CASE NO. 6312 CRB-4-19-3 CLAIM NOS. 400014823; 400037369 & 400055407	:	COMPENSATION REVIEW BOARD
LUZ TEDESCO CLAIMANT-APPELLEE CROSS-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	MARCH 3, 2020

CITY OF BRIDGEPORT
EMPLOYER
SELF-INSURED

and

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

APPEARANCES:

The claimant was represented by James M. Kearns, Esq., 799 Silver Lane, Trumbull, CT 06611-5301.

The respondents were represented by Joseph A. Marotti, Esq., Montstream Law Group, L.L.P., 655 Winding Brook Drive, PO Box 1087, Glastonbury, CT 06033-6087.

This Petition for Review from the February 11, 2019 Findings of Fact by Jodi Murray Gregg, the Commissioner acting for the Fourth District, was heard September 27, 2019 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners Peter C. Mlynarczyk and David W. Schoolcraft.[1]

[1] We note that five motions for extension of time were granted during the pendency of this appeal.

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The claimant and the respondents have filed separate appeals from the Findings of Fact (finding) reached by Commissioner Jodi Murray Gregg, in which she awarded benefits for total disability from September 24, 2014 forward but denied claims for penalties and attorney's fees.

The respondents argue that the award of total disability benefits was in error because the claimant failed to submit sufficient evidence supporting the relief she sought, and because the commissioner applied the force of estoppel to an issue which had not been previously litigated. They also argued she erred in denying their motion for articulation. In her appeal, the claimant argues that because she never returned to work after 2004, the commissioner erred by not awarding her benefits during a ten-year period prior to 2014, and that she also erred in not awarding sanctions. Upon review, we conclude that the award of total disability benefits in this case based on collateral estoppel cannot be sustained, and that the commissioner's finding is flawed in that "the facts have not been sufficiently found to render a just judgment." Cormican v. McMahon, 102 Conn. 234, 238 (1925). We therefore remand this matter for a *de novo* hearing.

The following facts are relevant to our consideration of this appeal. The claimant has a claim for benefits which the respondents have contested. After a formal hearing, Commissioner Charles Senich issued a Finding and Decision on November 12, 2015 (2015 finding) awarding the claimant benefits for various back injuries. The issues which were litigated at that hearing were: (1) compensability of the claimant's back condition, (2) medical treatment, and (3) whether the claimant was entitled to permanent partial

disability benefits under General Statutes § 31-308 (b). Commissioner Senich ruled in the claimant's favor on those issues and reached several factual findings as to the credibility of the claimant and her medical treaters. The respondents appealed from the 2015 finding and this tribunal affirmed the decision. See Tedesco v. City of Bridgeport - Board of Education, 6054 CRB-4-15-11 (September 14, 2016).

Thereafter, the claimant demanded payment of total disability benefits retroactive to 2004, when she last worked. A second formal hearing was held before Commissioner Gregg.[2] The claimant did not appear at the 2018 hearing but submitted testimony by deposition. In her February 11, 2019 finding, Commissioner Gregg framed the issue before her as follows: "The claimant is claiming permanent disability benefits pursuant to the Finding and Decision issued by Commissioner Senich on November [12], 2015 and affirmed [by] the Compensation Review Board." Findings, ¶ 4. In her finding, Commissioner Gregg adopted the material factual findings made by Commissioner Senich in the 2015 finding. Specifically, she noted that in the 2015 finding, Commissioner Senich had found the claimant's treater, John N. Awad, M.D., to be credible and persuasive, and that Awad had opined in September 2014 that the claimant is totally and permanently disabled. Based on those facts, Commissioner Gregg concluded as follows:

> A. I find that the Claimant is totally and permanently disabled per Commissioner Senich's November 12, 2015 Finding and Decision; as affirmed by the Compensation Review Board on September 14, 2016.
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> B. I find that although total disability benefits were not an issue for the formal hearings that Commissioner Senich presided

[2] The taking of evidence began on January 8, 2018. It was at that hearing that the exhibits were marked and, with the exception of an actuarial table that was submitted later that month, all the exhibits were entered. Subsequent hearings were noticed, but no further evidence was entered after January of 2018.

over, he found that the Claimant was totally and permanently disabled from work; the Respondent-Employer did not move that the Commissioner correct that Finding in his decision. Therefore, that "finding of fact" becomes binding and the Claimant is deemed to be permanently and totally disabled as of September 24, 2014, the date of Dr. Awad's report.

C. I find that although Commissioner Senich found the Claimant to be totally and permanently disabled, he did not ***order*** the Respondent-Employer to pay any benefits in support of that finding of fact.

D. I find that because the Respondent-Employer was not ***ordered*** to pay disability benefits a penalty for failure to pay such benefits cannot be imposed.

(Emphasis in original.) Conclusion, ¶¶ A-D.

Both parties filed motions to correct, and the respondent filed a request for articulation. None of the motions were granted. As noted, both parties have appealed to this tribunal, the respondents arguing that it was error to award any total disability benefits and the claimant arguing that it was error not to award total disability retroactive to when she last worked, around 2004. We begin with the respondents' appeal.

On appeal, we generally extend deference to the decisions made by the trial commissioner. "As 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). The Compensation Review Board cannot retry the facts of the case and may only overturn the findings of the commissioner if they are without evidentiary support, contrary to the law, or based on unreasonable or impermissible factual inferences. Kish v. Nursing & Home Care, Inc., 248 Conn. 379 (1999) and Fair v. People's Savings Bank,

207 Conn. 535, 539 (1988). Nonetheless, while we must provide deference to the decision of a commissioner, we may reverse such a decision if the commissioner did not properly apply the law or reached a decision unsupported by the evidence on the record. See Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

The respondents point out that at the 2018 formal hearing the claimant submitted no new medical evidence; the most recent medical opinion was the September 24, 2014 report of Dr. Awad, a report which was already considered by Commissioner Senich in 2015.[3] See Respondents' Brief, pp. 4, 7. This was the same medical evidence that resulted in Commissioner Senich's award of permanent partial disability. The respondents argue that, having been awarded permanent partial disability by Commissioner Senich, it was the claimant's burden at the subsequent 2018 formal hearing to produce evidence that her claimed total incapacity was the result of something that "is distinct from and due to a condition that is not a normal and immediate incident of the loss for which the claimant received disability benefits for loss of use." Respondents-Appellants' Brief, p. 8, *citing* Marandino v. Prometheus Pharmacy, 294 Conn. 564, 582 (2010).

The respondents argue Commissioner Gregg's award of benefits was based solely on her belief that the question of total incapacity had already been decided by Commissioner Senich in 2015. Accordingly, they filed a "Request for Articulation" requesting that the commissioner explain her reason for finding "permanent total disability" when no new evidence had been submitted. The commissioner denied the request. Given the commissioner's denial of the request to articulate her reasoning, we

[3] The claimant also offered no vocational expert testimony to support a claim for total incapacity. The claim for total incapacity rests on the medical record.

must now review her decision in the context of the trial record to see if the award was based on her independent review of the evidentiary record or whether she simply applied collateral estoppel.

Commissioner Gregg began her decision by noting that the claimant was seeking total incapacity benefits "pursuant to the Finding and Decision issued by Commissioner Senich . . . ." Findings, ¶ 4. We also note that most of the eleven findings of fact she made were references to the 2015 proceedings or quotations from the 2015 award. There is nothing in the finding suggesting that she incorporated any of the exhibits from the 2015 formal hearing into the 2018 formal hearing.[4]

In reviewing the record of the 2018 formal hearing we are struck by the lack of any new evidence pertinent to the question of whether the claimant is totally incapacitated. The majority of the exhibits introduced by the claimant at the 2018 formal hearing pertained to benefits, payroll and attendance records from the board of education regarding claimant's time out of work prior to her retirement in 2006. Indeed, the only medical records introduced by the claimant were a 2003 "out of work note" and corresponding records from a walk-in center. The claimant did introduce the transcript of a deposition she gave for respondents attorney on December 14, 2017, but that deposition had been taken for the purpose of questioning her about those pre-retirement payroll and attendance records, and her income from Social Security (which given her date of injury would be a credit against any award of total incapacity). The respondents introduced certain medical records and doctor depositions, but all of these predated the 2015 finding of Commissioner Senich.

[4] The commissioner's first finding said only: "Administrative notice was taken of all documents in the above referenced files." (There are three claim numbers assigned to this claimant.)

In her finding, Commissioner Gregg made no reference to any of the evidence produced at the 2018 formal hearing, nor did she reference any evidence from the prior formal hearing, apart from evidentiary references contained in the passages she adopted from the 2015 finding. Having reviewed the transcript of the January 8, 2018 hearing and the content of the commissioner's finding – which is essentially a recapitulation of findings from the 2015 award – it is clear that the commissioner did not conduct an independent review of the evidence in reaching her conclusion that the claimant was owed benefits for total incapacity. Rather, she adopted the 2015 finding and decision by Commissioner Senich as the entire basis for her award. We must presume she felt compelled to order payment of total incapacity based on collateral estoppel. The question now is whether it was appropriate to apply collateral estoppel in this situation.

In appropriate circumstances, the doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) can be raised as a bar to relitigation of a claim or defense in a workers' compensation case. "[C]laim preclusion prevents a litigant from reasserting a claim that has already been decided on the merits. . . . [I]ssue preclusion, prevents a party from relitigating an issue that has been determined in a prior suit." Crochiere v. Board of Education, 227 Conn. 333, 343 (1993), *quoting* Virgo v. Lyons, 209 Conn. 497, 501 (1988), *quoting* Gionfriddo v. Gartenhaus Cafe, 15 Conn. App. 392, 401-402 (1988), *aff'd*, 211 Conn. 67 (1989).

The doctrine of res judicata provides that "a final judgment, when rendered on the merits, is an absolute bar to a subsequent action, between the same parties or those in privity with them, upon the same claim." Dowling v. Finley Associates, Inc., 248 Conn.

364, 373 (1999), *quoting* Slattery v. Maykut, 176 Conn. 147, 156-57 (1978).[5] Collateral estoppel can bar relitigation of specific issues or facts that have actually been litigated and found in a prior case. To invoke collateral estoppel the issue or fact sought to be litigated in the new proceeding must be identical to an issue or fact actually litigated and determined in the prior proceeding. See Crochiere, supra, 345, *citing* Aetna Casualty & Surety Co. v. Jones, 220 Conn. 285, 297 (1991). "An issue is 'actually litigated' if it is properly raised in the pleadings, submitted for determination, and in fact determined." Crochiere, supra, 343, *citing* 1 Restatement (Second), Judgments § 27 (1982).

While Commissioner Senich's 2015 finding specifically recounted Awad's opinion that the claimant was totally disabled as of September 24, 2014, the respondents argue that the issue of total disability was never actually litigated in 2015, and it would therefore be improper to apply collateral estoppel here. We agree.

We must begin by determining what Commissioner Senich did and did not say about total incapacity in his 2015 finding. In the "Procedural History" part of her 2019 finding Commissioner Gregg wrote that "Commissioner Senich also found that the Claimant was/is totally and permanently disabled . . . ." This is also the position taken by the claimant in this appeal, and it is not entirely accurate.

At no point in his 2015 finding did Commissioner Senich make a finding that the claimant was totally incapacitated, let alone permanently so. He did recite Awad's opinion that the claimant was "totally and permanently disabled," and he did state that he

[5] Under the doctrine of res judicata "[a] judgment is final not only as to every matter which was offered to sustain the claim, [in the first action] but also as to any other admissible matter which might have been offered for that purpose. . . . The rule of claim preclusion prevents reassertion of the same claim regardless of what additional or different evidence or legal theories might be advanced in support of it." (Citations omitted; internal quotation marks omitted.) Milford v. Andresakis, 52 Conn. App. 454, 462-463, *cert. denied*, 248 Conn. 922 (1999), *quoting* Delahunty v. Massachusetts Mututal Life Ins. Co., 236 Conn. 582, 589 (1996).

considered "the opinions and report of Dr. Awad fully credible and persuasive." Conclusion, ¶¶ M, K. However, Commissioner Senich never actually made a finding that the claimant was, in fact, totally disabled; indeed, what he awarded was permanent partial disability. Under the circumstances, his general statement about the persuasiveness of Awad cannot be interpreted as a determination that the claimant was, in fact, qualified for benefits under § 31-307. In short, Commissioner Gregg seems to have applied collateral estoppel to an issue that was never actually determined in the 2015 hearing.

Even if we interpreted Commissioner Senich's words as an express finding that the claimant was totally incapacitated back in 2015, we do not think Commissioner Gregg could adopt such a finding as the basis of an award of total disability benefits.

As noted, the question of whether the claimant was totally incapacitated was not "actually litigated" in 2015. This, alone, prevents application of collateral estoppel. But there is yet another problem. Collateral estoppel can only be applied to a prior finding that was indispensable to the prior award. "Collateral estoppel eliminates the retrial of individual issues that have been settled in a prior suit; its invocation is dependent upon the actual litigation of said issues, and the indispensability of those issues to the prior judgment." Calinescu v. CFD Associates, 4144 CRB-8-99-11 (November 7, 2000), *appeal dismissed*, A.C. 21412 (April 16, 2001). If an issue was determined in the prior action "but the judgment [was] not dependent upon the determination of the issue, the parties may relitigate the issue in a subsequent action. Findings on nonessential issues usually 'have the characteristics of dicta.'" Scalzo v. Danbury, 224 Conn. 124, 128-29 (1992), *quoting* 1 Restatement (Second), Judgments § 27 (1982), comment h.

Because the claimant sought only benefits for permanent partial disability in the 2015 hearing, Commissioner Senich had no need to make any determination as to whether she was totally incapacitated. (Indeed, total incapacity and partial disability are generally seen as mutually exclusive.) As such, any determination Commissioner Senich made as to total incapacity could not be considered indispensable to the 2015 award and, at best, would be dicta. See, id.

More importantly, because the only indemnity benefit sought in 2015 was permanent partial disability, the respondents had no reason to marshal a defense to total incapacity.[6] Had the respondents been aware that Commissioner Senich's ruling was going to be made applicable at some point to the issue of temporary total disability they may well have litigated the case in a different manner. See Wilson v. Capitol Garage, Inc., 6109 CRB-2-16-6 (May 16, 2017), and Henry v. Ansonia, 5674 CRB-4-11-8 (August 8, 2012).[7]

The issues at the formal hearing in 2015 were the compensability of the claimant's back condition, medical treatment, and payment of permanent partial disability. The respondent cannot now be held liable for payment of total incapacity benefits based on the conclusions reached at that time. Accordingly, the award of total incapacity must be reversed, and the case remanded for a formal hearing on the merits, with the taking of evidence.

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[6] The issues litigated in the 2015 finding where Awad's opinion was credited related to the claimant's eligibility for General Statutes § 31-308 benefits; not eligibility for benefits provided for under General Statutes § 31-307. The elements of proof for permanent partial disability and temporary total incapacity are different. Collateral estoppel cannot be applied when the elements of proof at the two proceedings was not the same. See Larocque v. Electric Boat Corporation, 5942 CRB-2-14-6 (July 2, 2015).

[7] As our Appellate Court noted in Passalugo v. Guida-Seibert Dairy Co., 149 Conn. App. 478 (2014), administrative hearings before the Commission must be handled "in a fundamentally fair manner so as not to violate the rules of due process. . . ." (Internal quotation marks omitted.) Id., 484, n.6, *quoting* Flamenco v. Independent Refuse Services, Inc., 130 Conn. App. 280, 282-83 (2011).

Given our holding above, we need not address the balance of the claimant's appeal, however, her claim for retroactive benefits raises an issue that we feel compelled to address, if only to make sure that all relevant issues are fully considered on remand.

In 2015, the claimant sought only benefits for permanent partial disability, and those benefits were awarded. Specifically, the claimant was awarded benefits for a 60 percent loss of use of the back, which amounts to 224.4 weeks of benefits under § 31-308 (b). As the 2015 finding did not assign a date of maximum medical improvement at some point in the past, the award of 224.4 weeks necessarily begins to run on the date of Commissioner Senich's award, November 12, 2015, which award would run until March 1, 2020. Here, we take notice of the principle that a claimant may not simultaneously receive both indemnity benefits based on a permanency award and indemnity benefits based on temporary disability.

On remand, the trial commissioner must determine not only whether there is sufficient evidence to find the claimant totally incapacitated,[8] but must also address the respondents' argument that an award of total incapacity benefits after payment of permanent partial disability benefits would require evidence of some change in the claimant's condition since 2015, as opposed to a continuation of the condition that resulted in the 2015 award of permanent partial disability benefits under § 31-308 (b). See Marandino, supra, see also, Gustafson v. SNET/Southern New England Telecommunications, 6191 CRB-2-17-4 (April 13, 2018).

[8] Any award of total incapacity benefits at this point must, of necessity, include a factual determination that she is still totally disabled as of the present. We do not believe that Awad's 2014 opinion, even if fully credited by the commissioner, can establish the claimant's current medical condition and therefore, out of necessity, additional evidence must be added to the record.

We therefore vacate the February 11, 2019 Findings of Fact by Jodi Murray Gregg, the Commissioner acting for the Fourth District, and remand the matter for a *de novo* hearing for a trial commissioner to evaluate the entire record, obtain additional testimony or evidence as necessary and reach a determination as to the claimant's eligibility for § 31-307 benefits and the periods for which such benefits are owed.

Commissioners Peter C. Mlynarczyk and David W. Schoolcraft concur in this Opinion.