CASE NO. 6246 CRB-4-18-2 : COMPENSATION REVIEW BOARD
CLAIM NO. 400081416

ANTONIO VITTI : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : JANUARY 17, 2019

CITY OF MILFORD
EMPLOYER

and

PMA MANAGEMENT CORPORATION
OF NEW ENGLAND
THIRD-PARTY ADMINISTRATOR
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by David J. Morrissey, Esq., Morrissey, Morrissey & Mooney, L.L.C., 203 Church Street, P.O. Box 31, Naugatuck, CT 06770.

The respondents were represented by Scott W. Williams, Esq., Williams Law Firm, L.L.C., 2 Enterprise Drive, Suite 412, Shelton, CT 06484.

This Petition for Review from the February 1, 2018 Findings and Award/Order of the Commissioner acting for the Fourth District was heard August 17, 2018 before a Compensation Review Board panel consisting of Commissioners Scott A. Barton, Jodi Murray Gregg and Peter C. Mlynarczyk.[1]

[1] We note that one motion for extension of time was granted during the pendency of this appeal.

OPINION

SCOTT A. BARTON, COMMISSIONER. The claimant appeals from the February 1, 2018 Findings and Award/Order (finding) issued by Commissioner Randy L. Cohen (commissioner). In the finding, the commissioner determined that the claimant was not entitled to a 100 percent permanent partial disability (PPD) payment for loss of his native heart. The commissioner did conclude, however, that the claimant was entitled to an award of a 23 percent permanent impairment for the loss of use/function to his transplanted heart.

The claimant brought this claim for benefits pursuant to the provisions of General Statutes § 7-433c.[2] The claimant was employed as a police officer for the respondent-employer, City of Milford. In August 2010, the claimant experienced a cardiac event. The claimant underwent an angioplasty procedure, at which time an

[2] General Statutes § 7-433c states: "(a) Notwithstanding any provision of chapter 568 or any other general statute, charter, special act or ordinance to the contrary, in the event a uniformed member of a paid municipal fire department or a regular member of a paid municipal police department who successfully passed a physical examination on entry into such service, which examination failed to reveal any evidence of hypertension or heart disease, suffers either off duty or on duty any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability, he or his dependents, as the case may be, shall receive from his municipal employer compensation and medical care in the same amount and the same manner as that provided under chapter 568 if such death or disability was caused by a personal injury which arose out of and in the course of his employment and was suffered in the line of duty and within the scope of his employment, and from the municipal or state retirement system under which he is covered, he or his dependents, as the case may be, shall receive the same retirement or survivor benefits which would be paid under said system if such death or disability was caused by a personal injury which arose out of and in the course of his employment, and was suffered in the line of duty and within the scope of his employment. If successful passage of such a physical examination was, at the time of his employment, required as a condition for such employment, no proof or record of such examination shall be required as evidence in the maintenance of a claim under this section or under such municipal or state retirement systems. The benefits provided by this section shall be in lieu of any other benefits which such policeman or fireman or his dependents may be entitled to receive from his municipal employer under the provisions of chapter 568 or the municipal or state retirement system under which he is covered, except as provided by this section, as a result of any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability. As used in this section, 'municipal employer' has the same meaning as provided in section 7-467.

(b) Notwithstanding the provisions of subsection (a) of this section, those persons who began employment on or after July 1, 1996, shall not be eligible for any benefits pursuant to this section."

intra-aortic balloon pump was inserted. The procedure ultimately failed and further diagnostic testing revealed that the claimant suffered from giant cell myocarditis. On September 28, 2010, the claimant underwent a heart transplant.[3]

The appeal before us asks whether the commissioner erred in failing to award PPD benefits for the loss of function of the claimant's native heart rather than basing the PPD rating on the claimant's transplanted heart. In essence, the claimant asks us to determine if the commissioner erred as a matter of law in failing to conclude that the claimant sustained a 100 percent loss of use of his heart rather than the 23 percent loss of use of the transplanted heart found by the commissioner. We affirm the finding of the commissioner.

Benefits awarded pursuant to § 7-433c may include PPD available under General Statutes § 31-308 (b). See Costello v. Fairfield, 214 Conn. 189 (1990). Having concluded that the claimant satisfied the prerequisites for an award of PPD, the commissioner was then required to determine the percentage of the loss or use or function of the claimant's heart.

The following facts are pertinent to our inquiry. The claimant underwent a heart transplant on September 28, 2010. Prior to his heart transplant, the claimant was a detective in the respondent municipality's police force. The claimant returned to work part-time in April/May 2011 as a detective in the Special Investigations Unit. He commenced full-time employment as a detective in January 2012, and then retired from

[3] The present matter has been before this board on two other occasions. See Vitti v. Milford, 5877 CRB-4-13-8 (September 16, 2014) (Vitti I) and Vitti v. Milford, 6066 CRB-4-15-12 (April 21, 2017), appeal pending, A.C. 40399 (May 2, 2017) (Vitti II). Both Vitti I and Vitti II concerned whether the claimant's heart problem, giant cell myocarditis, was a matter for which General Statutes § 7-433c benefits may be awarded. In Vitti II, this board affirmed trial commissioner Jack Goldberg's conclusion that the claimant's giant cell myocarditis fell under the ambit of § 7-433c. That conclusion is currently under appeal as noted herein.

the Milford Police Department in December 2014. Between January 2012 and his December 2014 retirement, the claimant worked as a liaison between the Milford school system and the juvenile court system. In that capacity, he investigated sexual assaults, child abuse and missing persons. See Findings, ¶¶ 8-10.

Following his retirement, the claimant procured full-time employment as the Executive Director of the Rape Crisis Center of Milford. Findings, ¶ 11. The commissioner, in her findings, reviewed some of the activities and limitations to which the claimant testified.[4]

The evidence proffered before the commissioner included testimony and reports from Donald Rocklin, a board-certified cardiologist. Rocklin opined that even with the claimant's transplanted heart, the claimant endured some loss of cardiac function. Rocklin noted the claimant's need for maintaining a pharmaceutical regimen as well as a loss of exercise stamina. He also opined that the claimant's cardiac functionality was stable following the heart transplant.[5] Rocklin was of the opinion that the claimant had suffered a 23 percent loss of use/function of his heart following the transplant. See Respondents' Exhibit 2, pp. 27-28. Rocklin further opined that prior to the heart transplant, the claimant suffered from a 100 percent loss of cardiac function and had reached maximum medical improvement because "that was the best they had to offer him." Id., 56.

[4] The claimant testified to, inter alia, going to the gym regularly, walking for one hour multiple times a week, and having completed a 5K walk/run. He also testified that he has been without chest pain since his transplant and has traveled both out of state and out of the country. Conversely, the claimant testified to not being able to swim in pools due to fear of bacteria exposure and that he was now afraid to go skiing. In addition, he testified that he is concerned about what he eats and the effects of certain foods. The claimant also alleged nerve-based pain in his left leg. See Findings, ¶ 12.

[5] The trial commissioner noted that at the time of Dr. Rocklin's deposition in 2016, the doctor indicated that the claimant's cardiac issues were largely stable. See Findings, ¶ 15.

Additionally, there were reports from Chief of Cardiology, Joseph Robert Anthony, and Stephen M. Demeter, M.D., assessing the claimant's post-transplant cardiac permanent disability at a 28 percent or a 12 percent loss of use/function to the heart, respectively. See Respondents' Exhibit 3, p. 2; Respondents' Exhibit 5, p. 98. The commissioner concluded that the claimant's PPD was to be assessed for his transplanted heart and that he was entitled to a 23 percent PPD rating to the heart.

Evaluation of PPD following a successful heart transplant is a novel issue. The legal argument of the claimant rests largely on the statutory language of § 31-308 (b) and the rule of statutory construction compelled by General Statutes § 1-2z.[6] Section 31-308 (b) provides:

> 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 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….

The statute then lists the heart as one of the organs for which PPD may be awarded. The maximum number of weeks accorded to the total loss of the heart is 520 weeks. The claimant compares the loss of the native heart as analogous to the amputation of a limb.

[6] General Statutes § 1-2z states: "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."

In support of his position, the claimant cites Wrenn v. Connecticut Brass Co., 96 Conn. 35 (1921). In Wrenn, the claimant sustained a severe fracture to his arm. Surgeons attempted to repair the arm with a bone graft which initially appeared successful. Ultimately, the arm was rendered useless for "industrial purposes." Id., 36. In his brief, the claimant quotes the following from Wrenn:

> All reasonable efforts should be used to save an injured arm or limb, and thus prevent the necessity for its amputation, or its complete loss of usefulness…. Then, unless something further must be done to improve or heal the member, there exists the condition described in the statute (§ 5352), "the complete and permanent loss of the use of one arm," and the specific compensation provided by statute is then due.

Id., 36-37.

However, the Wrenn court also stated:

> The loss of the arm through amputation occurs when the amputation takes place. The complete and permanent loss of the use of the arm occurs when no reasonable prognosis for complete or partial cure, and no improvement in the physical condition or appearance of the arm can be reasonably made. Until such time the specific compensation for the loss of the arm, or for the complete and permanent loss of its use, cannot be made.

Id., 38.

In the present matter, the native heart was removed. However, unlike the state of the medical healing arts at the time of our Supreme Court's consideration of Wrenn, in the matter at bar, a heart transplant procedure did offer a "reasonable prognosis for complete or partial cure…." Id. Further, to the degree that the claimant's transplanted heart carried some degree of partial disability, our Act provided compensation for that condition.

We understand the claimant's argument that the complete removal of the heart organ is in effect an amputation of the organ. However, unlike the amputation of a limb, the claimant here was provided with an actual living replacement organ. That replacement organ served to improve the physical condition of the claimant. It not only extended his life, but vastly improved the quality of his life. That is not to say that the claimant's transplanted heart relieved the claimant of all degree of disability.

We are mindful that the purpose of PPD benefits pursuant to the provisions of § 31-308 (b) is to compensate a claimant for the deprivation of the scheduled body part. In Franko v. Schollhorn Co., 93 Conn. 13 (1918), Justice Wheeler wrote, "[t]he word 'loss' is used in the sense of deprivation. It designates the handicap under which the employee will suffer in the future. Compensation is based upon this loss. It is not measured, as are the other injuries resulting in partial incapacity, by impairment of earning power." Id., 17-18. See also Pizzuto v. Commissioner of Mental Retardation, 283 Conn. 257, 267 (2007), *citing* 4 A. Larson & L. Larson, Workers' Compensation Law (2004) § 80.04, p. 80-13 ("[p]ermanent partial schedule awards are based on medical condition after maximum improvement has been reached, and ignore wage loss entirely"); R. Carter et al., 19 Connecticut Practice Series: Workers' Compensation Law (2008 Ed.) § 8:77, p. 353.

The commissioner found that the claimant did not reach maximum medical improvement until November 21, 2013, more than a year after the heart transplant. Conclusion, ¶ D. Therefore, the only heart upon which the trier could have assessed the specific benefits accorded under § 31-308 (b) is the donated heart. Additionally, the determination of the date of maximum medical improvement is largely a factual question.

See Fusco v. New Haven-Board of Education, 6119 CRB-3-16-7 (October 13, 2017); Rodrigues v. American National Can, 4329 CRB-7-00-12 (January 2, 2002), *appeal withdrawn*, A.C. 22853 (April 30, 2002). As such, it is the province of the trial commissioner to assess the weight and credibility of the evidence proffered. The conclusions derived will not be disturbed unless contrary to law, without evidence or based on impermissible inferences. See Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988); Sanchez v. Edson Mfg., 175 Conn. App. 105 (2017); Gustafson v. SNET/Southern New England Telecommunications, 6191 CRB-2-17-4 (April 13, 2018).

The claimant did not file a motion to correct. This is not fatal to the appeal as the ultimate issue presented for review is more in the nature of a question of law. That being said, our review is limited and the facts as found by the commissioner are unchallenged. The trier's factual findings therefore stand. See Mack v. Blake Drug Co., 152 Conn. 523 (1965). Further, this board does not engage in de novo review. See Sanchez, supra.

The claimant references cases from outside our jurisdiction as persuasive authority buttressing his legal argument. The claimant directs us to the Ohio court's consideration of State ex rel. Kroger v. Stover (1987), 31 Ohio St.3d 229, 31 OBR 436, 510 N.E.2d 356. In Kroger, the claimant suffered severe burns resulting from ammonia exposure. Among the injuries to the claimant were corneal burns to both eyes. The claimant underwent a corneal transplant to his right eye but not to his left eye. The employer appealed, inter alia, the 80 percent loss of vision awarded for his right eye damage. On appeal, the employer argued that the claimant only sustained a 25 percent loss to his right eye as the corneal transplant to that eye corrected the claimant's vision in

that eye. The Kroger court determined that the issue at bar was whether a transplant eliminates the loss of vision or is a correction of vision.

The Ohio statute at issue in Kroger provided for an award of benefits "[f]or the permanent partial loss of sight of an eye … based upon the percentage of vision actually lost as a result of the injury…. R.C. 4123.57(C) does not specify the measures of correction to be included under the term 'uncorrected vision.' The court of appeals held that glasses, contact lenses or corneal transplants are all means by which vision is corrected." Id., 233. The Kroger court concluded that the corneal transplant to the eye was corrective and the claimant therefore did sustain a permanent loss of vision. Id., 234. The court additionally noted that future medical advances could require it to reconsider its holding.

> We acknowledge that advances in medical technology might, at some future time, permit the conclusion that a corneal transplant eliminates the loss (as for example the re-setting of broken bones could). But, at the present and on this record, a corneal transplant is no more than a correction to lost vision. Indeed, a patient might well decide not to have a corneal transplant.
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> Accordingly, we hold that the improvement of vision resulting from a corneal transplant is a correction to vision and, thus, shall not, on the current state of the medical art, be taken into consideration in determining the percentage of vision actually lost pursuant to R.C. 4123.57(C).

Id., 234.

However, the holding of the Kroger court was subsequently distinguished in State ex rel. General Elec. Corp. v. Industrial Com'n of Ohio, (2004), not reported, see N.E.2d WL 63961, in which the Ohio Tenth District Court of Appeals determined that the medical advancements predicted in Kroger, supra, were at hand. In General Electric, the

claimant prematurely developed cataracts following an industrial accident in which the claimant received an electric shock. The Ohio Tenth District Court of Appeals concluded that the repair of the claimant's cataracts by surgery and the insertion of intraocular lens implants restored the claimant's vision. Thus, the court concluded that the claimant did not have a permanent loss of vision and no award for that class of benefits was due.

However, on appellate review, the Supreme Court of Ohio reversed the lower court's opinion. See State ex rel. Gen. Elec. Corp. v. Indus. Comm., 103 Ohio St.3d 420, 2004-Ohio-5585, 816 N.E.2d 588. The Supreme Court concluded, inter alia, that the implant of an intraocular plastic lens was more in the nature of a prosthetic. The lens was corrective but did not provide all the benefits of the human eye. The court noted:

> Recognizing the miracle that is the eye, we note that the first prerequisite encompasses more than just enhancement of distance vision. In Kalhorn v. Bellevue (1988), 227 Neb. 880, 420 N.W.2d 713, for example, an intraocular lens implant raised claimant's postinjury visual acuity from 20/200 to 20/40. That improvement, however, was held insufficient to establish restoration. The Nebraska Supreme Court declared: "The evidence shows that unlike a human lens, the [claimant's implanted] plastic lens is monofocused, meaning that it focuses only at one distance. A human lens has the capability of changing its focus. The human lens differs from a plastic lens because the human lens has some ability to filter out light. The implant does not have any filtering powers. Therefore, the eye may become sensitive to bright light, according to expert testimony." Id., 227 Neb. at 885, 420 N.W.2d 713.

Id., 422.

The distinguishing factor here is that unlike the factual circumstances in General Electric, the claimant in this matter received a transplant of an actual human heart, not a mechanical or medical device. Given the claimant's pre-transplant physical condition and the other attempts to restore his cardiac function, it seems clear that maximum medical improvement was not reached until sometime after receipt of the donated heart.

As noted earlier in this opinion, the trier's factual findings remain as given. Thus, her conclusion that the claimant reached maximum medical improvement on November 21, 2013 stands.

We therefore affirm the February 1, 2018 Findings and Award/Order of the commissioner acting for the Fourth District.

Commissioners Jodi Murray Gregg and Peter C. Mlynarczyk concur.