CASE NO. 6087 CRB-3-16-3 CLAIM NO. 300097756	: COMPENSATION REVIEW BOARD
SEAN C. ROWLAND CLAIMANT-APPELLANT	: WORKERS' COMPENSATION COMMISSION
v.	: MARCH 31, 2017

TOWN OF WOODBRIDGE
EMPLOYER

and

TRAVELERS PROPERTY & CASUALTY
INSURER
RESPONDENTS-APPELLEES

APPEARANCES: The claimant was represented by Thomas E. Farver, Esq., Farver & Heffernan, 2858 Old Dixwell Avenue, Hamden, CT 06518.

The respondents were represented Gregory F. Lisowski, Esq., Pomeranz, Drayton & Stabnick, 95 Glastonbury Boulevard, Suite 216, Glastonbury, CT 06033.

This Petition for Review from the March 11, 2016 Finding and Orders of Jack R. Goldberg, the Commissioner acting for the Third District, was heard on October 28, 2016 before a Compensation Review Board panel consisting of Chairman John A. Mastropietro and Commissioners Ernie R. Walker and Nancy E. Salerno.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has petitioned for review from the March 11, 2016 Finding and Orders of Jack R. Goldberg, the Commissioner acting for the Third District. We find no error and accordingly affirm the decision of the trial commissioner.[1]

The trial commissioner, having identified as the issue for determination whether the claimant was entitled to temporary total and/or temporary partial disability benefits during the time period from October 30, 2011 through April 4, 2013, made the following findings which are pertinent to our review. The claimant was an active member of the Woodbridge Volunteer Fire Department and was serving as department chief when he suffered a compensable injury to his left ankle on October 30, 2011. In his capacity as fire chief, the claimant received a monthly stipend in the amount of $15,666.70 per year through December 31, 2011. Effective January 1, 2012, the claimant received $20,000.00 per year paid in monthly installments for calendar years 2012 and 2013. The claimant's responsibilities as fire chief included overseeing the more than fifty-member volunteer fire department and taking charge of fire suppression and victim rescue activities. His duties also included administration of the volunteer department, including maintaining and distributing the budget. There were no established hours of work as chief and the claimant could set his own hours to perform these functions.

The claimant was also self-employed as a carpenter in the business known as ROW-CARR Carpentry, LLC, during the relevant time period. He had no other

[1] We note that one Motion for Extension of Time was granted during the pendency of this appeal.

employment and was not covered for workers' compensation liability through the LLC. As of October 30, 2011, the claimant filed his federal income tax returns as "married, filing jointly" with four exemptions, including his wife and two children.

In light of the claimant's position as a volunteer member of the fire department and the nature of the injury sustained on October 30, 2011, the claimant was eligible for benefits pursuant to § 7-314a C.G.S. and § 7-314b C.G.S. [2] He elected to receive benefits in the amount specified in § 7-314a(b) C.G.S. because he was engaged in fire duties at the time of the incident and, as such, was entitled to a basic compensation rate of $996.00 per week. The respondents voluntarily advanced thirty-two (32) weeks of temporary total disability benefits at the rate of $172.83 for a total of $5,530.56.[3]

The claimant testified that he was unable to perform the duties of a volunteer firefighter or his regular job as a carpenter for a long time. He underwent surgery on his

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[2] Section 7-314a C.G.S. (Rev. to 2011) states, in pertinent part: "(a) Except as provided in subsections (e) and (f) of this section, active members of volunteer fire departments and active members of organizations certified as a volunteer ambulance service in accordance with section 19a-180 shall be construed to be employees of the municipality for the benefit of which volunteer fire services or such ambulance services are rendered while in training or engaged in volunteer fire duty or such ambulance service and shall be subject to the jurisdiction of the Workers' Compensation Commission and shall be compensated in accordance with the provisions of chapter 568 for death, disability or injury incurred while in training for or engaged in volunteer fire duty or such ambulance service.
(b) For the purpose of this section, the average weekly wage of a volunteer fireman or volunteer ambulance service member shall be construed to be the average production wage in the state as determined by the Labor Commissioner under the provisions of section 31-309.
Section 7-314b(a) (Rev. to 2011) states: "Any active member of a volunteer fire company or department engaged in volunteer fire duties or any active member of an organization certified as a volunteer ambulance service in accordance with section 19a-180 may collect benefits under the provisions of chapter 568 based on the salary of his employment or the amount specified in subsection (b) of section 7-314a, whichever is greater, if said firefighter or volunteer ambulance service provider is injured while engaged in fire duties or volunteer ambulance service."

[3] It should be noted that this matter previously came before this board on the issue of the claimant's compensation rate. We affirmed the trier's conclusion that because the claimant had sustained an injury while serving as an active member of a fire department engaged in performance of fire duties, the wage rate should be calculated in accordance with provisions of §§ 7-314a and 7-314b C.G.S., subject to § 7-314b(c) C.G.S. *See* Rowland v. Woodbridge, 5844 CRB-3-13-5 (June 6, 2014), *appeal withdrawn*, AC 36942 (2015).

ankle in April 2012 and was cleared for full duty for the week of November 22, 2012 to November 29, 2012; however, he did not work "because it was Thanksgiving week and he didn't know if he was going to be cleared that week to work." Findings, ¶ 9. He indicated that he was unable to perform his firefighting activities from the date of injury until April 4, 2013 and it was still tough to work at that point. He became bored and resumed the administrative functions of fire chief between the date of the injury and his surgery, although he was unable to perform the physical activities of a firefighter. He worked for five or six hours per week overseeing the budget and handling purchasing and personnel issues. He worked at both his own home and the firehouse and performed the duties whenever he felt up to it. He indicated that after his surgery, he was bedridden for a week or a week and a half and was therefore unable to carry out any administrative functions. After that time period, he resumed administrative duties only. He testified that he attended all fire calls, although he could not physically fight fires. There were approximately 700 calls from October 30, 2011 through April 4, 2013.

The claimant indicated that he continued performing all of his duties as fire chief and received every monthly stipend from October 30, 2011 through April 4, 2013. He also received the retention bonuses paid to the volunteer firefighters in 2011, 2012 and 2013 after meeting the minimum criteria each year of attending fifty percent (50%) of the business meetings, fifty percent (50%) of the truck crews, and twenty percent (20%) of the fire calls. The claimant testified that as fire chief, he had the use of an SUV and a mobile phone for the relevant time period and he continued to use the town pump for gasoline. In addition, the assistant fire chief never had to step in and assume any of the

administrative functions during that time frame. The claimant indicated that relative to his LLC, he did not file a Form 75 to elect workers' compensation coverage. He did no job searches. He turned down carpentry jobs because he was unable to perform them. He testified that he had previously used independent contractors to assist him in the business but he had had no one working for him in that capacity since October 30, 2011.

On April 17, 2012, David Caminear, M.D., the claimant's treating physician, and Mark Scanlan, M.D., performed a left ankle arthroscopy and exploration of the peroneal tendon sheath. The claimant followed up with Dr. Caminear on a regular basis; on November 8, 2012, the doctor returned the claimant to restricted duty with the recommendation that he refrain from climbing ladders. The doctor returned the claimant to full duty on April 4, 2013.

Having heard the foregoing, the trial commissioner found *inter alia* that the claimant was disabled from all work by his physician following the injury of October 30, 2011 but he voluntarily returned to his administrative duties as fire chief within one week. The trier also found that the claimant was disabled from all work after his surgery on April 17, 2012 but voluntarily returned to his position as fire chief within one and one-half weeks of the surgery. Dr. Caminear released the claimant to restricted duty on November 8, 2012 and to full duty on April 4, 2013.[4]

The claimant was considered the active fire chief at all times from October 30, 2011 through April 4, 2013, and the trial commissioner concluded that the claimant had

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[4] In Conclusion, ¶ f of his March 11, 2016 Finding and Orders, the trial commissioner stated that Dr. Caminear released the claimant to restricted duty on November 12, 2012. The date of Dr. Caminear's report is November 8, 2012; we deem this harmless scrivener's error. D'Amico v. Dept. of Correction, 73 Conn. App. 718, 729 (2002), *cert. denied*, 262 Conn. 933 (2003).

performed the essential functions of the fire chief's office for this time period, with the exception of one week at the outset of his injury and one and one-half weeks after his surgery. As such, the trier determined the claimant was entitled to two and one-half weeks of temporary total disability benefits at the base compensation rate of $996.00 per week. The trial commissioner concluded that the claimant was not totally disabled during the period of October 30, 2011 through April 4, 2013 by virtue of his work as fire chief and therefore was not entitled to any additional temporary total benefits. The trier also found that the claimant had continued to receive his monthly stipend for being fire chief during this time period and, as such, did not prove that he had suffered post-injury lost wages or income from his position as fire chief. The claimant also presented no evidence that he was ready, willing and able to perform other work in the same locality or that no other work was available. The claimant therefore failed in his burden to prove an entitlement to temporary partial disability benefits.

In addition, the trier concluded that because the claimant did not file a Form 75 electing to be covered by the State of Connecticut Workers' Compensation Act, the claimant had "affirmatively opted out" of workers' compensation insurance coverage relative to his self-employment as the managing member of ROW-CARR Carpentry, LLC. Conclusion, ¶ n. As such, the Workers' Compensation Commission had no jurisdiction over any claim of wage loss associated with the claimant's inability to perform his carpentry job. The trial commissioner ordered the respondents to pay the claimant two and one-half weeks of temporary total disability benefits at the compensation rate of $996.00 per week and dismissed the claim for temporary partial

disability benefits associated with his duties as fire chief for the Woodbridge Volunteer Fire Department. The trier also dismissed the claim for temporary partial disability benefits associated with the claimant's self-employment as the managing member of ROW-CARR Carpentry, LLC, due to the lack of jurisdiction by the Workers' Compensation Commission.

The claimant filed a Motion to Correct, which was denied in its entirety, and a Motion for Articulation, which was also denied, and this appeal followed. On appeal, the claimant asserts that because the medical reports of Dr. Caminear demonstrate that the claimant was in fact temporarily totally disabled during the time period between October 30, 2011 to April 4, 2013 (except for one week shortly after the date of injury), the trial commissioner erred in failing to award additional benefits for temporary total disability. The claimant also contends that the trial commissioner erroneously denied the claimant's Motion to Correct and Motion for Articulation.

We begin our analysis with a recitation of the well-settled standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions.

> [T]he role of this board on appeal is not to substitute its own findings for those of the trier of fact. Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 451 (2001). The trial commissioner's role as factfinder encompasses the authority to determine the credibility of the evidence, including the testimony of witnesses and the documents introduced into the record as exhibits. Burse v. American International Airways, Inc., 262 Conn. 31, 37 (2002); Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999). If there is evidence in the record to support the factual findings of the trial commissioner, the findings will be upheld on appeal. Duddy v. Filene's (May Department Stores Co.), 4484 CRB-7-02-1 (October 23, 2002); Phaiah v. Danielson Curtain (C.C. Industries), 4409 CRB-2-01-6 (June 7, 2002). This board may disturb only

> those findings that are found without evidence, and may also intervene where material facts that are admitted and undisputed have been omitted from the findings. Burse, supra; Duddy, supra. We will also overturn a trier's legal conclusions when they result from an incorrect application of the law to the subordinate facts, or where they are the product of an inference illegally or unreasonably drawn from the facts. Burse, supra; Pallotto v. Blakeslee Prestress, Inc., 3651 CRB-3-97-7 (July 17, 1998).

McMahon v. Emsar, Inc., 5049 CRB-4-06-1 (January 16, 2007).

Returning to the merits of the appeal, as mentioned previously herein, the claimant contends that the medical records submitted into evidence demonstrate that the claimant was temporarily totally disabled during the time period between October 30, 2011 to April 4, 2013 (except for one week shortly after the date of injury). As such, the trial commissioner erred in failing to award additional benefits for temporary total disability. The claimant also asserts that "if the circumstances of one's disabilities limit his job opportunities such that he is functionally unemployable … then he may still be qualified as temporarily totally disabled." Appellant's Brief, p. 6. See Osterlund v. State, 135 Conn. 498 (1949). In addition, the claimant points out that "through sheer boredom, love of the volunteer fire department, and a sense of duty, Chief Rowland ignored his doctor's opinion of temporary total disability and proceeded to carry on light administrative duties at his own pace and at his own schedule as effectively as he could." Id., 7.

It is of course well-settled that a claimant "is entitled to total disability benefits under General Statutes § 31-307(a) only if he can prove that he has a '*total incapacity to*

work.'"[5] (Emphasis added.) D'Amico v. Dept. of Correction, 73 Conn. App. 718, 724 (2002), *cert. denied*, 262 Conn. 933 (2003). Moreover, a claimant "[bears] the burden of proving an incapacity to work, and 'total incapacity becomes a matter of continuing proof for the period claimed.'" (Internal quotation marks omitted.) Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 454 (2001).

We have reviewed the medical record submitted into evidence and concede that it could conceivably provide a reasonable basis for the inference that the claimant was totally disabled for the period of January 10, 2012, when Dr. Addis-Thomas took him out of work, until November 8, 2012, when Dr. Caminear released him to light duty with a ladder-climbing restriction. However, we also note that at the formal hearing, the claimant testified that although he was not able to perform the activities associated with his carpentry business or his role as a volunteer firefighter during this time period, he did resume the administrative functions of the fire chief soon after both the date of the original injury and his ankle surgery. The claimant testified that he would spend five or six hours a week either at home or at the fire house making phone calls and taking care of budget, purchasing and personnel issues. November 4, 2015 Transcript, pp. 22-23, 25. The claimant also testified that in addition to collecting the fire chief stipend for the three years during the time period in question, he collected the retention incentive; eligibility for those payments required that a firefighter attend fifty percent (50%) of the business meetings, fifty percent (50%) of the truck crews, and twenty percent (20%) of the fire

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[5] Section 31-307(a) C.G.S. (Rev. to 2011) states, in pertinent part: "If any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five percent of the injured employee's average weekly earnings as of the date of the injury … and the compensation shall not continue longer than the period of total incapacity."

calls for the year. Id., 33. The claimant indicated that there was never a point at which the assistant fire chief had to step in and assume any of the administrative duties of the fire chief. Id., 35.

Having reviewed the evidentiary record, we find no basis for reversing the trial commissioner's decision to limit the award of temporary total disability benefits to two and one-half weeks. We are of course mindful of the Osterlund doctrine, which states that:

> [a] finding that an employee is able to work at some gainful occupation within his reasonable capacities is not in all cases conclusive that he is not totally incapacitated. If, though he can do such work, his physical condition due to his injury is such that he cannot in the exercise of reasonable diligence find an employer who will employ him, he is just as much totally incapacitated as though he could not work at all.

Osterlund v. State, 135 Conn. 498, 506-507 (1949).

Nevertheless, ultimately, the assessment of whether, and for how long, a claimant is eligible for temporary total disability benefits, or any other type of workers' compensation benefits for that matter, is a factual determination which lies squarely within the discretion of the trial commissioner. In the matter at bar, it may be reasonably inferred that the trial commissioner considered the various administrative functions conducted by the claimant during the relevant time period constituted an employment situation uniquely tailored to accommodate his significant disability. This board is not empowered to challenge such a factual determination. "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 v. People's Savings Bank, 207 Conn. 535, 540 (1988), *quoting* Del Vecchio v. Bowers, 296 U.S. 280, 287 (1935).

Turning to the claimant's allegations of error relative to the trial commissioner's denial of temporary partial disability benefits pursuant to § 31-308a C.G.S., we note at the outset the statutory elements which must be satisfied before these benefits can be awarded. A trial commissioner:

> may award additional compensation benefits for such partial permanent disability 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 such injured employee prior to his injury … and the weekly amount which such employee will probably be able to earn thereafter … to be determined by the commissioner based upon the nature and extent of the injury, the training, education and experience of the employee, the availability of work for persons with such physical condition and at the employee's age, but not 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. If evidence of exact loss of earnings is not available, such loss may be computed from the proportionate loss of physical ability or earning power caused by the injury. The duration of such additional compensation shall be determined upon a similar basis by the commissioner, but in no event shall the duration of such additional compensation exceed the lesser of (1) the duration of the employee's permanent partial disability benefits, or (2) five hundred twenty weeks. *Additional benefits provided under this section shall be available only to employees who are willing and able to perform work in this state.* (Emphasis added.)

Section 31-308a C.G.S.

In Sellers v. Sellers Garage, Inc., 80 Conn. App. 15 (2003), *cert. denied*, 267 Conn. 904 (2003), our Appellate Court set forth the following three-pronged test to assess

a claimant's eligibility for temporary partial disability benefits: "(1) the physician 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…." Id., 21, *quoting* Mikula v. First National Supermarkets, Inc., 60 Conn. App. 592, 598 (2000).

There is no question that the medical reports in this matter reflect that Dr. Caminear released the claimant to light duty on November 8, 2012 with the sole restriction that the claimant refrain from climbing ladders. *See* Claimant's Exhibit B. This report would appear to address the first prong set forth in Sellers, supra. However, the instant record is devoid of any evidence which would satisfy the second or third prong of these requirements. At no time did the claimant testify that he had attempted to find employment in addition to or in lieu of his responsibilities as fire chief, and when queried by respondents' counsel at the formal hearing as to whether he had ever looked for any other work, the claimant replied that he had not. November 4, 2015 Transcript, pp. 37-38. As such, the claimant failed to satisfy the statutory requirement that he was "willing and able to perform work in this state," § 31-308a C.G.S., thereby depriving the trial commissioner of a necessary basis for an award of temporary partial disability benefits. [6] As this board has previously observed:

> [a]bsent an abuse of discretion, we will not reverse a commissioner's decision to grant or deny benefits under this statute…. If the statutory factors are considered by the trial commissioner in making his or her decision, and the claimant's earning capacity is his focus, this board cannot tamper with the

[6] In light of our affirmance of the trial commissioner's decision to deny temporary partial disability benefits, we decline to enter into a discussion regarding the claimant's theory as to the proper calculation of such benefits.

> trier of fact's judgment." (Internal citations omitted; internal quotation marks omitted.)

Pontoriero v. Sanzo Concrete Construction, Inc., 3492 CRB-4-96-12 (March 6, 1998).

The claimant also claims as error the trial commissioner's denial of his Motion to Correct and his Motion for Articulation. Regarding the Motion to Correct, our review of the proposed corrections indicates that the claimant was merely reiterating the arguments made at trial which ultimately proved unavailing. As such, we find no error in the trier's decision to deny the Motion to Correct. D'Amico, supra, 728.

Relative to the Motion for Articulation,

> it is well established that [a]n articulation is appropriate where the trial court's decision contains some ambiguity or deficiency reasonably susceptible of clarification. . . . [P]roper utilization of the motion for articulation serves to dispel any . . . ambiguity by clarifying the factual and legal basis upon which the trial court rendered its decision, thereby sharpening the issues on appeal. (Internal quotation marks omitted.)

Breen v. Craig, 124 Conn. App. 147, 161 (2010). In the matter at bar, the claimant has requested that the trial commissioner:

> address specifically why claimant's election of benefits under C.G.S. § 7-314a(b) does not apply to the determination of the claimant's temporary partial disability compensation rate in this matter where the decision finds that claimant was unfit for full duty as a volunteer firefighter, and for full duty as Chief of the Volunteer Firefighter's Department, and for full duty as a self-employed carpenter.

March 31, 2016 Motion for Articulation

We are somewhat puzzled as the purpose of this articulation. In his March 11, 2016 Finding and Orders, the trial commissioner specifically found that the claimant was entitled to a basic compensation rate of $996.00 per week. Findings, ¶ 8; Conclusion, ¶ i.

This rate reflects the claimant's election of benefits pursuant to §§ 7-314a(b) C.G.S. We find no basis for the implied assumption that had the trial commissioner chosen to award temporary partial disability benefits in this matter, he would have used some other compensation rate.[7] We are therefore not persuaded that the trial commissioner's denial of the Motion for Articulation was in any fashion erroneous.

There is no error; the March 11, 2016 Finding and Orders of Jack R. Goldberg, the Commissioner acting for the Third District, is accordingly affirmed.

Commissioners Ernie R. Walker and Nancy E. Salerno concur in this opinion.

[7] We note that the trial commissioner found that the respondents voluntarily advanced thirty-two (32) weeks of temporary total disability benefits at the rate of $172.83 for a total of $5,530.56. We are quite certain that had the trier ordered the payment of any additional temporary total disability benefits, the order would have reflected that the benefits be paid at the proper compensation rate of $996.00 per week.