CASE NO. 6420 CRB-7-21-3 CLAIM NO. 700118053	:	COMPENSATION REVIEW BOARD
LOUIS MARTINOLI CLAIMANT-APPELLEE	:	WORKERS' COMPENSATION COMMISSION
v.	:	JANUARY 11, 2022

CITY OF STAMFORD/
POLICE DEPARTMENT
EMPLOYER
SELF-INSURED

and

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

APPEARANCES:

The claimant was represented by Andrew J. Morrissey, Esq., Morrissey, Morrissey & Rydzik, L.L.C., 203 Church Street, P.O. Box 31, Naugatuck, CT 06770, and Earl T. Ormond, Esq., Ormond Romano, L.L.C., 799 Silver Lane, Second Floor, Trumbull, CT 06611.

The respondents were represented by Scott Wilson Williams, Esq., Williams Law Firm, L.L.C., 2 Enterprise Drive, Suite 412, Shelton, CT 06484.

This Petition for Review from the March 11, 2021 Findings and Award by Randy L. Cohen, the Administrative Law Judge acting for the Seventh District, was heard 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 the Findings and Award issued by Administrative Law Judge Randy L. Cohen.[2] This decision determined that the claimant, a retired police officer, was entitled to benefits pursuant to General Statutes § 31-307 for temporary total disability.[3] The respondents argue that since the claimant has retired from the workforce and is not seeking employment, he is not entitled to benefits, notwithstanding his physical inability to work. We note that, although the respondents claim this appeal is based on issues of statutory interpretation, both on the facts and the law this case is virtually indistinguishable from Mascendaro v. Fairfield, 6304 CRB-4-19-1 (March 13, 2020), where this tribunal affirmed the award of § 31-307 benefits to a retired employee when it was challenged on policy grounds. We take note of Laliberte v. United Security, Inc., 261 Conn. 181 (2002), which stands for the premise that one's inability to work due to removal from the workforce is not a bar to receiving benefits for total disability. As we find the above precedent governs this matter, we are compelled to affirm the Findings and Award.[4]

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[2] Subsequent to the respondents seeking a correction to the original Findings and Award issued on March 11, 2021, the administrative law judge issued an Amended Findings and Award on March 23, 2021.

[3] The relevant portion of General Statute § 31-307 states: "(a) If any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the injured employee's average weekly earnings as of the date of the injury, 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 section 31-310; but the compensation shall not be more than the maximum weekly benefit rate set forth in section 31-309 for the year in which the injury occurred. No employee entitled to compensation under this section shall receive less than twenty per cent of the maximum weekly compensation rate, as provided in section 31-309, provided the minimum payment shall not exceed seventy-five per cent of the employee's average weekly wage, as determined under section 31-310, and the compensation shall not continue longer than the period of total incapacity."

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

The claimant has a compensable claim for heart disease which this tribunal affirmed in Martinoli v. Stamford Police Dept., 6271 CRB-7-18-5 (April 24, 2019), *appeal withdrawn*, A.C. 42889 (July 29, 2020) (Martinoli I). With respect to the issues currently before the Commission, the administrative law judge reached a number of findings after the formal hearing. She found that the claimant had a January 1999 date of injury for a compensable cardiac condition and retired from the Stamford police department later that year. He had not worked nor sought further employment after his retirement. The claimant sustained an atrial fibrillation in July 2015 that flowed from his previous cardiac condition. Medical evidence was presented that his permanent partial disability had increased since his 2015 cardiac episode and a stipulated finding was approved on September 7, 2018, after which the claimant was paid a specific award equal to an increase of 19.25 percent permanent partial impairment to the heart. The parties stipulated that the claimant had been temporary totally disabled since July 15, 2015 but disagreed as to whether the claimant was entitled to § 31-307 benefits and the extent of that indemnity benefit.

Based on this record, the administrative law judge concluded:

A. C.G.S. Section 31-307 is clear. If a claimant becomes totally disabled, they "shall" receive weekly benefits.
B. Pursuant to C.G.S. Section 31-307, it is irrelevant whether or not the claimant was working at the time he becomes totally disabled.
C. The claimant has been totally disabled since July 15, 2015.
D. The claimant has been totally disabled for greater than five years.

Conclusions, ¶¶ A-D.

Based on these conclusions, the claimant was awarded benefits pursuant to § 31-307 along with applicable cost-of-living adjustments, subject to the statutory offset

of benefits under General Statutes § 31-307 (e) and any applicable statutory cap on benefits pursuant to General Statutes § 7-433b (b). The respondents filed a motion to correct seeking a number of corrections consistent with the contention that the claimant was not entitled to § 31-307 benefits because he was not in the workforce at the time he became totally disabled. They also sought corrective findings that, pursuant to the precedent in Partlow v. Petroleum Heat & Power Company, Inc., 5432 CRB-7-09-2 (February 9, 2010), the claimant's compensation rate needed to be reset, as well as a conclusion that, pursuant to precedent in Syzmaszek v. Meriden, 5346 CRB-6-08-5 (April 2, 2009), *appeal withdrawn*, AC 30987 (September 16, 2009), the respondents were entitled to a credit against prior advances for permanent partial disability payments. We have reviewed the file and note that the claimant underwent quadruple bypass surgery in 1999, which presumably left him totally disabled, and that a compensation rate was established by the Commission for the claimant after that episode. As the claimant is presently disabled as the result of a sequalae from the cardiac injury responsible for this incident, he is now asserting that this rate plus cost-of-living adjustments is the compensation rate that is in force.

The administrative law judge issued an amended Findings and Award which called for additional hearings to ascertain compliance with the benefit cap as well as to ascertain if any credit is due for prior advances. The respondents have pursued this appeal. They argue that it is error to award temporary total disability benefits to a claimant who is no longer in the workforce. They also assert that the administrative law judge erred by failing to reset the compensation rate or crediting prior permanent partial disability payments.

In his brief, the claimant stated that he agreed with the factual basis of this appeal as set forth by the respondents. As a result, our role as an appellate body herein will not be to determine if there was a sufficient evidential foundation for the factual findings herein, but to determine if this decision comports with the statute. Nevertheless, we still must extend substantial deference to the decisions reached by the administrative law judge "'[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)." Thorn v. UTZ Quality Foods, Inc., 6253 CRB-5-18-3 (July 18, 2019), *appeal withdrawn*, A.C. 43264 (November 30, 2020).

The respondents in this appeal argue that, unlike Mascendaro, supra, they are not advancing a policy argument against granting temporary total disability benefits to retired employees who are no longer seeking employment. Instead, they argue that based on their interpretation of the statute, it does not authorize such benefits. We note that this would be a new interpretation of the statute and even if the "plain meaning" of the statute, General Statutes § 1-2z, suggested it had previously been applied incorrectly, the

precedent in Hummel v. Marten Transport, Ltd., 282 Conn. 477 (2007), weighs against reaching a new and contrary result. Id., 498-99.[5]

The argument advanced herein is that the purpose of temporary total disability benefits is to serve as wage replacement benefits to make an injured worker whole who is unable to earn money as the result of his or her injury. They argue that the phrase in the statute "total incapacity to work" implies that the claimant, at the time of their injury and/or disability, was either working or seeking work, and to compensate someone not seeking employment in the same manner as those who were creates an absurd or bizarre result.[6] We do not find support for this argument in either the plain language of the statute or the case law. See Vibert v. Board of Education, 260 Conn. 167, 177 (2002). However, we are persuaded by the claimant that binding precedent interpreting this statute has eliminated the necessity to be available for work in order to be eligible for temporary total disability benefits.

We are persuaded that the Laliberte precedent controls the issues presented herein. In Laliberte, the claimant was receiving temporary total disability benefits and was then sent to prison, wherein a form 36 was filed to stop the payment of these benefits. This tribunal determined that the claimant was still entitled to these benefits even though he was removed from the workforce due to his incarceration. See Laliberte v. United Security, 4264 CRB-5-00-7 (July 26, 2001), *aff'd*, 261 Conn. 181 (2002). Our

[5] Subsequent to the holding in Hummel v. Marten Transport, Ltd., 282 Conn. 477 (2007), the legislature enacted P.A. 09-178 in which it clarified the final judgement rule. Similar legislative action would be needed to alter the application of § 31-307.

[6] The respondents cite Osterlund v. State, 135 Conn. 498 (1949), for this proposition, but we note that in the over 70 years since Osterlund, the courts have not stated that an injured worker must attempt to seek employment and fail in order to receive § 31-307 benefits.

Supreme Court affirmed this tribunal's decision. Their reasoning was as follows:

> It is evident that § 31-307 (a) contains no provision permitting the discontinuance of the total disability benefits of an injured employee based on his incarceration. Section 31-307 (a) requires the payment of benefits for "total incapacity to work . . . ." The plaintiff has been found to be, and remains, totally incapable of working due to his disability. The statute does not address inability to work because of incarceration. As a result, no intent concerning discontinuance of benefits because of incarceration can be inferred from the statute itself. The defendant, moreover, has provided us with no legislative history, and we are aware of none, suggesting that the legislature intended to permit the discontinuance of total disability benefits for totally disabled recipients who are also unable to work as a result of incarceration.

Id., 186.

Our Supreme Court further noted that the General Assembly had enacted a statutory cap to address the combined receipt of workers' compensation and social security benefits and "this limitation on total disability benefits demonstrates that the legislature had contemplated what exclusions or limitations should apply to the statutorily required benefits. If the legislature had intended to discontinue total disability benefits for those who are incarcerated, it easily could have done so." Id., 187, *citing* State v. Russo, 259 Conn. 436, 450 (2002). This suggests that the General Assembly has been aware of the issues presented in this appeal, as it had passed legislation regarding claimants on social security but chose not to address them in the manner the respondents' desire. We take further note that in the 20 years since the Laliberte ruling, the General Assembly has not passed legislation aimed at reversing the impact of this decision. In Hanson v. Transportation General, Inc., 245 Conn. 613 (1998), our Supreme Court held:

> [w]e have long acted on the hypothesis that the legislature is aware of the interpretation that the courts have placed upon one of its legislative enactments. Once an appropriate interval to permit legislative reconsideration has passed without corrective legislative

> action, the inference of legislative acquiescence limits judicial authority to reconsider the merits of its earlier decision.

Id., 618-19, *citing* Hall v. Gilbert & Bennett Mfg. Co., 241 Conn. 282, 297-98 (1997).[7]

The respondents argue that we should interpret the Connecticut statute for temporary total disability compensation in the same manner as the courts in Oregon, see Cutright v. Weyerhauser Co., 299 Or. 290 (1985) and Ohio, see McCoy v. Dedicated Transport, Inc., 97 Ohio St.3d 25 (2002), have interpreted their state's statutes. For the reasons stated in Christensen, supra, *citing* Atkinson v. United Illuminating, 5064 CRB-4-06-3 (April 19, 2007), we decline to apply decisions from other states to our cases when we find Connecticut precedent is on point. We believe a reasonable interpretation of the precedent governing eligibility for § 31-307 benefits is that once the claimant proves that he is medically incapable of performing work, his willingness to obtain employment is irrelevant.

The respondents also argue that the compensation rate applied in this case is inaccurate, *citing* Partlow, supra, that they are entitled to a credit against payments for the increased permanent partial disability award, and that § 7-433b (b) and § 31-307 (e) reduce the weekly compensation payment that may be owed to the claimant. We note that the administrative law judge scheduled further hearings to address the issue of credits due to the respondents and therefore we do not believe that issue is ripe for appellate adjudication. As for the compensation rate, we believe that the precedent in Partlow is

[7] We recently cited Hanson v. Transportation General, Inc., 245 Conn. 613 (1998) and the concept of legislative acquiescence in our decision in Biggs v. Combined Insurance Company of America, 6247 CRB-7-18-2 (April 12, 2019).

inapplicable to a case such as this one where there is an established long-standing compensation rate in place.[8]

While the respondents may believe the issue herein involves statutory interpretation, we conclude in essence, that it remains like Mascendaro, supra, a challenge to the existing policy as to eligibility for temporary total disability benefits. We cannot intercede in such disputes. As former Chairman Mastropietro pointed out in his concurrence in Kronick v. Ansonia Copper & Brass, 5127 CRB-5-06-8 (August 15, 2007):

> Even if I shared the respondents' opinion that the present application of the law is incorrect and the statutes must be reinterpreted, I do not believe that issue can be resolved by an adjudicatory panel as it is within the General Assembly's exclusive jurisdiction to amend the statutes they enact. In the absence of direction from the legislative branch, we must presume that the current state of the law in this situation is the authoritative public policy we must enforce.

There is no error, the March 11, 2021 Findings and Award of Randy L. Cohen, the Administrative Law Judge acting for the Seventh District, is accordingly affirmed.

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

[8] In Partlow v. Petroleum Heat & Power Company, Inc., 5432 CRB-7-09-2 (February 9, 2010), the finding appealed to this tribunal, found "no voluntary agreement had been issued establishing the claimant's average weekly wage or base compensation rate." In this case, a supplemental finding and award dated October 4, 1999, established the claimant's compensation rate.