CASE NO. 6253 CRB-5-18-3 CLAIM NOS. 500135295, 500157505 & 500159173	:	COMPENSATION REVIEW BOARD
RAYMOND THORN CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	JULY 18, 2019
UTZ QUALITY FOODS, INC. EMPLOYER		
and		
LIBERTY MUTUAL INSURANCE COMPANY PMA MANAGEMENT CORPORATION INSURERS RESPONDENTS-APPELLEES		

APPEARANCES:

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

Respondents Utz Quality Foods, Inc., and Liberty Mutual Insurance Company were represented by Christopher J. Powderly, Esq., Law Offices of Meehan, Roberts, Turret & Rosenbaum, 108 Leigus Road, First Floor, Wallingford, CT 06492.

Respondents Utz Quality Foods, Inc., and PMA Management Corporation were represented by Laurie M. Lavoie, Esq., McGann, Bartlett & Brown, L.L.C., 111 Founders Plaza, Suite 1201, East Hartford, CT 06108.

This Petition for Review from the February 27, 2018 Finding and Orders by Christine L. Engel, the Commissioner acting for the Fifth District, was heard December 21, 2018 before a Compensation Review Board panel consisting of Commissioners Jodi Murray Gregg, Peter C. Mlynarczyk and Brenda D. Jannotta.[1]

[1] We note that a motion for extension of time and a motion for continuance were granted during the pendency of this appeal.

OPINION

JODI MURRAY GREGG, COMMISSIONER. The claimant has appealed from the February 27, 2018 Finding and Orders (finding) of Commissioner Christine L. Engel (commissioner) in which the issue for determination concerned the claimant's compensation rate pursuant to General Statutes § 31-307b.[2] The commissioner concluded that the compensation rate must conform to the provisions of General Statutes § 31-310 (a), which establishes a compensation rate as of the date of the claimant's injury.[3] The claimant argues that although his disability was the result of an accepted

[2] General Statutes § 31-307b states: "If any employee who receives compensation under section 31-307 returns to work after recovery from his or her injury and subsequently suffers total or partial incapacity caused by a relapse from the recovery from, or a recurrence of, the injury, the employee shall be paid a weekly compensation equal to seventy-five per cent of his or her average weekly earnings as of the date of the original injury or at the time of his or her relapse or at the time of the recurrence of the injury, whichever is the greater sum, 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 not more than (1) the maximum compensation rate set pursuant to section 31-309 if the employee suffers total incapacity, or (2) 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 the employee suffers partial incapacity, for the year in which the employee suffered the relapse or recurrent injury and the minimum rate under this chapter for that year, and provided (A) the compensation shall not continue longer than the period of total or partial incapacity following the relapse or recurrent injury and (B) no employee eligible for compensation for specific injuries set forth in section 31-308 shall receive compensation under this section. The employee shall also be entitled to receive the cost-of-living adjustment provided in accordance with the provisions of section 31-307a commencing on October first following the relapse or recurrent injury which disables him or her…. In no event shall the employee receive more than the prevailing maximum compensation."

[3] General Statutes § 31-310 (a) states: "For the purposes of this chapter, the average weekly wage shall be ascertained by dividing the total wages received by the injured employee from the employer in whose service the employee is injured during the fifty-two calendar weeks immediately preceding the week during which the employee was injured, by the number of calendar weeks during which, or any portion of which, the employee was actually employed by the employer, but, in making the computation, absence for seven consecutive calendar days, although not in the same calendar week, shall be considered as absence for a calendar week. When the employment commenced otherwise than at the beginning of a calendar week, that calendar week and wages earned during that week shall be excluded in making the computation. When the period of employment immediately preceding the injury is computed to be less than a net period of two calendar weeks, the employee's weekly wage shall be considered to be equivalent to the average weekly wage prevailing in the same or similar employment in the same locality at the date of the injury except that, when the employer has agreed to pay a certain hourly wage to the employee, the hourly wage so agreed upon shall be the hourly wage for the injured employee and the employee's average weekly wage shall be computed by multiplying the hourly wage by the regular number of hours that is permitted each week in

2004 injury, the appropriate compensation rate in the present matter should have been determined as of 2012, which was the last period for which he earned wages. He argues that such a determination would best reflect the letter and spirit of our Workers' Compensation Act. Upon review, we conclude that the commissioner applied the appropriate legal standard to the facts of this case. As a result, we affirm the finding.

The commissioner reached the following factual findings which are pertinent to our review. She noted that the claimant had sustained three separate compensable injuries while in the employ of the respondent-employer. The commissioner enumerated them as follows: "File No. 500135295, right knee, 07/06/2004, Liberty Mutual; File No. 500157505, right knee, 09/10/2012, Liberty Mutual; and File No. 500159173, left knee, 07/06/2002, PMA." Findings, ¶ 1. She noted that another commissioner had previously determined that the claimant's right total knee surgery of May 21, 2015, was due to the

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accordance with the agreement…. Where the injured employee has worked for more than one employer as of the date of the injury and the average weekly wage received from the employer in whose employ the injured employee was injured, as determined under the provisions of this section, are insufficient to obtain the maximum weekly compensation rate from the employer under section 31-309, prevailing as of the date of the injury, the injured employee's average weekly wages shall be calculated upon the basis of wages earned from all such employers in the period of concurrent employment not in excess of fifty-two weeks prior to the date of the injury, but the employer in whose employ the injury occurred shall be liable for all medical and hospital costs and a portion of the compensation rate equal to seventy-five per cent of the average weekly wage paid by the employer to the injured employee, after such earnings have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contribution Act made from such employee's total wages received from such employer during the period of calculation of such average weekly wage, but not less than an amount equal to the minimum compensation rate prevailing as of the date of the injury. The remaining portion of the applicable compensation rate shall be paid from the Second Injury Fund upon submission to the Treasurer by the employer or the employer's insurer of such vouchers and information as the Treasurer may require…. No claim for payment of retroactive benefits may be made to the Second Injury Fund more than two years from the date on which the employer or its insurer paid such benefits in accordance with this subsection. In cases which involve concurrent employment and in which there is a claim against a third party, the injured employee or the employer in whose employ the injury was sustained or the employer's insurer shall advise the custodian of the Second Injury Fund if there is a third party claim, and the employee, employer or employer's insurer shall pursue its subrogation rights as provided for in section 31-293 and shall include in its claim all compensation paid by the Second Injury Fund and shall reimburse the Second Injury Fund for all payments made for compensation in the event of a recovery against the third party."

2004 date of injury and the claimant was entitled to temporary total and temporary partial disability benefits. She also noted that the parties had stipulated to several facts:

> a. Temporary total and temporary partial disability benefits after May 21, 2015, are due to Liberty Mutual's accepted July 6, 2004, injury to the right knee.
>
> b. For at least 52 weeks prior to his surgery on May 21, 2015, the claimant was collecting benefits on his *left knee injury* of July 6, 2002, which was insured by PMA. (Emphasis in finding.)
>
> c. The claimant did not earn any wages from the employer in the 52 weeks prior to his right knee surgery.
>
> d. The last date that the claimant earned any wages was September 10, 2012, the date of his second right knee injury. (Citation omitted.)
>
> e. The relapse statute, C.G.S. § 31-307b, applied to the right knee claim, too. (Citation omitted.)

Findings, ¶¶ 3.a.-e.

In her finding, the commissioner cited the relevant provisions of §§ 31-307b and 31-310 (a). The claimant proposed that the relapse rate for the right knee should be calculated based upon the wages earned during the fifty-two weeks prior to September 10, 2012, the last date the claimant actually worked for the employer. The claimant admitted that he did not receive wages during the fifty-two weeks prior to his right knee surgery, but cited as the basis for his argument the remedial nature of the Workers' Compensation Act and the generally accepted principle that the Act should "be liberally construed in favor of the Claimant." Appellant's Brief, p. 5.

The commissioner noted that although the claimant claimed there was an agreement in place with respondent-insurer PMA Management Corporation to establish a relapse rate of $509.08, this rate applied to the claimant's left knee. The claimant

"argued that the purpose of the relapse statute is to recognize a claimant's increased earning capacity at the time of his relapse." Findings, ¶ 9, *citing* Appellant's Brief, pp. 5-6.

The respondents offered a different interpretation of the pertinent law and statutes, arguing that the relapse rate must be based upon wages earned during the time period immediately preceding the relapse. In the matter at bar, this calculation leads to a compensation rate of zero. In the alternative, the respondents contend that the relapse rate should be calculated on the basis of the claimant's base compensation rate for the 2004 date of injury, which was $380.30. Respondents cite Kovalik v. E. Stiewing, Inc., 4905 CRB-7-04-12 (February 28, 2006), *appeal withdrawn*, A.C. 27480 (September 21, 2007), in support of their argument. In Kovalik, the claimant's relapse occurred while he was back at work on light duty, earning lower wages and collecting a differential payment from the compensation insurer. On appeal, this board held that the relapse rate should have been calculated without adding the differential payments, which calculation produced a low compensation rate for the time period preceding the relapse.

In the present matter, the commissioner noted that in Kovalik, the respondents had cited Trankovich v. Frenish, Inc., 47 Conn. App. 628 (1998), and Prescott v. Community Health Center, Inc., 4426 CRB-8-01-8 (August 23, 2002), which stood for the following propositions, respectively:

> 15. In Trankovich, the claimant had worked part-time for her employer for some time prior to working full-time. The CRB had ordered the part-time weeks omitted in calculating the base compensation rate. The Appellate Court reversed the CRB decision, stating that "when statutory language is clear and unambiguous we must presume that [the legislature] meant what it said." Trankovich v. Frenish, Inc., 47 Conn. App. 628, [631] (1998).

> 16. In Prescott, the claimant had suffered a non-work-related condition that caused her to work part-time when she had previously worked full-time. The part-time wages were supplemented by short- and long-term disability benefits provided by the employer. Those benefits were not included in calculating the compensation rate. See Prescott v. Community Health Center, Inc., 4426 CRB-8-01-8 (August 23, 2002).

Findings, ¶¶ 15-16.

The commissioner also found that in Prescott, this board had specifically stated that:

> Though a trace of inequity may occasionally appear to arise in situations where the 52-week calculation arguably fails to reflect a claimant's actual earning power during that time period, *this board does not have the authority to disregard the wages actually received by or owed to a claimant whenever it seems that some other barometer of a claimant's pre-injury earnings would facilitate a result more in keeping with the overall humanitarian spirit of the Workers' Compensation Act.* (Emphasis in finding.)

Findings, ¶ 17, *quoting* Prescott, supra.

On the basis of the foregoing, the commissioner concluded that wages calculated in accordance with § 31-307b must conform to the provisions of § 31-310 (a), which require that the "weeks immediately preceding the week during which the employee was injured" shall be used to calculate the base compensation rate. She found the reasoning in Trankovich, Prescott, and Kovalik persuasive, and concluded that the applicable statutory language was "clear and unambiguous." Conclusion, ¶ F. Accordingly, she denied the claimant's bid to have the wage rate for his relapse rate benefits calculated on the basis of wages received in 2012.

The claimant did not file a motion to correct the finding; rather, he is pursuing this appeal on the basis of the argument that as a matter of law, it was error for the

commissioner not to calculate the compensation rate based on wages received in 2012. The claimant contends that the facts of the present matter are distinguishable from the cases cited by the commissioner in her finding, and argues that Gill v. Brescome Barton, Inc., 317 Conn. 33 (2015), is on point. It is the respondents' position that the finding is consistent with our law, and we find this position more persuasive.

The facts relevant to this appeal are not the subject of a substantive dispute and, as such, our analysis will focus on whether the commissioner appropriately applied the law. 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), *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).

In order to reverse the decision of the commissioner in this matter, this board would need to be persuaded that the commissioner's application of the law was unreasonable. We note that the commissioner identified Kovalik, supra, as relevant

precedent. In that case, the claimant was awarded compensation at a rate reflecting his full wages rather than the reduced wages earned prior to his injury at his part-time employment. This board reversed the commissioner's conclusion, stating that "[w]e are compelled to read the statute according to its plain language, and apply the formula as written." Id. Having determined that the record indicated that the claimant was only earning part-time wages prior to his injury, we determined that the provisions of § 31-310 (a) required that the claimant's compensation rate be based upon the wages actually earned by the claimant for the period in question.

In the present matter, the claimant is arguing that the commissioner should disregard a prior finding in which liability for the claimant's disabling surgery was assigned to the 2004 date of injury for his right knee. However, that finding is now "the law of the case," and the commissioner was not empowered to blithely disregard it for humanitarian reasons. Waterbury Hotel Equity, LLC v. Waterbury, 85 Conn. App. 480, 489 (2004); Gilbert v. Ansonia, 5342 CRB-4-08-5 (May 14, 2009). Given that the date of injury for the right knee was established in a prior finding, the commissioner was obliged to apply that date in accordance with the relevant statutory provisions.

In light of these circumstances, we are not persuaded that the reasoning in Gill, supra, is particularly relevant to the present matter. In Gill, the parties did not dispute the compensation rate due to the claimant. Rather, the issue at bar concerned whether the cost of the claimant's benefits should be apportioned between two separate and distinct injuries after a bilateral surgery rendered both injuries jointly responsible for a period of disability. The commissioner concluded that it would be equitable to split the expense between the two carriers, and we affirmed that decision. See Gill v. Brescome Barton,

Inc., 5659 CRB-8-11-6 (June 1, 2012), *aff'd*, 142 Conn. App. 279 (2013), *aff'd*, 317 Conn. 33 (2015). Our Supreme Court affirmed, rejecting the appellant's argument that the commissioner lacked jurisdiction to consider this issue. See Gill v. Brescome Barton, Inc., 317 Conn. 33, 44-45 (2015). We find no authority in Gill for the notion that this board is empowered to reopen a commissioner's findings based on our own sense of what constitutes an equitable result.

Moreover, cases such as Cantoni v. Xerox Corp., 251 Conn. 153 (1999), and Discuillo v. Stone & Webster, 242 Conn. 570 (1997), stand for the proposition that our statutes must be administered in a fashion consistent with the manner in which they were written by the General Assembly. Given that we are satisfied that the commissioner in the present matter did exactly that, we therefore affirm the finding.

There is no error; the February 27, 2018 Finding and Orders by Christine L. Engel, the Commissioner acting for the Fifth District, is accordingly affirmed.

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