on the respondent. We also note similarities to Lewis v. State/Department of Correction, 5677 CRB-4-11-8 (August 15, 2012) and Wikander v. Asbury Automotive Group/David McDavid Acura, 5586 CRB-4-10-9 (September 8, 2011), *aff'd,* 137 Conn. App. 665 (2012), where we affirmed sanctions against respondents who failed to adhere to their statutory obligations. If the trial commissioner concluded that the respondent failed to adhere to § 5-145a C.G.S., she had a basis to sanction the respondent for this failure. As the trial commissioner had a reasonable basis supported by facts on the record to sanction the respondent, we affirm the Finding and Orders on the issue of sanctions.

The claimant's appeal is based upon his belief that the trial commissioner failed to properly apply § 31-308(a) C.G.S. As the claimant views this case, at all times relevant to this appeal he was ready and willing to return to his prior job as a firefighter and was undergoing significant medical treatment intended to return him to work at the earliest

possible date. The claimant cites Shimko v. Ferro Corporation, 40 Conn. App. 409 (1996) for the proposition that he did not need to conduct any work searches in order to qualify for temporary partial disability benefits. The claimant points out that the respondent did not have light duty work available for its firefighters. Since the claimant was not offered light duty work by his employer, had a work capacity and was willing to work, he believes he qualifies for these benefits. We are not persuaded.

As the Appellate Court pointed out in Shepard v. Wethersfield Offset, 98 Conn. App. 682 (2006) "[t]he burden of proving entitlement to benefits under § 31-308(a) rests on the claimant . . . ." Id., 687. We note that in Shimko, supra, while the Appellate Court vacated a finding that the claimant failed to qualify for § 31-308(a) G.G.S. benefits, it remanded the case to ascertain if suitable work for the claimant existed in his locality. Id., 414-415. The claimant needed to establish to the trial commissioner's satisfaction that he sought employment that was within his limitations in order to qualify for temporary partial disability benefits. In Findings, ¶ 20, the trial commissioner found that the claimant was not disabled from working as a fire dispatcher. The trial commissioner further found the claimant did not attempt to find employment as a fire dispatcher, or in any other occupation he could reasonably pursue during the period now under dispute. The commissioner's conclusion that the claimant did not seek employment within his limitations was therefore supported by the subordinate findings on the record.

Notwithstanding the claimant's reliance on the Shimko decision, we find no precedent construing § 31-308(a) C.G.S. that suggests that if a claimant cannot return to his prior occupation for medical reasons that he is not obligated to seek alternative employment within his limitations to qualify for benefits. Nor do we find any precedent

that limits an injured employee to seeking only light duty work with his employer in order to qualify for benefits. While the unavailability of light duty work from an employer may weigh on a commissioner's decision, it is not dispositive of the issue.[4] We also do not find any precedent that states that as a matter of law, medical treatment intended to restore a claimant to his prior job is a substitute to seeking alternative employment within a claimant's limitation.

Subsequent to the Appellate Court's decision in Shimko we have reached a number of decisions as to the impact the absence of job searches has on a claimant's bid for § 31-308(a) C.G.S. benefits. We have noted that the specific circumstances of each case govern whether it was reasonable for a claimant to perform job searches, and the vigor and thoroughness of such job searches is an issue to be considered by the trial commissioner. See Fountain v. Coca Cola Bottling Co., 5328 CRB-1-08-3 (February 18, 2009). In Fountain, the respondent appealed an award to the claimant asserting he had not made a reasonable effort to secure employment within his limitations. We affirmed the award as "[w]hether 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)." Id. On the other hand in Gelinas v. P & M Mason Contractors, Inc., 5567 CRB-8-10-6 (June 7, 2011) the trial commissioner did not find the claimant had made sufficient efforts to secure available employment, and we affirmed a denial of § 31-308(a) C.G.S. benefits. The claimant failed to persuade the trial commissioner that he

[4] The claimant addresses the obligations of an employer under § 31-313 C.G.S. in his brief, Claimant-Appellant's Brief, p. 9, but the issue as to whether the respondent appropriately complied with this statute does not appear to have been litigated before the trial commissioner, and was not part of the claimant's Motion to Correct. Consequently, we cannot consider this issue as it was not preserved for appeal.

should be excused from job searches in this matter. We do not find the trial commissioner's decision that the claimant failed to prove his entitlement to § 31-308(a) benefits was arbitrary and capricious.

We note that unlike the § 31-308(a) C.G.S. benefits denied by the trial commissioner in this case, which required the claimant to seek alternative employment, the 13 weeks of full salary benefits awarded to the claimant under § 5-145a C.G.S. are based solely on whether the claimant had sustained a compensable heart condition.[5] Entitlement to this benefit is based solely on the claimant being adjudged as sustaining a compensable condition, and presumably, not being at his job being paid his normal full salary during that 13 week period after his injury. The trial commissioner based on the record herein clearly could determine the claimant had qualified for benefits under § 5-145a C.G.S. due to his compensable injury and reach an adverse decision on the claimant's eligibility for § 31-308(a) C.G.S. benefits.

We turn to the trial commissioner's denial of the claimant's Motion to Correct and the trial commissioner's denial of the respondent's Motion to Correct. We find the claimant was attempting to present their interpretation of statute as binding on the trial commissioner. The respondent was attempting to add findings to the Finding and Orders which the trial commissioner may not have found essential to her decision. We do not find the denial of these Motions constitutes legal error. See D'Amico v. Dept. of Correction, 73 Conn. App. 718 (2002) and Arsenault v. Shelton, 5679 CRB-4-11-9 (September 6, 2012).

[5] While the respondent argues in their brief this statute requires a finding of "temporary total incapacity" Appellant Brief, p. 7, the "plain meaning" of the statute requires only a finding of compensability and some level of disability. We further note the respondent did not appeal the award of § 5-145a benefits to the claimant in this case.

We find the trial commissioner had a substantive basis in the record for her Finding and Orders and this decision was consistent with law. As a result, we affirm the Finding and Orders.

Commissioners Michelle D. Truglia and Stephen M. Morelli concur in this opinion.