CASE NO. 6322 CRB-2-19-5 : COMPENSATION REVIEW BOARD
CLAIM NO. 200198810

PENNY GFELLER : WORKERS' COMPENSATION
CLAIMANT-APPELLEE COMMISSION

v. : APRIL 8, 2020

BIG Y FOODS
SELF-INSURED
EMPLOYER
RESPONDENT-APPELLANT

APPEARANCES:

The claimant was represented by Robert B. Keville, Esq., Suisman, Shapiro, Wool, Brennan, Gray & Greenberg, P.C., The Courtney Building, Suite 200, 2 Union Plaza, P.O. Box 1591, New London, CT 06320.

The respondent was represented by Nicholas W. Francis, Esq., Law Office of Jonathan Zajac, L.L.C., P.O. Box 699, Avon, CT 06001-0699.

This Petition for Review from the April 22, 2019 Finding and Award of Peter C. Mlynarczyk, Commissioner acting for the Second District, was heard on October 25, 2019 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners Daniel E. Dilzer and David W. Schoolcraft.

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The respondent has petitioned for review from the April 22, 2019 Finding and Award of Peter C. Mlynarczyk, Commissioner acting for the Second District (commissioner). We find no error and accordingly affirm the decision of the commissioner.

The commissioner identified as the issue for analysis whether the claimant was entitled to temporary partial disability benefits pursuant to General Statutes § 31-308 (a) despite the claimant's employment having been previously terminated for cause.[1] A formal hearing was held on February 13, 2019, before Commissioner Thomas J. Mullins in the Second District Office of the Workers' Compensation Commission (commission). The parties thereafter agreed to have the matter transferred to Commissioner Mlynarczyk for a decision based on the evidentiary record already before the commission. Another hearing was held on April 10, 2019, at which time the parties submitted their proposed findings and the record was closed.

[1] General Statutes 31-308 (a) states: "If any injury for which compensation is provided under the provisions of this chapter results in partial incapacity, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the difference between the wages currently earned by an employee in a position comparable to the position held by the injured employee before his injury, after such wages have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act in accordance with section 31-310, and the amount he is able to earn after the injury, after such amount has been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act in accordance with section 31-310, except that when (1) the physician or the advanced practice registered nurse attending an injured employee certifies that the employee is unable to perform his usual work but is able to perform other work, (2) the employee is ready and willing to perform other work in the same locality and (3) no other work is available, the employee shall be paid his full weekly compensation subject to the provisions of this section. Compensation paid under this subsection shall not be 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, and shall continue during the period of partial incapacity, but no longer than five hundred twenty weeks. If the employer procures employment for an injured employee that is suitable to his capacity, the wages offered in such employment shall be taken as the earning capacity of the injured employee during the period of the employment."

The commissioner made the following factual findings which are pertinent to our review of this matter. The respondent conceded that on October 13, 2017, the claimant sustained compensable injuries to her right shoulder and left knee while at work. The claimant sought treatment for her injuries at Concentra within a few days of the October 13, 2017 incident, which treatment was paid for by the respondent. On October 23, 2017, the Concentra treating physician released the claimant back to work with restrictions on lifting, pushing and pulling. The respondent accommodated the restrictions and provided the claimant with her usual number of hours at full wages. The claimant's employment was terminated for cause on March 2, 2018, due to a violation of company policy unrelated to her work injury. The respondent did not pay any indemnity benefits from March 3, 2018, through April 1, 2018, and the claimant is not claiming indemnity benefits for this period.

On April 2, 2018, the claimant underwent right shoulder surgery with Ammar Anbari, M.D., at which time the respondent commenced payment of temporary total disability benefits. On May 31, 2018, Anbari released the claimant to light duty with restrictions. On June 4, 2018, the commission received a notice to discontinue benefits ("form 36") as of May 31, 2018. The respondent contended the claimant was not eligible for temporary partial disability benefits because the employer would have accommodated the claimant's restrictions had she not been terminated for cause. The form 36 was approved on June 4, 2018, and the claimant subsequently sought to have the form 36 re-opened and denied.

John Connolly, the director of the respondent's store location in Mystic, Connecticut, testified at the formal hearing. He stated that but for the claimant's

termination for cause, the respondent would have accommodated her post-operative employment restrictions without any loss of wages. Connolly also testified that because the claimant had been terminated for cause, she would never be eligible for future employment with Big Y.

The claimant submitted work searches for the period of June 3, 2018, through July 21, 2018. The respondent challenged the credibility of the work searches because they were performed on-line and the claimant did not attach receipts to the printouts which would have allowed the respondent to verify that the searches were actually performed.

The claimant secured employment at Holmgren Subaru on August 12, 2018, and worked there through September 8, 2018. On September 28, 2018, the claimant secured employment at Select Physical Therapy, which employment was still ongoing at the time of the formal hearing. She is claiming entitlement to temporary partial disability benefits based on the differential between her compensation rate and her earnings from both employers.

Based on the foregoing, the commissioner concluded that the claimant had "demonstrated a credible willingness to work on and subsequent to May 31, 2018, especially given the fact that her efforts were successful in securing employment on two occasions." Conclusion, ¶ A. In light of the claimant's willingness to work, the commissioner concluded that she was eligible to receive § 31-308 (a) benefits commencing on May 31, 2018. The commissioner re-opened and denied the form 36 which had been approved on June 4, 2018, and ordered the respondent to pay § 31-308 (a) benefits to the claimant at her full compensation rate for the time periods

when the claimant was unemployed, and at the differential rate, to be calculated on the basis of the claimant's paystubs, for the periods of time during which the claimant received wages from other employers.

The respondent filed a motion to correct, which was denied in its entirety, and this appeal followed. On appeal, the respondent contends that the commissioner erroneously concluded that the claimant was eligible for temporary partial disability and/or wage differential benefits after having been terminated for cause.

We begin our analysis of this matter with a recitation of the well-settled standard of review we are obliged to apply to a trial commissioner's findings and legal conclusions.

> [T]he role of this board on appeal is not to substitute its own findings for those of the trier of fact. Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 451 (2001). The trial commissioner's role as factfinder encompasses the authority to determine the credibility of the evidence, including the testimony of witnesses and the documents introduced into the record as exhibits. Burse v. American International Airways, Inc., 262 Conn. 31, 37 (2002); Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999). If there is evidence in the record to support the factual findings of the trial commissioner, the findings will be upheld on appeal. Duddy v. Filene's (May Department Stores Co.), 4484 CRB-7-02-1 (October 23, 2002); Phaiah v. Danielson Curtain (C.C. Industries), 4409 CRB-2-01-6 (June 7, 2002). This board may disturb only those findings that are found without evidence, and may also intervene where material facts that are admitted and undisputed have been omitted from the findings. Burse, supra; Duddy, supra. We will also overturn a trier's legal conclusions when they result from an incorrect application of the law to the subordinate facts, or where they are the product of an inference illegally or unreasonably drawn from the facts. Burse, supra; Pallotto v. Blakeslee Prestress, Inc., 3651 CRB-3-97-7 (July 17, 1998).

McMahon v. Emsar, Inc., 5049 CRB-4-06-1 (January 16, 2007).

In the present matter, the respondent contends that the claimant is ineligible for temporary partial disability benefits pursuant to § 31-308 (a) because she was terminated for cause. Citing Donovan v. United Technologies Corp., 7 Conn. Workers' Comp. Rev. Op. 5, 632 CRD-4-87 (June 9, 1989), the respondent points out that "[a] claimant who declines a light duty position at the same wages is not entitled to lost earning capacity benefits under 31-308(a)." Appellant's Brief, p. 3. We note that in Donovan, the claimant was offered a second-shift position which had a slightly higher hourly pay rate than the rate he was earning at the time of his injury. However, the claimant declined this position, opting instead to take a first-shift position at a lower hourly pay rate, and requested temporary partial disability benefits to make up the difference. This board affirmed the commissioner's denial of § 31-308 (a) benefits under these circumstances, stating that the evidence in the record provided a basis for the commissioner to "reasonably conclude that the amount claimant was able to earn after the injury was *greater* than the amount he actually earned prior to the injury. Without an impairment to claimant's earning capacity there can be no award for partial incapacity under Sec. 31-308(a)." (Emphasis in the original.) Id., 6-7.

We are not persuaded that the factual scenario in Donovan is particularly relevant to the appeal at bar. Somewhat more pertinent to our consideration of this matter is Levey v. Farrel Corp., 3649 CRB-4-97-7 (July 30, 1998), in which this board affirmed the denial of temporary partial disability benefits to a claimant who was terminated for cause while working light duty following his return to employment after being injured. In Levey, we stated:

> Where a claimant is terminated for cause, the trier has the discretion to consider such a dismissal from employment

> tantamount to a refusal to perform a suitable light duty position for the purposes of § 31-308 (a). If not for his own actions, the claimant in this case would have been able to earn the same salary he was earning before his injury, and would not have been entitled to temporary partial disability benefits.

Id.

However, in a case involving similar considerations, albeit under General Statutes § 31-308a, this board affirmed an award of partial disability benefits to a claimant who had been terminated for cause.[2] See Lopez v. Lowe's Home Improvement Center, 4922 CRB-6-05-3 (March 29, 2006). The claimant in that case had been accommodated with light duty but stopped working, telling his employer he had suffered an increase in symptoms. His employer told him needed to produce a disability note, which the claimant said he was unable to secure, and his employment was terminated for violating the company's attendance policies. Some months later, after collecting permanent partial

[2] General Statutes § 31-308a states: "In addition to the compensation benefits provided by section 31-308 for specific loss of a member or use of the function of a member of the body, or any personal injury covered by this chapter, the commissioner, after such payments provided by said section 31-308 have been paid for the period set forth in said section, may award additional compensation benefits for such partial permanent disability equal to seventy-five per cent of the difference between the wages currently earned by an employee in a position comparable to the position held by such injured employee prior to his injury, after such wages have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act in accordance with section 31-310, and the weekly amount which such employee will probably be able to earn thereafter, after such amount has been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act in accordance with section 31-310, to be determined by the commissioner based upon the nature and extent of the injury, the training, education and experience of the employee, the availability of work for persons with such physical condition and at the employee's age, but not 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. If evidence of exact loss of earnings is not available, such loss may be computed from the proportionate loss of physical ability or earning power caused by the injury. The duration of such additional compensation shall be determined upon a similar basis by the commissioner, but in no event shall the duration of such additional compensation exceed the lesser of (1) the duration of the employee's permanent partial disability benefits, or (2) five hundred twenty weeks. Additional benefits provided under this section shall be available only to employees who are willing and able to perform work in this state.

(b) Notwithstanding the provisions of subsection (a) of this section, additional benefits provided under this section shall be available only when the nature of the injury and its effect on the earning capacity of an employee warrant additional compensation."

disability benefits, the claimant sought additional lost earnings benefits pursuant to § 31-308a, which the respondent contested on the basis that the claimant had been terminated for cause and was not willing and able to work. The claimant argued he had been willing to work but was prevented from doing so by the company's insistence on a doctor's note. The commissioner awarded the benefits and the respondent appealed. This board affirmed the award, noting that the trial commissioner had weighed the circumstances surrounding the claimant's failure to return to work and had "accepted the claimant's position that his failure to return was based on … a bureaucratic barrier to performance." Id.

This board also noted that the Lopez respondents had placed "virtually exclusive reliance" on Levey, supra, in order to justify their defense of the claim. However, we pointed out that "the actual text of the Levey opinion makes the circumstances of termination not a legal bar to recovery, but an issue for the trial commissioner to consider in deciding whether to award benefits." Id. As such, the "determination of the claimant's status as 'able and willing' to work is ultimately a question of fact for the trial commissioner and [the respondents'] arguments related to termination for nonattendance are relevant but not dispositive." Id.

There is no question that both Levey and Lopez demonstrate that the issue of whether a claimant is entitled to temporary partial disability benefits is subject to the commissioner's discretion. It is axiomatic that "[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). Having reviewed the record of the present matter in its entirety, it may be reasonably inferred that the commissioner believed the factual scenario presented in this appeal was more akin to the circumstances in Lopez, supra, rather than Levey, supra. The respondent has not demonstrated that the commissioner abused his discretion; nor has it provided this board with any other basis for reversing the commissioner's conclusions in this matter.

When an injured claimant returns to work with restrictions, it is generally accepted that the employer for whom the claimant was working when injured will attempt to accommodate those restrictions. If such an accommodation is not possible, it is expected that the employer will provide temporary partial disability benefits while the claimant attempts to secure alternative employment.

In this case, the claimant did not seek temporary partial disability benefits for the period immediately following her March 2, 2018 termination. Rather, the period for which she seeks benefits begins on May 31, 2018, after her intervening surgery. For the time period in question, her physician certified that she was unable to perform her usual work but could perform other work, and the commissioner was satisfied that the claimant was ready and willing to perform other work. Thus, the essential elements set out in § 31-308 (a) were met. The employer had the right to avoid paying indemnity benefits by offering the claimant light duty, as it had done when she was partially disabled before her surgery, but did not do so. In the present matter, the impediment to the claimant's return to light duty with the employer was not an inability to accommodate her work restrictions but, rather, an internal corporate policy which prohibited the rehiring of employees who have been terminated for cause. We appreciate the distinction, and the understandable

reluctance of the respondent to provide workers' compensation benefits to a former employee in such a situation. However, given that the claimant met the statutory requirements for partial disability, and given that she did not in fact decline an offer of work from the employer, we are not persuaded that the commissioner erred in concluding that the factual scenario presented herein did not justify the denial of § 31-308 (a) benefits. In addition, we are quite leery of issuing a decision that could even arguably suggest that a respondent employer may preemptively inoculate itself against future liability under § 31-308 (a) (or § 31-308a) by simply firing an injured employee, or by creating additional barriers which the employee must surmount before returning to work.

Finally, the respondent claims as error the commissioner's denial of its motion to correct. Our review of the proposed corrections indicates that the respondent was merely reiterating the arguments made at trial which ultimately proved unavailing. As such, we find no error in the trier's decision to deny the respondent's motion to correct. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003).

There is no error; the April 22, 2019 Finding and Award of Peter C. Mlynarczyk, Commissioner acting for the Second District, is accordingly affirmed.

Commissioners Daniel E. Dilzer and David W. Schoolcraft concur in this opinion.