CASE NO. 6035 CRB-6-15-10 : COMPENSATION REVIEW BOARD
CLAIM NO. 601036144

BARBARA DAHLE
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: AUGUST 8, 2016

STOP & SHOP
EMPLOYER
SELF-INSURED

and

MAC RISK MANAGEMENT
ADMINISTRATOR

and

SECOND INJURY FUND
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant filed this appeal on her own behalf. At the trial level, the interest of the claimant was represented by the Law Office of Barbara Collins, 557 Prospect Avenue, Hartford, CT 06105 until May 2010 when the Law Office of Kevin Hecht, PC, 220 South Main Street, Cheshire, CT 06410 represented the claimant until May 2013.

The respondents Stop & Shop and Mac Risk Management were represented by Jane M. Carlozzi, Esq., Law Offices of Nuzzo & Roberts, LLC, One Town Center, PO Box 747, Cheshire, CT 06410.

The respondent Second Injury Fund 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 September 28, 2015 Finding & Dismissal of Stephen B. Delaney, the Commissioner acting for the Sixth District, was heard April 29, 2016 before a Compensation Review Board panel

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

consisting of the Commission Chairman John A. Mastropietro and Commissioners Scott A. Barton and David W. Schoolcraft.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant appealed from a September 28, 2015 Finding & Dismissal reached by Commissioner Stephen Delaney denying her bid to obtain relief from the social security offset promulgated under § 31-307(e) C.G.S.[2] The claimant argues that due to a number of alleged errors and delays in the hearing process that she has an equitable argument against applying the statutory offset to her benefits. The trial commissioner disagreed and denied this relief. On appeal, she has reiterated the arguments she presented at the formal hearing. After review, we can identify no legal error in Commissioner Delaney's decision. We affirm the Finding & Dismissal.

The trial commissioner reached the following factual findings in his Finding & Dismissal. He took administrative notice of an approved voluntary agreement dated January 18, 2005 concerning compensable injuries to the claimant's right shoulder and left hip sustained on August 8, 2003. The commissioner noted that this agreement set a compensation rate for the claimant and at the time of the formal hearing the claimant was sixty nine years old. The claimant testified that she underwent surgery on September 17, 2014 for which she received total incapacity benefits which were subject to the § 31-

[2] This statute, which was in effect as of the date of the claimant's injury, read as follows:
"(e) Notwithstanding any provision of the general statutes to the contrary, compensation paid to an employee for an employee's total incapacity shall be reduced while the employee is entitled to receive old age insurance benefits pursuant to the federal Social Security Act. The amount of each reduced workers' compensation payment shall equal the excess, if any, of the workers' compensation payment over the old age insurance benefits."

307(e) C.G.S. offset against her social security benefits. The claimant further testified that she receives social security benefits of $1,138.00 per month. The commissioner noted that § 31-307(e) C.G.S. had been repealed in 2006, but that the "date of injury rule" was in effect for this case.

Commissioner Delaney noted that the claimant's argument was that because alleged delays and errors had delayed her surgery for ten years that this should constitute an equitable bar to applying the statutory social security offset. The commissioner noted that the claimant asserted numerous periods of alleged delays, including from 2003 to 2008. Commissioner Delaney took administrative notice of a Finding & Award/Finding & Dismissal dated June 4, 2008 issued by Commissioner Ernie Walker in this matter. He also took administrative notice of a Compensation Review Board decision dated June 5, 2009 wherein Commissioner Walker's decision of June 4, 2008 was affirmed. No further appeals were pursued by the claimant or her counsel. The trial commissioner noted that from the period of August 2008 through May 2013 approximately fifteen hearings were held regarding various issues including medical treatment, temporary total benefits, temporary partial benefits, medical bills and settlement, and the claimant had been represented by counsel at these hearings. The commissioner also noted the claimant and her counsel through this time period requested a formal hearing only on the issue of temporary partial benefits, which was resolved via a stipulation to date prior to a formal hearing. He also found that the file reflects that through this time period the respondent and commission authorized the claimant to be evaluated and be treated with various physicians.

Based on this record Commissioner Delaney concluded the totality of the evidence did not sustain the claimant's burden of proof that she is entitled to temporary total benefits without the offset for the old age social security benefits. Noting the claimant's date of injury and the applicability of the "date of injury rule", the commissioner rejected the claimant's equitable argument that the § 31-307(e) C.G.S. offset should not be applicable in this matter, and dismissed the claim. The claimant filed a motion to correct seeking substitute findings supportive of receiving the relief she was seeking. The trial commissioner denied this motion in its entirety and the claimant commenced this appeal.

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 Compensation Review Board cannot retry the facts of the case and may only overturn the findings of the trial commissioner if they are without evidentiary support, contrary to the law, or based on unreasonable or impermissible factual inferences. Kish v. Nursing and Home Care, Inc., 248 Conn. 379 (1999) and Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Nonetheless, while we must provide deference to the decision of a trial commissioner, we may reverse such a decision if the commissioner did not properly apply the law or reached a decision unsupported by the evidence on the record. Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

The gravamen of the claimant's argument is that the alleged delays in this case would warrant waiver of the "date of injury" rule. This is simply not the law in Connecticut. The claimant was injured on August 8, 2003. Pursuant to the date of injury rule the claimant's eligibility for benefits under Chapter 568 was limited to the benefits available under the statutes in force as of that date. Section 31-307(e) C.G.S. was enacted as part of Public Act 93-228 and took effect on July 1, 1993. This statute was not repealed until the enactment of Public Act 06-84 in 2006. Therefore, § 31-307(e) C.G.S. governed the claimant's August 8, 2003 injury, notwithstanding that at a future date the General Assembly may have passed legislation more beneficial to claimants under Chapter 568. See Preveslin v. Derby & Ansonia Developing Co. 112 Conn. 129 (1930), which defined workers' compensation benefits as a "contract" and held "[t]hat contract to pay and accept such compensation as is prescribed by statute in effect at the date of the injury." Id., 142. The Supreme Court in Preveslin held that notwithstanding a more beneficial amendment of the statute in 1927, the claimant's date of injury placed him within the terms of the statute as it stood in 1919. See also, Quilty v. Connecticut Co., 96 Conn. 124, 127 (1921).

Even if this tribunal could consider this case on the merits, we would find that many of the arguments raised by the claimant on appeal go to factual issues which an appellate panel such as ours cannot retry on appeal. Fair, supra. Moreover, many of the issues she has raised go to the handling of her claim during the period prior to June 4, 2008 when Commissioner Walker issued a finding that the claimant subsequently appealed. We affirmed that decision. The claimant did not appeal our decision to the Appellate Court. We must now treat this decision as final and as being the "law of the

case" in accordance with the precedent in Waterbury Hotel Equity, LLC v. Waterbury, 85 Conn. App. 480 (2004).[3]

The balance of the claimant's argument is based on her position that the various delays in her case should constitute equitable grounds to bar application of the statutory social security offset. For a variety of reasons we do not find this argument tenable. We must adhere to applying the terms of Chapter 568 in the manner that the General Assembly has prescribed. See Wiblyi v. McDonald's Corporation, 5883 CRB-1-13-10 (October 3, 2014), *appeal pending*, 37303/37304 and Falkowski v. W. E. Bassett Company, 5711 CRB-4-11-12 (December 3, 2012). In addition, the date of the claimant's injury was a fixed date that predated any of the alleged delays in this case. The "date of injury rule" stands for the proposition that we will apply the law in effect as of the date of the claimant's injury to determine eligibility for benefits, not the law as it may have been amended later as of the claimant's date of disability or her date of maximum medical improvement. See Gil v. Courthouse One, 239 Conn. 676, 685-688 (1997) and Iacomacci v. Trumbull, 209 Conn. 219, 222 (1988). Whether or not this claim had been expeditiously resolved was irrelevant to determining whether the claimant would still be subject to the terms of § 31-307(e) C.G.S.

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[3] See also Bailey v. Stripling Auto Sales, Inc.,4516 CRB-2-02-4 (May 8, 2003):
"In order for the doctrine of res judicata to prevent the claimant from asserting his claim for total disability benefits, the respondents must demonstrate that the claim was substantially identical to the claimant's prior, unsuccessful action for total disability benefits. "The rule of claim preclusion prevents reassertion of the same claim regardless of what additional or different evidence or legal theories might be advanced in support of it." Delahunty v. Massachusetts Mutual Life Ins. Co., 236 Conn. 582, 589 (1996). A closely related doctrine, collateral estoppel, prevents the retrial of issues that were actually litigated and necessarily determined in prior actions between the same parties. Lafayette v. General Dynamics Corp., 255 Conn. 762, 772 (2001)."

These legal concepts preclude this tribunal from revisiting the issues fully litigated in Dahle v. Stop & Shop Companies, Inc., 5356 CRB-6-08-6 (June 5, 2009).

The claimant does not identify any provision in Public Act 06-84, which repealed § 31-307(e) C.G.S., which contravenes the "date of injury rule" as to the applicability of this statute. Therefore, as we pointed out in Pasquariello v. Stop & Shop Companies, Inc., 4730 CRB-7-03-9 (September 3, 2004), "…there is nothing in the language of the statute, the legislative history or in Rayhall, supra, that would lead us to the conclusion that the § 31-307(e) offset can be waived under any circumstance."

Therefore, we affirm the Finding & Dismissal.

Commissioners Scott A. Barton and David W. Schoolcraft concur in this opinion.