CASE NO. 5901 CRB-6-13-12 : COMPENSATION REVIEW BOARD
CLAIM NO. 601046904

MARGRET R. CZYRKO
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: DECEMBER 4, 2014

STATE OF CONNECTICUT
UNIVERSITY OF CONNECTICUT
HEALTH CENTER
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLEE

and

GALLAGHER BASSETT SERVICES
ADMINISTRATOR

APPEARANCES:

The claimant was represented by Jeremy Lee Brown, Esq., McCarthy, Coombes & Costello, LLP, 61 Russ Street, Hartford, CT 06106.

The respondent was represented by Francis C. Vignati, Jr., Esq., Assistant Attorney General, Office of the Attorney General, 55 Elm Street, Hartford, CT 06141-0120.

This Petition for Review[1] from the November 12, 2013 Findings and Orders of the Commissioner acting for the Sixth District was heard September 26, 2014 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Michelle D. Truglia and Daniel E. Dilzer.

[1] We note that a postponement was granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from Findings and Orders issued by the trial commissioner in this matter concerning the appropriate compensation rate for her award of permanent partial disability benefits. The trial commissioner awarded the claimant benefits based on her average weekly wage during the fifty-two week period prior to the date of injury. The claimant has appealed, arguing that she should have been awarded benefits based on her average weekly wage at the time of the first day of her disability; which was a period six years later. We find that the precedent applicable to temporary disability benefits, which are relied upon by the claimant, is inapplicable to the calculation of a specific award for permanent partial disability benefits. We affirm the Findings and Orders.

The commissioner reached the following factual findings. The claimant was employed by the State of Connecticut on November 21, 2005 and was injured on that date when she fell, striking her face on the side of a desk. Dr. Barry McGuire surgically repaired the claimant's jaw on December 6, 2011. Dr. McGuire assigned the claimant a thirty percent (30%) permanent partial impairment on September 27, 2012. A voluntary agreement was approved by the commission on July 25, 2012 reflecting a November 21, 2005 date of injury, a December 6, 2011 date of incapacity, an average weekly wage of $1,031.65, a total incapacity compensation rate of $628.60 with a notation, "wages as of Date of Disability 12/6/11 (31-310)." An unsigned voluntary agreement was issued on November 28, 2012 by the workers' compensation adjuster on behalf of Gallagher Bassett Services for a thirty percent (30%) loss of the jaw for 10.5 weeks of benefits

beginning September 27, 2012 at a compensation rate of $300.89 based on an average weekly wage of $456.12 indicating a December 6, 2011 date of incapacity.

The respondent issued two checks to the claimant for the permanent partial disability benefits which she negotiated; one for $1,504.45 and the other for $1,654.90. The total amount of permanent partial disability benefits that have been paid are $3,159.35 for 10.5 weeks at the compensation rate of $300.89 in accordance with the November 28, 2012 voluntary agreement issued by Gallagher Bassett which was not signed by the claimant.

Based on those factual findings the trial commissioner concluded as follows:

A) C.G.S. §31-310 provides that the Claimant's Average Weekly Wage shall be calculated based on the date of injury.

B) C.G.S. §31-307b provides an alternate method of calculating the Average Weekly Wage for *Temporary Total and Temporary Partial Disability Benefits* based on a relapse and recovery. (emphasis added)

C) C.G.S. §31-307b(2)(B) states, in pertinent part that "no employee eligible for compensation for specific injuries set forth in section 31-308 shall receive compensation under this section."

Therefore the trial commissioner determined that "[t]he Claimant's Average Weekly Wage for purposes of Permanent Partial Disability Benefits must be calculated based on the fifty-two (52) weeks of wages ending on the date of injury (November 21, 2005) and NOT the first date of disability (December 6, 2011)." The commissioner concluded the respondent had appropriately calculated the amount due to the claimant for specific benefits. As a result; the trial commissioner concluded the permanent partial disability benefits owed to the claimant had been paid in full by the respondent. The

commissioner denied and dismissed any claim by the claimant seeking to apply the "date of incapacity" standard to the payment of permanent partial disability benefits in this case.

The claimant's argument is simple and based solely on her interpretation of law. She argues that in a number of cases the "date of incapacity" standard has been applied to ascertain the compensation rate in a case where the claimant's date of incapacity was later than his or her date of injury. She cites Partlow v. Petroleum Heat & Power Company, Inc., 5432 CRB-7-09-2 (February 9, 2010), Mulligan v. F.S. Electric, 231 Conn. 529 (1994) and Moxon v. Board of Trustees of Regional Community Colleges, 37 Conn. App. 648 (1995) for this proposition. The claimant noted that those cases all involved the calculation of temporary total disability benefits. However, the claimant believes the statute governing setting a compensation rate, § 31-310c C.G.S.,[2] does not treat temporary disability benefits in a different fashion than benefits for the permanent impairment of a body part.

The respondent offers a different interpretation of law. They argue that the statute that governs this issue is § 31-310 C.G.S.[3] and the plain meaning of the statute requires

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[2] The statute reads as follows:

Sec. 31-310c. Average weekly wage of worker with an occupational disease. For the purposes of this chapter, in the case of an occupational disease the average weekly wage shall be calculated as of the date of total or partial incapacity to work. However, in the case of an occupational disease which manifests itself at a time when the worker has not worked during the twenty-six weeks immediately preceding the diagnosis of such disease, the claimant's average weekly wage shall be considered to be equivalent to the greater of (1) the average weekly wage determined pursuant to section 31-310 and adjusted pursuant to section 31-307a or (2) the average weekly wage earned by the claimant during the fifty-two calendar weeks last worked by the claimant, which wage shall be determined in accordance with said section 31-310 and adjusted pursuant to said section 31-307a.

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

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,

that this compensation rate be set based on the claimant's wages during the 52 weeks immediately prior to his or her date of injury. The trial commissioner accepted this reasoning. Upon review we concur with this application of the statute.

We note that recently we considered the issues as to an appropriate compensation rate for an injured worker who was not immediately incapacitated in Garvey v. Atlas Scenic Studios, Inc., 5493 CRB-4-09-9 (February 14, 2012). In Garvey the issue was an appropriate compensation rate for temporary total disability benefits for the claimant and our analysis of this issue was as follows.

> We reviewed the Supreme Court's Mulligan decision at length in Partlow, and for the following reasons, believe it has delineated a "bright-line" standard of incapacity as the benchmark date for setting a compensation rate.
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> The Court did an extensive review of the legal theories and precedent governing the payment of temporary total disability benefits and determined "[w]e agree with the claimant that the calculation should have been based on his earnings preceding his incapacity." Mulligan, supra at 540. The Court in Mulligan restated the holding reached in Rousu, supra, that ". . . *The just measure of the value of the earning power of an employee and the correlative loss incurred by him would seem to relate to his earnings at the time the loss occurs through incapacity to work, rather than his earnings at an earlier time* . . . ." Mulligan, supra, at 541. (Emphasis in original.) The court in Mulligan rejected the respondent's argument that Rousu should be limited to occupational disease cases, and made clear the "date of incapacity" standard applied to traumatic injuries. Id., at 542-545.

In Partlow we noted that the trial commissioner followed the "plain meaning" of the statute and determined that the "date of injury" was an appropriate manner to

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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.

calculate the claimant's compensation rate for temporary total disability. We reversed that decision on appeal noting that while § 1-2z C.G.S.[4] supported this result, "[s]ubsequent to the enactment of § 1-2z C.G.S., the Supreme Court, in a case which turned on the interpretation of Chapter 568, made clear that the "plain meaning" statute was *not* intended to undo prior judicial interpretation of statutes." Id. We relied on the precedent in Hummel v. Marten Transport, LTD, 282 Conn. 477 (2007) which held that while the "final judgment" rule for appeals was inconsistent with the "plain meaning" of statute it was in accord with prior appellate precedent and "the legislature, by virtue of its enactment of § 1-2z, did not intend to overrule our prior interpretation of any other statutory provision, including § 31-301b." Hummel, supra, 498-499. We determined that in Partlow there was consistent appellate precedent predating the enactment of § 1-2z C.G.S. "that for traumatic injuries, the 'date of incapacity' should be the applicable date for calculation of a wage rate and compensation rates, not the 'date of injury."' Id.

This divergence from the plain meaning of the statute has only been applied in cases where the claimant was seeking benefits for a period of disability from work, however. The claimant has not presented any precedent which has applied the precedent in Mulligan, supra, to an award of specific benefits for permanent partial disability. In addition, we note that our precedent has treated such benefits in a very different fashion than awards for temporary disability. See Morgan v. East Haven, 208 Conn. 576 (1988)

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[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.

This statute was enacted in 2003 and was not in force during any time prior to that point.

where our Supreme Court explained the difference between the different types of benefits.

> Specific benefits are benefits for the loss or loss of the use of specific body parts. See *Everett v. Ingraham,* 150 Conn. 153, 155, 186 A2d 798 (1962). These [specific] benefits . . . are not paid as compensation for loss of earning power but to compensate the injured employee for the incapacity through life because of the loss or loss of use of the body member in question.
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> On the other hand, a special award is one that is not compensation for the loss or loss of use of a body part, but is compensation for the inability to work as a result of the disability.

Id., 584.

In footnote 11 of the Morgan opinion the Supreme Court elaborated on this matter, noting "a distinction often is made between specific and special benefits based on the certainty of the award. Awards that are fixed for a certain period of time may be categorized as specific, and claims of uncertain duration may be categorized as special. . . . Underlying this distinction is the notion that specific awards for the loss of a body part are not contingent on incapacity, and thus, the compensation can be fixed at the time of injury." Id., 584-585. This reasoning suggests to us that specific benefits should be calculated on a "date of injury" basis, and not as "special awards" are; calculated on a "date of incapacity" standard; as the compensation for a specific award can be "fixed at the time of the injury." Id.

This reliance on statute is buttressed by the text of § 31-308(b) C.G.S.;[5] which establishes the compensation mechanism for specific injuries under Chapter 568. This

[5] The relevant terms of this statute read as follows:

(b) With respect to the following injuries, the compensation, in addition to the usual compensation for total incapacity but in lieu of all other payments for compensation, shall be seventy-five per cent of the average weekly earnings of the injured employee, calculated pursuant to section 31-310, after such earnings have

statute indicates that all benefits for specific injuries should be calculated in accordance with the terms of § 31-310 C.G.S. and not the statute cited in the claimant's brief, § 31-310c C.G.S. The "plain meaning" of this statute supports the trial commissioner's decision.[6] As we cannot point to appellate precedent on the compensation rate of specific injuries in derogation of this statute, we believe we must apply this plain meaning. Since the Supreme Court in Morgan, supra, directed us to fix compensation for specific injuries at the date of injury, we cannot extend the precedent in Mulligan, supra, Moxon, supra, and Partlow, supra, to this form of compensation.

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been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's average weekly wage pursuant to said section 31-310, but in no case 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, or less than fifty dollars weekly. All of the following injuries include the loss of the member or organ and the complete and permanent loss of use of the member or organ referred to . . . .

[6] We further note that the claimant's brief relies in part on the applicability of § 31-307b C.G.S. Claimant's Brief, pp. 3-5. The relevant portion of this statute reads as follows:

> **Sec. 31-307b. Benefits after relapse from recovery. Recurrent injuries.** If any employee who receives compensation under section 31-307 returns to work after recovery from his or her injury and subsequently suffers total or partial incapacity caused by a relapse from the recovery from, or a recurrence of, the injury, the employee shall be paid a weekly compensation equal to seventy-five per cent of his or her average weekly earnings as of the date of the original injury or at the time of his or her relapse or at the time of the recurrence of the injury, whichever is the greater sum, calculated pursuant to section 31-310, after such earnings have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's average weekly wage pursuant to said section 31-310, but not more than (1) the maximum compensation rate set pursuant to section 31-309 if the employee suffers total incapacity, or (2) 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, if the employee suffers partial incapacity, for the year in which the employee suffered the relapse or recurrent injury and the minimum rate under this chapter for that year, and provided (A) the compensation shall not continue longer than the period of total or partial incapacity following the relapse or recurrent injury and (B) no employee eligible for compensation for specific injuries set forth in section 31-308 shall receive compensation under this section.

We do not believe that the "relapse statute" is relevant to affixing a compensation rate for a specific injury when the compensation for such injuries is fixed at the time of the injury and unlike temporary disability benefits, the claimant's award can be ascertained in a defined manner and is not potentially open-ended in nature.

Therefore, as there was no error of law, we affirm the Findings and Orders.

Commissioners Michelle D. Truglia and Daniel E. Dilzer concur in this opinion.