CASE NO. 6333 CRB-4-19-6 : COMPENSATION REVIEW BOARD
CLAIM NO. 400004031

VICTOR DIAZ : WORKERS' COMPENSATION
CLAIMANT-APPELLEE COMMISSION

v. : APRIL 29, 2020

CITY OF BRIDGEPORT
SELF-INSURED
EMPLOYER

and

PMA COMPANIES
THIRD-PARTY ADMINISTRATOR
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by David J. Morrissey, Esq., Morrissey, Morrissey, Mooney & Rydzik, L.L.C., 230 Church Street, P.O. Box 31, Naugatuck, CT 06770.

The respondents were represented by Joseph J. Passaretti, Jr., Montstream Law Group, 655 Winding Brook Drive, P.O. Box 1087, Glastonbury, CT 06033.

This Petition for Review from the May 21, 2019 Order of Jodi Murray Gregg, Commissioner acting for the Fourth District, was heard on November 22, 2019 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners Peter C. Mlynarczyk and David W. Schoolcraft.

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The respondents have petitioned for review from the May 21, 2019 Order (order) of Jodi Murray Gregg, Commissioner acting for the Fourth District (commissioner). We find no error and accordingly affirm the decision of the commissioner.[1]

The commissioner made the following factual findings which are pertinent to our review of this matter. A formal hearing was held on April 15, 2019 in order to determine whether a portion of the claimant's permanent partial disability award was eligible for commutation pursuant to the provisions of General Statutes § 31-302.[2] In a prior Supplemental Finding and Award dated January 30, 2019, the claimant had been awarded 245 weeks of permanent partial disability benefits at the weekly compensation rate of $551.13, with a maximum medical improvement date of February 20, 2019.[3] The claimant subsequently requested that the final 123 weeks of his 245-week award be commuted into a lump sum. At the formal hearing, the claimant testified that he

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

[2] General Statutes § 31-302 states: "Compensation payable under this chapter shall be paid at the particular times in the week and in the manner the commissioner may order, and shall be paid directly to the persons entitled to receive them unless the commissioner, for good reason, orders payment to those entitled to act for such persons, except that when the commissioner finds it just or necessary, the commissioner may approve or direct the commutation, in whole or in part, of weekly compensation under the provisions of this chapter into monthly or quarterly payments, or into a single lump sum, which may be paid to the one then entitled to the compensation, and the commutation shall be binding upon all persons entitled to compensation for the injury in question. In any case of commutation, a true equivalence of value shall be maintained, with due discount of sums payable in the future; and, when commutation is made into a single lump sum, (1) the commissioner may direct that it be paid to any savings bank, trust company or life insurance company authorized to do business within this state, to be held in trust for the beneficiary or beneficiaries under the provisions of this chapter and paid in conformity with the provisions of this chapter, and (2) the parties, by agreement and with approval of the commissioner, may prorate the single lump sum over the life expectancy of the injured employee."

[3] Our review of the record indicates that on February 5, 2018, Paul B. Nussbaum, M.D., assigned the claimant a 70 percent permanent partial disability rating to the bilateral kidneys as a result of hypertension.

understood that any commutation of his award would be subject to a 3 percent actuarial reduction, and that once the lump sum was paid, he would be deemed to have been paid his full weekly rate for the weeks covered by the commutation period.

The claimant indicated that he was seeking a lump-sum payment in order to pay past-due property taxes and reduce his credit card debt. The respondent municipality objected to the commutation.

Following the formal hearing, the commissioner concluded that the claimant had demonstrated "good and sufficient cause," Conclusion, ¶ 1, for a commutation of his permanent partial disability award. She granted the commutation for the time period commencing on the 123rd week of the award and continuing until the expiration of the 245th week. The commissioner ordered the respondents to continue paying the claimant's weekly permanent partial disability benefits until the expiration of the 122nd week, at which time the January 31, 2019 Supplemental Finding and Award would be satisfied. She also determined that the respondents would have a moratorium against the payment of weekly permanency benefits for the time period covered by the commutation. In addition, she authorized the respondents to discontinue the payment of weekly indemnity benefits after the payment for the 122nd week without the necessity of filing a notice to discontinue benefits ("form 36"). Finally, she indicated that the parties would receive a commutation order under separate cover outlining the payments due to the claimant and the discounts taken on the commuted amount.[4]

[4] A review of the record indicates that on May 21, 2019, the commissioner sent correspondence setting forth the terms of the commutation order to the PMA Customer Service Center.

The respondents filed an appeal petition along with a motion for articulation and a motion to correct. Both motions were denied; on appeal, the respondents challenge a commissioner's right to grant a commutation "off the end" of an award of specific indemnity benefits, i.e., to order prepayment of some final portion of a permanency award while the claimant is still collecting weekly benefits as they come due. As such, the respondents contend that the commissioner's decision to grant the claimant's request for a commutation of weeks 123 through 245 of his permanency award in the absence of a moratorium for the first 122 weeks constituted an improper application of the provisions of § 31-302. The respondents also claim as error the commissioner's denial of their motion to correct and motion for articulation.

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. "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). Thus, "it is … immaterial that the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing

court." Fair v. People's Savings Bank, 207 Conn. 535, 540 (1988), *quoting* Del Vecchio v. Bowers, 296 U.S. 280, 287 (1935).

We note at the outset that the respondents have conceded that the decision to grant a commutation of a claimant's benefits is subject to the commissioner's discretion, and the respondent payor is entitled to an actuarial discount of 3 percent per annum, compounded weekly. Nevertheless, they object to the structuring of the commutation in the present matter "under the principles of fundamental fairness," contending that the commutation "goes beyond that which the Compensation Act intended." Appellants' Brief, p. 8. They argue that in compelling the respondents to pay the lump-sum commutation of the final 123 weeks, while simultaneously making the weekly payment of $511.13 (up until the 123rd week), the commissioner "has effectively facilitated the Claimant getting more than the maximum compensation rate allowed pursuant to the Workers' Compensation Act." Id. We are not persuaded; although we recognize that the claimant's receipt of his weekly benefits in addition to the lump-sum commutation amount will result in a one-time payment in excess of the weekly maximum compensation rate, we are unclear as to how the lump-sum payment in the present matter can be distinguished from a lump-sum payment pursuant to a commutation order presumably structured in accordance with a schedule more acceptable to the respondents.

The respondents also point out that:

> Our [Workers' Compensation] Act does not permit double compensation…. When an injury entitles a worker to benefits both under the compensation statute and under other legislation, so that a double burden would be imposed on the employer, our courts have held that compensation payments during the period of disability reduce the employer's obligation created by other legislation.

McFarland v. Dep't of Developmental Services, 115 Conn. App. 306, 313-14 (2009).

We are of course cognizant of the prohibition against double recovery in our workers' compensation system. However, we are not persuaded that the commutation granted by the commissioner in the present matter in any fashion constitutes a double recovery. Again, as would be the case under any other commutation order, the claimant's total payout is still predicated on, and limited to, the same number of weeks for which he would have received weekly benefits had he not chosen to convert part of his permanency award into a lump-sum payment.

The respondents further aver that the commutation order in the present matter violates the "cap" on heart and hypertension benefits pursuant to the provisions of General Statutes § 7-433b (b).[5] The respondents point out that in Carriero v. Naugatuck, 243 Conn. 747 (1998), our Supreme Court concluded that "based upon careful interpretation of § 7–433b (b), … the ceiling therein is applicable to cumulative payments of disability compensation and retirement pension benefits when any portion of those payments has been awarded under § 7–433c."[6] Id., 762. While we do not dispute the

[5] General Statutes § 7-433b (b) states: "Notwithstanding the provisions of any general statute, charter or special act to the contrary affecting the noncontributory or contributory retirement systems of any municipality of the state, or any special act providing for a police or firemen benefit fund or other retirement system, the cumulative payments, not including payments for medical care, for compensation and retirement or survivors benefits under section 7-433c shall be adjusted so that the total of such cumulative payments received by such member or his dependents or survivors shall not exceed one hundred per cent of the weekly compensation being paid, during their compensable period, to members of such department in the same position which was held by such member at the time of his death or retirement. Nothing contained in this subsection shall prevent any town, city or borough from paying money from its general fund to any such member or his dependents or survivors, provided the total of such cumulative payments shall not exceed said one hundred per cent of the weekly compensation."

[6] In Carriero v. Naugatuck, 243 Conn. 747 (1998), the respondents appealed a decision by the Appellate Court, affirming an Opinion by this tribunal, holding that the claimant's receipt of disability benefits pursuant to General Statues § 7-433c, combined with the payments from a service-connected retirement pension unrelated to his § 7-433c claim, were not subject to the statutory ceiling imposed by § 7–433b (b).

respondents' characterization of the Carriero holding, we do not consider it relevant to the issue before this tribunal. Theoretically, any significant lump-sum payment to a claimant pursuant to a commutation order would technically result in a one-time "violation" of the statutory ceiling. However, the respondents have not provided, and we are certainly not aware of, a reasonable basis for concluding that the legislature intended to impose a blanket prohibition against commutation orders for this reason. Moreover, given that commutation orders are predicated upon awards which contemplate scheduled weekly payments, it is our belief that regardless of whether the commissioner had granted or denied the claimant's request for a commutation of his permanency award, the § 7-433b (b) ceiling would only be implicated if the cumulative amount of the claimant's weekly permanency benefits and his pension payment exceeded the statutory guidelines.

Although the respondents have conceded that the claimant is entitled to a commutation of his permanency award, they contend that the claimant has been "placed in the best position possible by this order, while the Respondents are being unduly burdened without any consideration." Appellants' Brief, p. 12. We disagree; both the commissioner's order and her May 21, 2019 correspondence to the third-party administrator clearly state that the respondents are entitled to the 3 percent actuarial discount. See Conclusion, ¶ 5. We recognize that the commutation of the permanency award as structured in this matter constitutes a perhaps-unanticipated budgetary challenge for the respondent municipality. Nevertheless, we are not persuaded that the financial difficulties attendant on compliance with the commutation order are such that the

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See Carriero v. Naugatuck, 14 Conn. Workers' Comp. Rev. Op. 98, 1690 CRB-5-93-4 (May 26, 1995), *aff'd*, 43 Conn. App. 773 (1996), *rev'd*, 243 Conn. 747 (1998).

commissioner's decision to commute the award in the fashion requested by the claimant was improper.

As the respondents acknowledge, the provisions of § 31-302 afford a commissioner considerable discretion to:

> approve or direct the commutation, in whole or in part, of weekly compensation under the provisions of this chapter into monthly or quarterly payments, or into a single lump sum, which may be paid to the one then entitled to the compensation, and the commutation shall be binding upon all persons entitled to compensation for the injury in question.

General Statutes § 31-302.

It is well-settled that "[a]n abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors." In re Shaquanna M., 61 Conn. App. 592, 603 (2001). In the present matter, the claimant appeared at a formal hearing and offered testimony attesting to his reasons for seeking a commutation of his permanency award. See April 15, 2020 Transcript, p. 7. The commissioner found this testimony sufficiently compelling to grant the commutation, and we have no reasonable basis for concluding that, under the particular circumstances of this matter, the decision to do so constituted an abuse of discretion.

The respondents also contend that the commissioner erroneously denied their motion for articulation. Generally speaking,

> [a]n articulation is appropriate where the trial court's decision contains some ambiguity or deficiency reasonably susceptible of clarification…. [P]roper utilization of the motion for articulation serves to dispel any … ambiguity by clarifying the factual and legal basis upon which the trial court rendered its decision, thereby

> sharpening the issues on appeal. (Internal quotation marks omitted.)

Breen v. Craig, 124 Conn. App. 147, 161 (2010).

The respondents argued that an articulation was warranted given that the "ambiguities in the Commissioner's Order … render it impossible for a reviewing court to properly determine whether legal error occurred, or whether inferences were unreasonably or impermissibly drawn from the subordinate facts." June 4, 2019 Motion for Articulation, p. 2. In addition, the respondents sought an articulation of "[t]he statutory basis upon which [the commissioner] determined that there would be no simultaneous moratorium of payment of permanent partial disability benefits with payment of commutation." Id., 3. In the alternative, the respondents requested that the commissioner provide the relevant case law and/or legislative history upon which her decision was based.

Having reviewed the commissioner's order, we are not persuaded that it was in any way ambiguous. As discussed previously herein, the provisions of § 31-302 afford a commissioner considerable discretion to structure a commutation order in accordance with the preferences of the party seeking the commutation. While the structure of the order in the present matter may strike the respondents as "unprecedented," id., we find it was neither ambiguous nor an unreasonable exercise of the commissioner's discretion. Moreover, with specific regard to the moratorium, we believe the commissioner correctly determined that the moratorium should remain in effect for the time period actually implicated by the commutation order; namely, weeks 123-245. In light of this analysis, we therefore find no error in the commissioner's denial of the motion for articulation.

The respondents also claim as error the commissioner's denial of their motion to correct. Our review of this motion indicates that the respondents were essentially proposing that the commissioner grant a commutation period of 122 weeks commencing as of the date of her May 21, 2019 order and running through September 23, 2021, with a concomitant moratorium for that time period. The respondents also sought authority for discontinuing indemnity benefits as of May 22, 2019 without the necessity of filing a form 36. These proposed corrections echo the respondents' argument made at trial; to wit, our case law does not permit "the commissioner to pick and choose the window of time that is to be applied to the commutation." April 15, 2019 Transcript, p. 9. Given that we have determined that the provisions of § 31-302 allow a commissioner to do precisely that, we find no error in the commissioner's denial of these proposed corrections. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003).

There is no error; the May 21, 2019 Order of Jodi Murray Gregg, Commissioner acting for the Fourth District, is accordingly affirmed.

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