CASE NO. 6243 CRB-5-18-1 : COMPENSATION REVIEW BOARD
CLAIM NO. 800177227

JESSICA CHADBOURNE : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : JANUARY 8, 2019

STATE OF CONNECTICUT/DEPARTMENT
OF MENTAL HEALTH AND
ADDICTION SERVICES
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLEE

and

GALLAGHER BASSETT SERVICES, INC.
ADMINISTRATOR

APPEARANCES: The claimant was represented by Jonathan H. Dodd, Esq., The Dodd Law Firm, L.L.C., Ten Corporate Center, 1781 Highland Avenue, Suite 105, Cheshire, CT 06410.

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

This Petition for Review from the February 1, 2018 Revised Finding and Orders After Motions to Correct From Both Parties of Christine L. Engel, the Commissioner acting for the Sixth District, was heard June 29, 2018 before a Compensation Review Board panel consisting of Commissioners Scott A. Barton, Peter C. Mlynarczyk and Brenda D. Jannotta.[1]

[1] The Petition for Review filed on January 24, 2018 indicates that this appeal was being taken from the January 10, 2018 Finding and Orders. For purposes of accuracy, we will rely on the February 1, 2018 "Revised Finding and Orders after Motions to Correct From Both Parties" in examining the merits of the appeal.

OPINION

SCOTT A. BARTON, COMMISSIONER: The claimant has appealed from the February 1, 2018 Revised Finding and Orders after Motions to Correct from Both Parties (finding) issued by Commissioner Christine L. Engel (commissioner). In the finding, the commissioner determined that for the purposes of General Statutes § 5-142 (a), the claimant's compensation rate should be calculated on the basis of a twenty-eight hour workweek. [2] The claimant argues that her job was based on a thirty-two hour workweek.

[2] General Statutes § 5-142 (a) states: "If any member of the Division of State Police within the Department of Emergency Services and Public Protection or of any correctional institution, or any institution or facility of the Department of Mental Health and Addiction Services giving care and treatment to persons afflicted with a mental disorder or disease, or any institution for the care and treatment of persons afflicted with any mental defect, or any full-time enforcement officer of the Department of Energy and Environmental Protection, the Department of Motor Vehicles, the Department of Consumer Protection who carries out the duties and responsibilities of sections 30-2 to 30-68m, inclusive, the Office of Adult Probation, the division within the Department of Administrative Services that carries out construction services or the Board of Pardons and Paroles, any probation officer for juveniles or any employee of any juvenile detention home, any member of the police or fire security force of The University of Connecticut, any member of the police or fire security force of Bradley International Airport, any 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 and 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, the Chief State's Attorney, the Chief Public Defender, the Deputy Chief State's Attorney, the Deputy Chief Public Defender, any state's attorney, any assistant state's attorney or deputy assistant state's attorney, any public defender, assistant public defender or deputy assistant public defender, any chief inspector or inspector appointed under section 51-286 or any staff member or employee of the Division of Criminal Justice or of the Division of Public Defender Services, or any Judicial Department employee sustains any injury (1) while making an arrest or in the actual performance of such police duties or guard duties or fire duties or inspection duties, or prosecution or public defender or courthouse duties, or while attending or restraining an inmate of any such institution or as a result of being assaulted in the performance of such person's duty, or while responding to an emergency or code at a correctional institution, and (2) that is a direct result of the special hazards inherent in such duties, the state shall pay all necessary medical and hospital expenses resulting from such injury. If total incapacity results from such injury, such person shall be removed from the active payroll the first day of incapacity, exclusive of the day of injury, and placed on an inactive payroll. Such person shall continue to receive the full salary that such person was receiving at the time of injury subject to all salary benefits of active employees, including annual increments, and all salary adjustments, including salary deductions, required in the case of active employees, for a period of two hundred sixty weeks from the date of the beginning of such incapacity. Thereafter, such person shall be removed from the payroll and shall receive compensation at the rate of fifty per cent of the salary that such person was receiving at the expiration of said two hundred sixty weeks as long as such person remains so disabled, except that any such person who is a member of the Division of State Police within the Department of Emergency Services and Public Protection shall receive compensation at the rate of sixty-five per cent of such salary as long as such person remains so disabled. Such benefits shall be payable to a member of the Division of State Police after two hundred sixty weeks of disability only if the member elects in writing to receive such benefits in lieu of any benefits payable to the employee under the

Twenty-eight hours per week was the standard workweek, and as a condition of her employment, she was required to work four hours per week standard overtime. The commissioner, in reliance upon an arbitration decision limiting vacation and personal leave accruals to those earned based on a twenty-eight hour workweek, determined that for the purposes of § 5-142 (a), the claimant should be compensated based on a twenty-eight hour workweek. Upon review, we conclude that this was not the "full salary" the claimant was earning at the time she was injured and our precedent such as Boulay v. Waterbury, 9 Conn. Workers' Comp. Rev. Op. 111, 941 CRD-5-89-11 (April 8, 1991), *aff'd*, 27 Conn. App. 483 (1992), *cert. denied*, 223 Conn. 905 (1982), stands for the proposition that a collective bargaining agreement cannot agree to provide for a different level of benefits than is mandated under our statute. Accordingly, we vacate the finding as to the claimant's compensation rate and remand for a new finding based on the claimant working a thirty-two hour workweek.

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state employees retirement system. In the event that such disabled member of the Division of State Police elects the compensation provided under this subsection, no benefits shall be payable under chapter 568 or the state employees retirement system until the former of the employee's death or recovery from such disability. The provisions of section 31-293 shall apply to any such payments, and the state of Connecticut is authorized to bring an action or join in an action as provided by said section for reimbursement of moneys paid and which it is obligated to pay under the terms of this subsection. All other provisions of the workers' compensation law not inconsistent with this subsection, including the specific indemnities and provisions for hearing and appeal, shall be available to any such state employee or the dependents of such a deceased employee. All payments of compensation made to a state employee under this subsection shall be charged to the appropriation provided for compensation awards to state employees. On and after October 1, 1991, any full-time officer of the Department of Energy and Environmental Protection, the Department of Motor Vehicles, the Department of Consumer Protection who carries out the duties and responsibilities of sections 30-2 to 30-68m, inclusive, the Office of Adult Probation, the division within the Department of Administrative Services that carries out construction services or the Board of Pardons and Paroles, any probation officer for juveniles or any employee of any juvenile detention home, the Chief State's Attorney, the Chief Public Defender, the Deputy Chief State's Attorney, the Deputy Chief Public Defender, any state's attorney, assistant state's attorney or deputy assistant state's attorney, any public defender, assistant public defender or deputy assistant public defender, any chief inspector or inspector appointed under section 51-286 or any staff member or employee of the Division of Criminal Justice or the Division of Public Defender Services, or any Judicial Department employee who sustains any injury in the course and scope of such person's employment shall be paid compensation in accordance with the provisions of section 5-143 and chapter 568, except, if such injury is sustained as a result of being assaulted in the performance of such person's duty, any such person shall be compensated pursuant to the provisions of this subsection."

The following facts are relevant to our inquiry. The formal hearing in this matter involved three issues: the compensability of the claimant's hypersomnia; the length of time the claimant was entitled to temporary total disability benefits; and the compensation rate at which the claimant was entitled to § 5-142 (a) benefits. The first two issues were resolved in the finding and were not appealed and we will not address them at this juncture. The commissioner noted in the finding that there had been a prior formal hearing in this claim and took administrative notice of various findings from that decision. As for the issues regarding § 5-142 (a), the commissioner noted that the parties had stipulated that this statute applied to this claim and that pursuant to this statute, the claimant was entitled to her "full salary" while she was totally disabled. Findings, ¶ 4. She also noted that counsel for the claimant cited Vecca v. State, 29 Conn. App. 559 (1992), for the proposition that "full salary" was defined as "an employee's base pay prior to the inclusion of overtime pay or other salary enhancements." Id., 563; Findings, ¶ 5.

The commissioner considered testimony from the claimant and from Attorney Sandra Fae Brown-Brewton, the Assistant Chief of Labor Relations for the State of Connecticut Office of Policy and Management, Office of Labor Relations, on the issue of what the claimant's "full salary" entailed. The claimant testified that she was hired for her current position in 2011 by the State of Connecticut (state) at the Department of Mental Health and Addiction Services (DMHAS), was paid for eight hours of work per day, and her workweek was thirty-two hours per week. The commissioner noted that at a prior formal hearing on August 27, 2014, the claimant testified that her position was a "28-hour position" and the additional four hours per week were called "built-in standard

overtime." August 27, 2014 Transcript, pp. 16-17; Findings, ¶ 27. The claimant noted that her union had filed a grievance at some point after 2011 as to the classification of twenty-eight hours per week as regular work hours and four hours as overtime, but the commissioner noted that she did not submit a copy of such a grievance decision as evidence. The claimant did testify that in most two-week periods, she worked seventy-two hours.

Brown-Brewton testified as to the respondent's position and presented as evidence an Opinion and Award between the state and the claimant's bargaining unit dated June 13, 2015 (arbitration decision). See Respondent's Exhibit 2 (July 17, 2017). She testified that this arbitration decision dealt with vacation and personal time accruals which the union believed should have been calculated on the basis of a thirty-two hour workweek. Brown-Brewton also testified that "28 plus 4 employees" had basic employment of twenty-eight hours per week and regularly work four or more hours a week of overtime. Any hours beyond twenty-eight hours per week is considered overtime no matter how often the employee works those hours. Brown-Brewton said that the union had previously brought up the issue of deeming "28 plus 4 employees" as being "thirty-two hour per week" employees, but the union withdrew that issue. She also testified that the state's position is that the base pay for someone hired to work or scheduled to work twenty-eight hours is based on a twenty-eight hour workweek, and any hours beyond that are deemed overtime. Their base pay is based on a twenty-eight hour workweek and not a thirty-two hour workweek.

The commissioner also noted that the claimant's hours of employment and weekly wage determination were governed by a collective bargaining agreement between

her union and the state. The commissioner also reviewed the terms of the arbitration decision and noted that it determined that the state did not violate the collective bargaining agreement in the manner in which it calculated personal leave accruals for the "28+4 employees" at DMHAS (utilizing a twenty-eight hour workweek) thus denying the union's grievance. The commissioner also noted that the claimant had not raised the workweek issue herself with her union; nor were they aware she had filed a workers' compensation claim.

Based on these facts, the commissioner determined that the claimant's testimony that her base salary should be calculated on a thirty-two hour per week basis was not persuasive. She found her testimony from the 2014 formal hearing that her position was a twenty-eight hour a week position persuasive but her testimony as to the number of hours she generally worked at present was not relevant to her compensation rate in 2012. Reviewing the arbitration decision, the commissioner determined that it allowed her to conclude that it created a separate class of "28+4 employees" at DMHAS, and by reading the arbitration decision in conjunction with Brown-Brewton's testimony, which was deemed persuasive, it enabled the commissioner to conclude that the base salary of a "28+4 employee" should be calculated on a twenty-eight hour workweek. As a result, in Order, ¶ III of the finding, the commissioner determined that the claimant's compensation rate pursuant to § 5-142 (a) should be calculated based on a twenty-eight hour workweek.

Both the claimant and the respondent filed motions to correct the original finding. The claimant's motion to correct was denied in its entirety while the commissioner incorporated some corrections suggested by the respondent in the revised finding which reached the same result as to what relief was due the claimant. The claimant filed a

timely appeal from the finding, arguing that it was error to find the claimant's base salary for the purposes of § 5-142 (a) was based on a twenty-eight hour workweek and not a thirty-two hour workweek. The respondent argues that the reasoning in the arbitration decision should be binding on this tribunal and the commissioner was correct to rely upon this decision.

We note that the facts relevant to this appeal are not the subject of a substantive dispute. We will therefore focus our review on appeal to whether the commissioner appropriately applied the law. Nonetheless, we still extend great deference to the findings of a commissioner. "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), *quoting* Thalheim v. Greenwich, 256 Conn. 628, 656 (2001). "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).

The essential question is what defines the term "full salary" for the claimant? The respondent argues that pursuant to the collective bargaining agreement, the "full salary" was what the claimant earned in a twenty-eight hour workweek, and her earnings from

the four hours of "overtime" under the "28+4" schedule were in excess of her "full salary." The claimant argues that that constitutes a semantic argument and her standard workweek during the period relevant to calculation of a § 5-142 (a) compensation rate was a thirty-two hour workweek. Upon review, we conclude that based on the facts herein, a twenty-eight hour workweek was not a "full" workweek for the claimant and compensating her on that basis would be providing her less than her "full salary" during her period of disability.

We have reviewed the relevant case law on this matter. We note that it is clear that overtime earnings have generally been determined to be above and beyond the "full salary" that a claimant should receive as a benefit under § 5-142 (a). See Palmer v. State/Fairfield Hills, 9 Conn. Workers' Comp. Rev. Op. 53, 900 CRD-4-89-7 (February 4, 1991), and Vecca, supra, 561-62. The claimant points to a letter offering her the current position as establishing a standard schedule of four eight-hour shifts per week. See Claimant's Exhibit A (August 27, 2014). The evidence presented at the formal hearing established that the claimant was paid at the same hourly rate for the hours she worked after she worked twenty-eight hours per week up to working thirty-two hours per week. The claimant also argues that the testimony of Brown-Brewton and the terms of the arbitration decision should be limited to the issue of vacation and personal time accruals and are not dispositive of the issue of what a "full salary" is for the claimant for the purposes of § 5-142 (a).

The respondent's brief essentially restates one point repeatedly: this decision is governed by a binding arbitration decision regarding the terms of the collective bargaining agreement between the state and the claimant's labor union. As the

respondent views this situation, the commissioner was bound by the terms of the arbitration decision and was therefore obligated to rule against the claimant's position as to how her "full salary" was to be calculated for the purposes of § 5-142 (a). The respondent cites Bulger v. Lieberman, 39 Conn. App. 772 (1995), for this proposition. We have read Bulger and it involves a wrongful termination decision, not an issue relevant to workers' compensation or hazardous duty benefits. Moreover, in Bulger, the court referenced Genovese v. Gallo Wine Merchants, Inc., 226 Conn. 475 (1993), in which issues pertaining to Chapter 568 were litigated, and the Bulger court held that the matter did not "fall within the exceptions explicated in Genovese…." Bulger, supra, 773. Therefore, we do not deem Bulger, or another case relied upon by the respondent, Spiotti v. Wolcott, 326 Conn. 190 (2017), as dispositive of the issues herein.[3] We also reject the respondent's reliance on Garcia v. Hartford, 292 Conn. 334 (2009), for the proposition that the claimant was obligated to exhaust her rights under a grievance process prior to seeking an adjudication of this dispute before the Workers' Compensation Commission (commission). Garcia dealt with issues solely within a scope of a collective bargaining agreement and did not deal with issues under this commission's jurisdiction.[4]

The Appellate Court in Boulay, supra, affirmed this commission's position that the commission must interpret its statutes independently and is not bound by collective

[3] While Spiotti v. Wolcott, 326 Conn. 190 (2017), did deal with issues pertaining to an arbitration decision and a collective bargaining agreement, it did not deal with Chapter 568 or with General Statutes § 5-142 (a).

[4] We also question the reference to Szudora v. Fairfield, 214 Conn. 552 (1990), in the respondent's brief as the claimant did not cite this case as authority to reverse the commissioner. While Szudora does deal with the issue of "base salary," we noted that the provisions of General Statutes § 7-433c, which are materially different from those of General Statutes § 5-142 (a), required a calculation of all "compensation" received by the claimant to ascertain a compensation rate, which included overtime earnings. Id., 557-59. Our precedent is that for § 5-142 (a), only a claimant's base salary can be considered in the calculation of benefits. See Palmer v. State/Fairfield Hills, 9 Conn. Workers' Comp. Rev. Op. 53, 900 CRD-4-89-7 (February 4, 1991), and Vecca v. State, 29 Conn. App. 559 (1992).

bargaining agreements which may result in an award of benefits inconsistent with our statutes. Since that decision, there have been further decisions demonstrating that a claimant cannot bargain away his or her rights in order to seek redress before this commission for benefits under the statute. See Leonetti v. MacDermid, Inc., 310 Conn. 195 (2013), and Zolla v. John Cheeseman Trucking, Inc., 5261 CRB-5-07-8 (August 4, 2008), *appeal dismissed*, A.C. 30251 (March 5, 2009).

Nonetheless, had the arbitration decision unequivocally determined that the claimant's "full salary" was based on a twenty-eight hour workweek, we would affirm the finding in this case, as the commissioner's decision would have been based on probative evidence relevant to the issue at hand. After reviewing the arbitration decision, we find it did not address this issue directly and we are unwilling to infer that it was intended to address this issue. The sole issue addressed in the arbitration decision was the accrual of personal leave time as provided for in the collective bargaining agreement. The state noted that "28+4 employees" had been accruing time in the same manner since 1988 and argued that changing the accrual approach should be left to future negotiations. See Respondent's Exhibit 2 (July 17, 2017), p. 8.

In his decision, the arbitrator noted that the relevant provision of the collective bargaining agreement did not mention "28+4 employees" id., 9, and the state was asserting a practice in place since 1988. Id., 9-10. Since "[n]otions of fairness and equity… simply cannot be read into the Parties' Agreement," the arbitrator ruled for the state. Id., 10. The arbitration decision does not discuss the term "salary" or "overtime" at any point within the four corners of the document. A more reasonable inference from reading this document is that the position proffered by the state in this matter is that at

some point in the past the state decided to limit personal time accruals for part-time employees by adopting the "28+4 schedule" and the union had failed to address the issue in previous negotiations.

We reach this conclusion in part based on what the commonly accepted definition of "overtime" is. As defined in Black's Law Dictionary (8th Ed. 2004), overtime is "[t]he hours worked by an employee in excess of a *standard* day or week." (Emphasis added.) The claimant's testimony was that her standard workweek was that of four eight-hour shifts. Indeed, she described that difference between twenty-eight hours and thirty-two hours a week as being "built-in *standard* overtime." (Emphasis added.) Findings, ¶ 27. Our review of Brown-Brewton's testimony indicates that she did not refute this characterization. Her testimony was that the state could mandate that the claimant work the difference between twenty-eight hours and thirty-two hours at the state's direction. See July 17, 2017 Transcript, pp. 30-31. As a result, the evidence herein was that the claimant's *standard* workweek was thirty-two hours per week.

Essentially, the paradigm that the state persuaded the commissioner to adopt in this case was that the claimant's "standard workweek" was twenty-eight hours a week and that her full salary should be calculated for § 5-142 (a) purposes on that basis. The difficulty with this theory is that when the evidence showed the claimant was actually expected to work thirty-two hours a week, the "28+4" schedule yields what the Appellate Court in Vecca, supra, deemed "bizarre results." Id., n.4. In Vecca, in which the Appellate Court declined to allow a claimant to add overtime earnings to the base for § 5-142 (a), the court noted that "[u]nder the claimant's interpretation of the statute, two similarly situated state employees will receive different benefits under § 5-142 (a) simply

because one happened to work more overtime or on a shift paying a differential during the pay period preceding the injury." Id. We are not persuaded that it is a more reasonable result to have two different employees who regularly worked a thirty-two hour workweek shift receiving a different level of compensation under this statute based on whether their employer classified certain work hours as "standard overtime."[5] Since a claimant is entitled to compensation based on his or her "full salary," see Jones v. Mansfield Training School, 220 Conn. 721, 725 (1992), we believe that under the facts as presented herein, the claimant's full salary must be calculated based on what a commonly understood "base salary" would be; i.e., the actual hours she was contractually obligated to work on a regular basis during the period prior to injury, regardless if such hours are labeled "overtime" by her employer.

Therefore, we vacate Order III of the finding and remand this matter to establish the claimant's § 5-142 (a) compensation rate as being based on a thirty-two hour workweek.

Commissioners Peter C. Mlynarczyk and Brenda D. Jannotta concur in this opinion.

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[5] See also Rohmer v. New Haven, 5811 CRB-3-12-12 (December 23, 2013), n.4, in which this tribunal stated the following: "The claimant argues that the defendant's collective bargaining agreement with the claimant constitutes a "waiver" of any defense to any alleged "double recovery" from a disability pension and the claimant's subsequent employment earnings. Claimant's Brief, pp. 9-12. We disagree. First, we find the issue of waiver is essentially an issue of fact, see (L & R Realty v. Connecticut National Bank, 246 Conn. 1, 8 (1998)) where the trial commissioner resolved this issue in a manner adverse to the claimant. The commissioner was not obligated to find a waiver on another issue bound the respondents on the issue herein. We may not second-guess this determination on appeal. In addition, we have long held that collective bargaining agreements may not supersede the provisions of Chapter 568. See Boulay v. Waterbury, 9 Conn. Workers' Comp. Rev. Op. 111, 941 CRD-5-89-11 (April 8, 1991), *aff'd*, 27 Conn. App. 483 (1992), *cert. denied*, 223 Conn. 905 (1982), and Morales v. Bridgeport, 5750 CRB-4-12-5 (April 29, 2013)."