CASE NO. 6379 CRB-4-20-2 CLAIM NO. 400004031	:	COMPENSATION REVIEW BOARD
VICTOR DIAZ CLAIMANT-APPELLEE	:	WORKERS' COMPENSATION COMMISSION
v.	:	NOVEMBER 30, 2021

CITY OF BRIDGEPORT
EMPLOYER
SELF-INSURED

and

PMA MANAGEMENT
CORPORATION OF NEW ENGLAND
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 February 13, 2020 Finding and Award of Jodi Murray Gregg, the Administrative Law Judge acting for the Fourth District, was heard on July 30, 2021 before a Compensation Review Board panel consisting of Chief Administrative Law Judge Stephen M. Morelli and Administrative Law Judges Peter C. Mlynarczyk and Daniel E. Dilzer.[1]

[1] Effective October 1, 2021, the Legislature directed that the phrase "Administrative Law Judge" be substituted when referencing a workers' compensation commissioner. See Public Act 21-18.

OPINION

STEPHEN M. MORELLI, CHIEF ADMINISTRATIVE LAW JUDGE. The respondents have appealed from a Finding and Award (award) issued by Administrative Law Judge Jodi Murray Gregg on February 13, 2020. This decision granted the claimant's bid to convert the first 122 weeks of his permanent partial disability award to temporary total disability benefits. The respondents argue that the administrative law judge did not have a sufficient foundation of facts to grant this relief, arguing the claimant's condition had not deteriorated in a manner that would justify total disability benefits and the statutory standards to open an award were not present. They also claim that the award did not comport with the precedent in Rayhall v. Akim Co., 263 Conn. 328 (2003) and Miller v. Hopkins School, 5084 CRB-3-06-4 (June 18, 2007). The claimant argues that these cases do not apply to this issue, that the claimant at all relevant times herein had a pending request for total disability benefits supported by medical evidence credited by the respondents, and that the statute permits the relief herein to be granted. After considering these arguments we find no error and affirm the Finding and Award.[2]

We note that we previously dealt with many of these issues in our decision in Diaz v. Bridgeport, 6333 CRB-4-19-6 (April 29, 2020), *aff'd*, 208 Conn. App. 615 (2021) (Diaz I). In that case, the administrative law judge granted the claimant's bid pursuant to General Statutes § 31-302 to commute 122 weeks of benefits into a lump sum payment.[3]

---

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

[3] 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

Subsequent to the granting of his commutation request, the claimant sought to have the first 123 weeks of his permanent partial disability award converted to benefits pursuant to General Statutes § 31-307 for temporary total disability. The administrative law judge took administrative notice of all prior findings and award, including the prior decision in Diaz I. She noted that the claimant had sustained hypertension while employed as a police officer in 1989 and he had been awarded benefits for this compensable injury. On February 5, 2018, the claimant's treating nephrologist, Paul Nussbaum, opined that the claimant was at maximum medical improvement with a 70 percent permanent partial disability to each kidney. The claimant sought hearings regarding permanency which were held on March 16, 2018 and September 7, 2018. During this time period, Nussbaum reported the claimant had sustained a deterioration in his work capacity as the result of having to undergo dialysis, which rendered him totally disabled. On May 5, 2018, the claimant sought a hearing for total disability benefits, and the administrative law judge found several hearings were held on this issue. A Supplemental Finding and Award was entered on January 30, 2019, where the parties agreed the claimant was entitled to a specific award of 70 percent permanent partial disability for his kidney condition. On May 21, 2019, the administrative law judge granted the claimant's commutation request, see Diaz I, for the final 122 weeks of permanency benefits. At the August 22, 2019 formal hearing, the respondents finally

---

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."

conceded the claimant was totally disabled. The claimant then sought to have the first 123 weeks of his permanency award reclassified as temporary total disability benefits. The administrative law judge noted that he has been collecting these benefits since February 20, 2019.

Based on this record, the administrative law judge reached the following conclusions and awarded the relief sought by the claimant:

> A. I find that on February 5, 2018, the Claimant was assigned a 70% permanent partial disability rating to each kidney.
> B. I find that on May 5, 2018, the Claimant was deemed to be totally disabled due to his declining kidney condition.
> C. I find Dr. Nussbaum's opinions and reports to be credible.
> D. I find that on May 21, 2019, pursuant to a commutation order, the Claimant was paid the last 122 weeks of his permanency in a lump sum.
> E. I find that at the formal hearing on August 22, 2019 the Respondent-Employer conceded that the Claimant is totally disabled.
>
> WHEREFORE, IT IS ADJUDGED AND DECREED THAT:
>
> 1. The Respondent-Employer reclassify the claimant's benefits from permanency benefits to temporary total disability benefits retroactive to May 5, 2018
> 2. The Respondent-Employer is entitled to a credit for permanent partial disability benefits that have been paid from February 20, 2019 through the date of this order.

February 13, 2020 Finding and Award; Conclusions, ¶¶ A-E and Orders, ¶¶ 1-2.

The respondents filed a motion to correct clarifying that they were entitled to a credit for benefits already paid to the claimant after May 5, 2018. The correction was granted, and the respondents have pursued this appeal, arguing essentially that under an election of remedies paradigm the claimant should now be barred from obtaining this award. In the alternative, they argue that the evidentiary or procedural requirements to open an award are not present herein. We are not persuaded by this argument.

The fulcrum of the respondents' argument appears to be that the claimant engaged in two separate and distinct events; first the commutation of the remaining part of his permanency award into a lump sum and then, as a totally unrelated event, the present motion to reclassify prior paid benefits as temporary total disability benefits. Therefore, in the respondents' view, by receiving the initial award the claimant is estopped from seeking the relief in the award. The claimant argues that at all relevant times during the proceeding he was seeking temporary total disability benefits and the respondents' unwillingness to concede total disability despite medical evidence supporting this status caused the process to be delayed. After review, we agree with the claimant. We find his position comports with the humanitarian interpretation of our statutes promulgated by our Appellate Court in Diaz I. As the Appellate Court made clear, "we are mindful of the proposition that all workers' compensation legislation, because of its remedial nature, should be broadly construed in favor of disabled employees. . . ." Id., 620 *quoting* Ciarelli v. Hamden, 299 Conn. 265, 277 (2010).

In addition, we have reviewed the precedent advanced by the respondents and find none of it addresses the issues of a commutation under General Statutes § 31-302. We therefore afford it little weight.

As the administrative law judge outlined in the facts that she found, the claimant advanced his claim for temporary total disability benefits on May 5, 2018, well prior to the hearing in which he obtained a commutation of the remaining portion of his permanent disability award. The respondents' contention that the commutation award received in May 2019 was an alternative remedy is a fact that we cannot find from the record. We have reviewed the transcript from the August 22, 2019 hearing and at no

point did counsel for the claimant concede that his client had in any manner waived his claim to temporary total benefits. Counsel for the respondents admitted that he did not have medical evidence for opposing the request, and indeed stated "I don't think there's any question that medically Mr. Diaz qualifies for benefits under 31-307." August 22, 2019 Transcript, p. 8. Nonetheless, counsel asserted that in his opinion the precedent in Rayhall, supra, stood for the election of remedies proposition. August 22, 2019 Transcript, pp. 5-7. However, we note that in Dinan v. Patten, 317 Conn. 185 (2015), our Supreme Court held "[w]aiver is a question of fact. . . ." Id., 194, *quoting* AFSCME, Council 4, Local 704 v. Dept. of Public Health, 272 Conn. 617, 622-23 (2005).[4] Had the respondents sought to advance that, as a factual matter, the claimant waived his right to his pending request for temporary total disability benefits so as to constitute an election of remedies, they needed to file a motion to correct to bring this to this tribunal's attention. They did not do so and therefore we are bound by the facts found in the award. See Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008), *appeal dismissed*, A.C. 29795 (June 26, 2008).

The respondents apparently believe that, notwithstanding the claimant's continuous demands for temporary total disability benefits, once he received a commutation award the Rayhall case banned such relief. Upon review of the facts and law addressed in this precedent we are not persuaded. Rayhall involved two separate

[4] "[W]here the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . ." (Citations omitted.) Dinan v. Patten, 317 Conn. 185, 194-95 (2015). The Dinan opinion also discussed election of remedies "[t]he doctrines of estoppel and election of remedies both require the defendant to prove detrimental reliance." Id., 197. (Footnote omitted.) In light of the respondents' decision to continuously litigate the issues herein, we find no evidence in the record that the respondents changed their position subsequent to the granting of a commutation of part of the claimant's permanency award.

appeals. The claimant appealed from the social security offset then imposed on awards pursuant to General Statutes § 31-307 (e), while the respondent appealed arguing that the claimant was obligated to exhaust his permanency award prior to receiving temporary partial disability benefits. The court ruled against both appeals. Ruling against the claimant's contention as to the social security offset and as for the respondent's appeal, the court concluded that under the facts presented, wherein the claimant had more than one injured body part, the claimant was entitled to obtain temporary benefits regardless of whether or not he had reached maximum medical improvement. The court cited the standard for temporary total disability benefits delineated in McCurdy v. State, 227 Conn. 261, 268 (1993). See also Rayhall, supra, 357.

Having considered the respondents' brief, we are perplexed at their reliance upon the Rayhall decision. The decision does not cite the commutation statute at all. While the decision does discuss the benefit limits in General Statutes 31-308 (b), the decision does so in pointing out that this statute has been construed as a bar on double recovery, i.e., "to prohibit the payment of other permanency awards for the same incident." Rayhall, supra, 355 *citing* Panico v. Sperry Engineering Co., 113 Conn. 707, 711-12 (1931).[5] The claimant herein will not receive a second permanency award, and it is

[5] See also Churchville v. Bruce R. Daly Mechanical Contractor, 299 Conn. 185 (2010): "Because the two types of benefits compensate an employee for distinct losses, entitlement to the two benefits is triggered by different factors. Entitlement to incapacity benefits depends on the employee's capacity to work. General Statutes §§ 31-307 (a) and 31-308 (a). As for entitlement to disability benefits, because the extent of that award necessarily depends on both the establishment of a permanent disability and the extent of the disability, '[w]e have long held that an injured worker has a right to a permanent partial disability award once he or she reaches maximum medical improvement.'" Id., 193-194, *quoting* McCurdy v. State, 227 Conn. 261, 268 (1993).

black-letter law that awards for permanent disability are "in addition to the usual compensation for total incapacity . . . ." Panico, 713.[6]

The Rayhall decision does approve that claimant's decision to elect to accept temporary disability benefits in advance of receiving permanency benefits, but we note that in that case the claimant had more than one injured body part and had not reached MMI on each body part. Our Supreme Court in that case affirmed our tribunal's decision (Rayhall v. Akim Co., Inc. 4321 CRB-2-00-12 (November 5, 2001)) to grant the claimant's request to expedite the payment of temporary partial disability benefits. We find nothing in the Rayhall decision that suggests that the claimant was obligated to proceed in the manner they approved or, in the alternative, was barred from seeking further relief. Indeed, the court found that an election to receive temporary benefits in advance of a permanency award was permissible, not mandatory. See Rayhall, supra, 355-58.[7]

In the present case, the claimant has reached maximum medical improvement, but we do not find that this distinction makes the Rayhall precedent any more beneficial to the respondents' position, particularly as it does not cite the commutation statute at all. The other cases cited in the respondents' brief are also inapposite and unpersuasive. See

---

[6] We also note that our Appellate Court in Diaz v. Bridgeport, 208 Conn. App. 615 (2021), rejected the respondents "double recovery" argument. Id., 632-34.

[7] The respondents' brief on page 14 cites footnote 32 in Rayhall v. Akim Co., 263 Conn. 328 (2003), as authority against allowing the claimant to make an election of benefits. We believe the respondents are referring to footnote 23, which states: "We note, however, that, although we agree with the board's construction of § 31-308 (b) that the term 'or members' means the maximum improvement of all members, there is nothing in the statutory scheme to suggest that a claimant may elect the order in which to receive his or her benefits, choosing to receive first either the permanency benefit or the partial incapacity benefit. Accordingly, we do not endorse the board's reasoning to the contrary." Id., 358, n.23. We note that this essentially is dicta which is not material to the holding in this case. We also note that this footnote does not address the right of a claimant to a commutation pursuant to General Statutes § 31-302. In addition, it seems internally inconsistent with the text of the opinion which found "the plaintiff's interpretation" of the applicable statute "more plausible." Id., 357.

Hyatt v. City of Milford, 26 Conn. App. 194 (1991), a case where the claimant sought to go to Superior Court to recover allegedly underpaid compensation benefits. This relief was denied as the claimant had failed to exhaust his remedies before this Commission and indeed, his entire payment of permanency benefits had been paid out about three years prior to his commencing his civil action. See, id., 196-97. The facts in Hyatt indicate that while the commutation statute was an available remedy to the claimant, he apparently failed to exercise this remedy during the time frame when it was available. We cannot see how this precedent stands for the proposition that a claimant cannot invoke the jurisdiction of this commission to reclassify benefits prior to the exhaustion of a permanency award. A similar scenario exists in Fenton v. Connecticut Hospital Assn. Workers' Compensation Trust, 58 Conn. App. 45 (2000). In that case, a claimant tried to go directly to Superior Court to seek enforcement of a voluntary agreement. See id., 56. Our Appellate Court found the terms of that agreement equivocal and held "[t]his case does not present, as the plaintiff claims, a voluntary agreement that is a final and enforceable judgment." Id., 62. While the respondents attempt to use this case to reach over to the precedent cited in McIntyre v. Standard Oil of New York, 126 Conn. 491 (1940), we simply do not find that decision is applicable to a case such as this one where no final stipulation had been reached and a further pending request for interlocutory relief was being pursued at the time of the May 2019 commutation order.[8]

[8] As our Appellate Court pointed out in Fenton v. Connecticut Hospital Assn. Workers' Compensation Trust, 58 Conn. App. 45 (2000), the commutation award in McIntyre v. Standard Oil of New York, 126 Conn. 491 (1940), involved a commutation of benefits into a lump sum that "was contemplated such as there was a final judgment." Fenton, supra, 62. We do not find that a commutation under the facts herein, where the claimant had a pending request for further relief under consideration at the time of the commutation, was contemplated as a "final judgment" and pursuant to Hyatt v. City of Milford, 26 Conn. App. 194 (1991), our commission would retain jurisdiction over any dispute and a demand for payment could not be presented to Superior Court.

We also do not find the respondents reliance on Miller, supra, persuasive. In Miller, we held:

> Under our law, a claimant who is collecting temporary partial disability benefits becomes entitled to receive permanent partial disability benefits upon reaching maximum medical improvement, and either party can request that this shift be made. See Rayhall v. Akim Co., 263 Conn. 328, 357-58 (2003); Krol v. A.V. Tuchy, Inc., 4613 CRB-4-03-1 (January 29, 2004), aff'd, 90 Conn. App. 346 (2005). Such a change could occur by agreement of the parties, by judicial finding after a properly-noticed evidentiary hearing, or following the filing of a Form 36 that is approved by the commissioner.

Indeed, in Miller, we found the respondents failed to take steps prior to the hearing to advance their interests such as issue a new form 36, and similar to Rayhall, supra, the claimant's position was affirmed. The relief granted to the claimant in this case occurred after a properly held hearing where the respondents conceded the claimant was now totally disabled. We believe that as the claimant offered evidence that his condition had continued to deteriorate the fact finder could credit this evidence.[9] Since the record at the hearing supports the relief awarded, we do not find Miller on point. In both Rayhall and Miller, we affirmed the claimant's position and we do not find a basis in those decisions to overturn the decision in this case.

On the other hand, we find the precedent cited by the claimant applicable to the issues herein. He cites Angell v. Guida Seibert Dairy, 1836 CRB-1-93-9 (April 28, 1995) and Antonucci v. Hartford, 5 Conn. Workers. Comp. Rev. Op. 151 (July 29, 1988), as being on point. In Angell, we found,

---

[9] The respondents' reliance on Miller v. Hopkins School, 5084 CRB-3-06-4 (June 18, 2007), appears based on their belief that the prior commutation order constituted a final judgment requiring a formal motion to open to be presented. In light of the fact that that the Commission had yet to rule on a pending motion for temporary total benefits as of the time the earlier relief was granted, we are not persuaded that given the facts in this case that this standard was applicable.

> [i]n that case, we ruled that where a claimant becomes temporarily totally disabled during a period for which he has accepted a commuted payment of permanent partial benefits, the claimant will receive temporary total benefits in place of the permanent partial benefits. We further ruled that the permanent partial benefits, which were interrupted by the temporary total benefits, will be 'tacked on' immediately following the period of temporary total disability payments.

Angell, supra, *quoting* Antonucci, 152, thus, we approved the payment of temporary total disability benefits following a commutation. We do not find a material difference between the scenario presented herein and the scenario in Angell.[10]

We believe that we must seek to implement the purpose of the commutation statute. We believe that it exists to enable a claimant to promptly receive his or her permanency benefits when a compelling request is presented to the Commission. This fact pattern is present in this case and as our Supreme Court pointed out in Rainforest Café, Inc. v. Dept. of Revenue Services, 293 Conn. 363 (2009) "[w]hen construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . ." (Internal quotation marks omitted.) Id., 372, *quoting* State v. Peters, 287 Conn. 82, 87-88 (2008). Indeed, as our Supreme Court stated in Rayhall,

> [f]inally, we note that our interpretation of this statutory scheme 'is guided by the principles underlying Connecticut practice in [workers'] compensation cases: that the legislation is remedial in nature . . . and that it should be broadly construed to accomplish its humanitarian purpose. . . . We, therefore, do not construe the [Workers' Compensation Act] to impose limitations on benefits that the act itself does not specify clearly.' (Citations omitted; internal quotation marks omitted.)

[10] Respondents argue that there are distinctions between Angell v. Guida Seibert Dairy, 1836 CRB-1-93-9 (April 28, 1995) and Antonucci v. Hartford, 5 Conn. Workers. Comp. Rev. Op. 151 (July 29, 1988), causing these cases not to apply to this situation. They argue that in the absence of an actual interruption of payment of permanent partial disability benefits these cases are inapposite. We are not persuaded that this compels a different result. They also argue that, despite the pending request for temporary total disability benefits in this case that no "change of circumstances" is present. As previously stated, we do not agree.

Rayhall, supra, 358, *quoting* Gartrell v. Dept. of Correction, 259 Conn. 29, 41-42 (2002). The commutation statute contains no express limitation upon reclassification of benefits following a commutation and we are persuaded that the claimant was seeking such relief at the time he obtained his commutation.

In Diaz I, our Appellate Court noted "[t]he humanitarian and remedial purpose of the act counsel against an overly narrow construction that unduly limits eligibility for workers' compensation. . . . Accordingly, [i]n construing workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the act." (Citation omitted; internal quotation marks omitted.) Id., 623 *quoting* Balloli v. New Haven Police Dept., 324 Conn. 14, 18-19 (2016). As there is no clear statutory prohibition against the reclassification of benefits as part of a commutation of an award, we believe that were we to rule in favor of the respondents we would act in derogation of our precedent in Dickerson v. Stamford, 6215 CRB-7-17-8 (September 12, 2018), *aff'd*, 334 Conn. 870 (2020), where we held that we will "not engraft a limitation which cannot be expressly found within the plain language of the statute." Id. As we find the respondents' position herein essentially does exactly that, we must affirm the award.

There is no error, the Finding and Award issued by Administrative Law Judge Jodi Murray Gregg on February 13, 2020 is affirmed.

Administrative Law Judges Peter C. Mlynarczyk and Daniel E. Dilzer concur in this Opinion.