CASE NO. 6160 CRB-7-16-12 CLAIM NO. 700130383	: COMPENSATION REVIEW BOARD
ANNA PERALTA-GONZALEZ CLAIMANT-APPELLANT	: WORKERS' COMPENSATION COMMISSION
v.	: NOVEMBER 16, 2017

FIRST STUDENT
EMPLOYER

and

GALLAGHER BASSETT SERVICES
THIRD-PARTY ADMINISTRATOR
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Heather Perreault, Esq., Guendelsberger Law Offices, L.L.P., 28 Park Lane Road, New Milford, CT 06776.

The respondents were represented by Patrick T. Battersby, Jr., Esq., and Alessandra Carullo, Esq., Montstream & May, L.L.P., P.O. Box 1087, Glastonbury, CT 06033-6087.

This Petition for Review from the November 17, 2016 Findings and Order by Randy L. Cohen, the Commissioner acting for the Seventh District, was heard on May 19, 2017 before a Compensation Review Board panel consisting of Commissioners Christine L. Engel, Daniel E. Dilzer and Peter C. Mlynarczyk.

OPINION

CHRISTINE L. ENGEL, COMMISSIONER. The claimant has petitioned for review from the November 17, 2016 Findings and Order by Randy L. Cohen, the Commissioner acting for the Seventh District. We find error and accordingly affirm in part and reverse in part the decision of the trial commissioner and remand this matter for additional proceedings consistent with this Opinion.

In her Findings and Order, the trial commissioner, having identified as the issue for determination the amount of the credit for permanent partial disability allowed to the respondents pursuant to General Statutes § 31-349, made the following factual findings which are pertinent to our analysis of this appeal.[1] On May 3, 2002, the claimant sustained an injury to her back and right knee which was accepted by the respondents as compensable. On February 3, 2010, Edward Staub, M.D., on the basis of a respondents' medical examination, assessed a permanency rating of 20 percent to the claimant's right knee. On May 11, 2010, Kevin Shea, M.D., on the basis of a Commissioner's Examination, assessed a rating of 17 percent of the right knee. At a June 23, 2010 informal hearing, the parties agreed to compromise the ratings at 18.5 percent; a Voluntary Agreement reflecting the compromised rating was not issued.

[1] General Statutes § 31-349 states: "(a) The fact that an employee has suffered a previous disability, shall not preclude him from compensation for a second injury, nor preclude compensation for death resulting from the second injury. If an employee having a previous disability incurs a second disability from a second injury resulting in a permanent disability caused by both the previous disability and the second injury which is materially and substantially greater than the disability that would have resulted from the second injury alone, he shall receive compensation for (1) the entire amount of disability, including total disability, less any compensation payable or paid with respect to the previous disability, and (2) necessary medical care, as provided in this chapter, notwithstanding the fact that part of the disability was due to a previous disability. For purposes of this subsection, "compensation payable or paid with respect to the previous disability" includes compensation payable or paid pursuant to the provisions of this chapter, as well as any other compensation payable or paid in connection with the previous disability, regardless of the source of such compensation."

In December, 2010, the claimant underwent a right total knee replacement and was subsequently assigned two new ratings that the parties have agreed to compromise at 55 percent. This compromised rating is premised upon a 50 percent permanent partial disability rating assigned by Peter Jokl, M.D., pursuant to a Respondents' Medical Examination, and a 60 percent permanent partial disability rating assigned by the claimant's treating physician, Anthony Viola, M.D. The claimant contends that she is now entitled to a 36.5 percent increase in her permanent partial disability rating, based on the difference between the parties' new compromised amount of 55 percent and the old compromised rating of 18.5 percent. The respondents argue that the claimant is only entitled to a 35 percent increase in her permanent partial disability rating, based on the difference between the new compromised amount of 55 percent and the 20 percent rating assigned by Edward Staub, M.D.

The trial commissioner, having found that the claimant had sustained a compensable injury to her back and right knee on May 3, 2002, concluded that the respondents were entitled to a credit for the 20 percent rating of Dr. Staub. The commissioner determined, in accordance with Ouelette v. New England Masonry Company, 5424 CRB-7-09-2 (January 14, 2010), that the 20 percent rating, although not paid in its entirety, was considered "payable" pursuant to General Statutes § 31-349.

The claimant has appealed the Findings and Order on two grounds. First, the claimant argues that the trial commissioner committed reversible error by applying the provisions of General Statutes § 31-349 in reaching her determination that the respondents are entitled to a 20 percent permanent partial disability credit against the new compromised rating of 55 percent. Second, the claimant contends that the trial

commissioner erroneously concluded that the 20 percent rating assigned by Dr. Staub, although not paid in its entirety, constituted "payable" compensation as contemplated by the provisions of General Statutes § 31-349.[2]

The standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions is well-settled. "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). "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 begin with the claimant's assertion that the trial commissioner erred in applying the provisions of General Statutes § 31-349 in concluding that the respondents are entitled to a permanent partial disability credit of 20 percent against the new compromised rating of 55 percent. In support of this argument, the claimant points to Levanti v. Dow Chemical Co., 218 Conn. 9 (1991), wherein our Supreme Court observed that General Statutes § 31-349 is "an apportionment statute that limits the liability of

[2] We note that the claimant did not file a Motion to Correct; as a result, "we must accept the validity of the facts found by the trial commissioner and this board is limited to reviewing how the commissioner applied the law." Corcoran v. Amgraph Packaging, Inc., 4819 CRB-2-04-6, 4948 CRB-2-05-5 (July 26, 2006).

employers previously imposed," rather than a statute which creates liability. Id., 17. It is the claimant's contention that the provisions of the statute do not apply because the present matter does not involve either apportionment or transfer to the Second Injury Fund ("fund"). We disagree.

There is no question that the statute in question, appearing as it does in the section of the Act entitled "Second Injury Fund," was originally drafted to address issues surrounding the transfer of liability in cases involving claimants who had sustained multiple injuries. However, although the legislature in 1995 chose to amend the statute and close the fund to claims for injuries occurring on or after July 1, 1995, the legislature never adopted new provisions intended to replace General Statutes § 31-349 in addressing subsequent injuries sustained by claimants.[3] In fact, the amended statute specifically states that "[a]ll claims shall remain the responsibility of the employer or its insurer under the provisions of this section."

Moreover, as the respondents correctly point out, this board has previously accepted the application of this statute in several matters in which the trier was called upon to determine whether respondents were entitled to a permanency credit following a second disability rating. See, e.g., Ouelette, supra; Johnson v. Manchester Bus Service, Inc., 3472 CRB-1-96-11 (April 1, 1998); and DiGrazio v. CBL Trucking, 3479 CRB-8-96-11 (February 18, 1998). In light of this precedent, and the fact that the claimant cannot point to any other provisions in our Act which would effectively enable a trier to assess a respondent's eligibility for a credit against previously-paid permanent partial

[3] Public Act 95-277 added a new subsection (d) which states: "Notwithstanding the provisions of this section, no injury which occurs on or after July 1, 1995, shall serve as a basis for transfer of a claim to the Second Injury Fund under this section. All such claims shall remain the responsibility of the employer or its insurer under the provisions of this section."

disability benefits, we affirm the decision of the trial commissioner in this matter to apply the provisions of General Statutes § 31-349 in determining the amount of the permanency credit owed to the respondents.

The claimant also argues that the trial commissioner erred in concluding that the 20 percent permanent partial disability rating assigned by Dr. Staub constituted "payable" compensation as contemplated by General Statutes § 31-349. The claimant contends that this rating:

> was not considered 'payable' before the parties' agreement, as the claimant did not enjoy a present and enforceable right to demand payment at this rate until such time the parties agreed to payment at that rate. At no time did the parties agree to payment at the 20% rate, thus this was never a 'payable' obligation, and instead only potential in nature.

Appellant's Brief, p. 8.

We agree. The instant record is devoid of any written agreements documenting the payment of either the 20 percent rating assigned by Dr. Staub or the 17 percent rating assigned by Dr. Shea. As such, this appeal can be distinguished from other matters in which this board has previously examined a respondent's entitlement to a credit for permanent partial disability benefits.

For instance, in Ouelette, supra, this board examined a claim of error brought by a claimant who agreed to a payment pursuant to a Stipulation to Date in 2002 which, inter alia, "recited the claimant's position that he had sustained a 20% permanent partial disability to his low back as a result of the compensable injuries." Id. In 2005, the parties agreed to a new compromised permanent partial disability rating of 32.5%, against which the respondents wanted to take a 20 percent credit. However, the claimant, on appeal, contended that because the prior Stipulation to Date had only paid him the

equivalent of an 11.25 percent permanency rating for the prior incident, the trial commissioner erred in concluding that the respondents were entitled to credit in the amount of 20 percent.

In affirming the decision of the trial commissioner, this board noted that because the provisions of General Statutes § 31-349 state that a respondents' credit for a subsequent disability rating is predicated on the amount of compensation that was either payable or previously paid to the claimant, "the question for the trial commissioner to consider is not the amount of compensation the claimant actually received, but to ascertain what was the level of compensation which was *payable* to the claimant at that time."[4] Id. (Emphasis in the original.)

Thus, although we did find "a certain level of ambiguity in the stipulation," id., we held that because the agreement was clearly intended to be a full and final settlement of the claimant's permanency claim in 2002, the trial commissioner had reasonably determined, based on the "four corners," id., of the stipulation document, that the 20% permanency rating was "payable" and the respondents were therefore entitled to a credit of 20 percent.

In DiGrazio v. CBL Trucking, 3479 CRB-8-96-11 (February 18, 1998), this board reversed the decision of a trial commissioner who denied a Form 36 after failing to take into account a prior voluntary agreement for permanent partial disability benefits that had

[4] In Francis v. Rushford Centers, Inc., 5428 CRB-8-09-2 (February 8, 2010), this board recited the following definition of "payable" as set forth in Black's Law Dictionary (5th Edition): "Capable of being paid; suitable to be paid, admitting or demanding payment; justly due; legally enforceable. A sum of money is said to be payable when a person is under an obligation to pay it. Payable may therefore signify an obligation to pay at some future time, but when used without qualification, term normally means that the debt is payable at once, as opposed to "'owing.'"

resulted in the payment of compensation. The respondents had filed the Form 36 following payments to the claimant for permanency associated with a voluntary agreement of August 31, 1994, and sought to open the voluntary agreement on the basis "that it was entered into as the result of mutual mistake, because the [claimant's] prior back injuries were not accounted for in calculating benefits due for disability." Id. Given that the record did contain a voluntary agreement dated February 9, 1984 documenting an award of permanency benefits for the claimant's prior back injuries, this board remanded the matter with instructions to grant the Form 36. We stated:

> Whether the claimant actually received compensation on account of that permanent partial impairment (and we note that he does not suggest that such compensation was not received) is immaterial under § 31-349(a); if compensation was *payable* for such disability, it must be considered in any subsequent award for permanent partial disability to the same body part. (Emphasis in the original.)

Id.

Finally, in Milewski v. Stratford, 5483 CRB-4-09-7 (July 20, 2010), this board affirmed the decision of the trial commissioner to deny a claim for interest and penalties arising from the allegedly late payment of permanent partial disability benefits. The commissioner found that although the parties had entered into a voluntary agreement setting forth the authorized treating physician, the compensation rate, and the date of maximum medical improvement, the agreement failed to establish the percentage of disability associated with the date of maximum medical improvement. Given that the medical reports in the record also "were insufficient to establish the attainment of maximum medical improvement by the claimant which would trigger an obligation to

pay benefits under § 31-295(c)," id., the trial commissioner declined to assess penalties or interest against the respondents.[5]

In reviewing Milewski, we discussed this board's reasoning in Ouelette, supra, and noted that in Ouelette, we "upheld a determination by the trial commissioner that what constitutes a 'payable' obligation must be determined from the agreements that document the award or agreement." Id. However, in the instant appeal, both parties concede that although they reached a verbal agreement to compromise the initial ratings at 18.5 percent, the agreement was never memorialized by way of a voluntary agreement or Stipulation to Date. See November 17, 2016 Findings and Order, Findings, ¶ 6; August 22, 2016 Transcript, p. 2; Appellant's Brief, p. 8. As such, we find this matter can be distinguished from both Ouelette and DiGrazio, in which the prior permanency awards to the claimant were memorialized, albeit imperfectly. As the instant claimant points out:

> there are no agreements that document the award or agreement at the 20% RME pre-surgery rating issued by Dr. Staub in 2010, just as there are no agreements that document the award or agreement at the 17% rate as assigned by Dr. Shea. The only agreement between the parties is that they would compromise the ratings at 18.5%, which at that time became *payable* by the Respondents and was in fact *paid*. (Emphasis in the original.)

Appellant's Brief, p. 8.

Thus, in the absence of any documentation from the parties setting forth the terms of the initial agreement to compromise the permanency ratings, we are unable to discern

[5] General Statutes § 31-295 (c) states in relevant part: "If the employee is entitled to receive compensation for permanent disability to an injured member in accordance with the provisions of subsection (b) of section 31-308, the compensation shall be paid to him beginning not later than thirty days following the date of the maximum improvement of the member or members and, if the compensation payments are not so paid, the employer shall, in addition to the compensation rate, pay interest at the rate of ten per cent per annum on such sum or sums from the date of maximum improvement…."

the reason why the 20 percent rating provided by Dr. Staub should be deemed any more "payable" than the 17 percent rating provided by Dr. Shea.[6] The respondents argue that:

> it was the claimant who decided to compromise the PPD ratings between the Commissioner's examiner and the respondents' examiner rather than proceed to a formal hearing where the Trial Commissioner would decide between the two ratings. The claimant knowingly made this tactical decision to compromise the rating and now, with the benefit of hindsight, cannot seek a greater increase in what is currently payable.

Appellees' Brief, p. 6.

We do not find this argument persuasive; both parties stood to benefit from the compromise, as it was impossible to predict whether the trier would adopt the 20 percent or 17 percent rating at a formal hearing. We are similarly unpersuaded by the respondents' contention that a determination by this board that the compromised rating constituted "payable" compensation would leave future respondents with little incentive to compromise a permanency rating if they were not able to take credit for the higher amount at a later date. We disagree; a memorialized agreement setting forth the terms of a compromised rating would protect the ability of both parties to properly calculate the correct amount of a future credit when such a credit is warranted.

[6] We recognize that this board has held that a single permanency rating assigned some eleven years after the initial date of injury sufficed to create a "payable" compensation award. In Johnson v. Manchester Bus Service, Inc., 3472 CRB-1-96-11 (April 1, 1998), this board remanded the decision of a trial commissioner who, after concluding that the claimant had sustained a 15 percent partial disability of the back for a date of injury in 1988, of which 5 percent was deemed by Gerald Becker, M.D., to be attributable to an earlier work-related accident in 1977, declined to grant the respondents a credit for the 5 percent. In reviewing the matter, we noted that "the record *and the findings* indicate that the claimant sustained a work-related injury in 1977 which resulted in a permanent impairment to his back." (Emphasis added.) Id. As such, we find the instant matter can be distinguished from Johnson given that in Johnson, the permanency ratings at issue were ultimately memorialized by the trier in his findings, whereas in the instant matter, the compromised ratings were solely the subject of a verbal agreement by the parties.

There is error; the November 17, 2016 Findings and Order of the Commissioner acting for the Seventh District is accordingly affirmed in part, reversed in part, and remanded for additional proceedings consistent with this opinion.

Commissioners Daniel E. Dilzer and Peter C. Mlynarczyk concur.